Volume 32, Number 9, January 31, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 365-401

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **MUNICIPAL CORPORATIONS—ORDINANCES—MOORING OF VESSELS—UNPERMITTED DOCKING. State law does not preempt a town from enacting or enforcing ordinances governing the mooring of vessels on Florida's navigable waters. However, in the case at issue, a special magistrate's final order imposing a fine and lien against the sales and leasing company of an apartment complex violated 162.09(3) where the company did not own the unlawfully-docked boat and there was no evidence that the company was responsible for the boat owner's violations.** *VIA SALES & LEASING INC. v. TOWN OF LAUDERDALE-BY-THE-SEA FLORIDA. Circuit Court (Appellate), Seventeenth Judicial Circuit in and for Broward County. October 17, 2024. Full Text at Circuit Courts-Appellate Section, page 367a.*

- **ATTORNEY'S FEES—INSURANCE—PROPERTY. The statutory attorney's fees provision in section 627.70152 affects substantive rights and cannot be applied retroactively to insurance policies in effect prior to the effective date of the statute.** *HOLMES v. SECURITY FIRST INSURANCE COMPANY. Circuit Court (Original), Fourteenth Judicial Circuit in and for Calhoun County. November 20, 2024. Full Text at Circuit Courts-Original Section, page 377a.*

- **GARNISHMENT—DISSOLUTION OF WRIT. A person of interest identified in a garnishee's answer and served with a notice of the right to dissolve the writ has a statutory right to file a motion to dissolve the writ within 20 days of service of the notice, but cannot challenge the garnishment by filing an affidavit under the provisions of section 77.16. Section 77.16 applies only to individuals not disclosed in the garnishee's answer.** *CHASE BANK USA, N.A. v. FENIK. County Court, First Judicial Circuit in and for Okaloosa County. Filed November 7, 2024. Full Text at County Courts Section, page 379a.*

FLW SUPPLEMENT (ISSN10684050) is published monthly by Judicial and Administrative Research Associates, Incorporated, 1327 North Adams Street, Tallahassee, FL 32303. All rights reserved. Subscription price is $300 per year plus tax. Internet subscription available at www.FloridaLawWeekly.com. Periodical postage paid at Tallahassee, FL. POSTMASTER: Send address changes to FLW Supplement, P.O. Box 4284, Tallahassee, FL 32315. Telephone (800)

© 2025 JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

10CIR 25	**Circuit Court - Appellate** (**Bold** type) (10th Circuit, page 25)
20CIR 10	Circuit Court - Original (20th Circuit, page 10)
CO	County Court
M	Miscellaneous Reports

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Bold denotes decision by circuit court in its appellate capacity.

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

MUNICIPAL CORPORATIONS (continued)

SMALL CLAIMS

* * *

TABLE OF CASES REPORTED

* * *

TABLE OF STATUTES CONSTRUED

Florida Statutes and Rules of Procedure construed in opinions reported in this issue.

FLORIDA STATUTES

TABLE OF STATUTES CONSTRUED (continued)

FLORIDA STATUTES (continued)

SMALL CLAIMS RULES

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing,
or other means without the express permission of the publishers. 1-800-351-0917

TABLE OF CASES TREATED (continued)

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Volume 32, Number 9
January 31, 2025
Cite as 32 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Cancellation—Due process—Hearing—Licensee who was terminated from Special Supervision Services Program and whose restricted license was cancelled was only entitled to "face to face" meeting with another DUI program, not full administrative hearing

THOMAS BEVERLY, Petitioner, v. NORTHEAST FLORIDA SAFETY COUNCIL AND DEPARTMENT OF HIGHWAY AND MOTOR VEHICLES, Respondents. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2022-AP-20. Division AP-A. October 15, 2024. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Britney Sanford-Soles, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM.) Petitioner seeks certiorari review of the Department's decision to revoke his DUI program license after concurring recommendations of termination. On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *see also Dep't of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

Appeals from Special Supervision Services are governed by Florida Administrative Code Rule 15A-10.031. When one DUI program recommends cancellation, a participant can appeal the recommendation to another DUI program. *Id.* at (2). Here, Petitioner challenged the Northeast Florida Safety Council's recommendation, and the North Florida Safety Council received his appeal. Pursuant to Rule 15A-10.031(2)(b), Petitioner received a face-to-face meeting with the North Florida Safety Council. After this meeting, the North Florida Safety Council agreed with the original recommendation.

Petitioner argues he was deprived of procedural due process because a witness was not allowed to testify on his behalf at the face-to-face meeting. His argument fails because this was not the termination of a license governed by section 322.2615, Florida Statutes (2022). When a driver's license is suspended because a driver either failed or refused to take a blood-alcohol or breath-alcohol test, the driver is entitled to a full administrative hearing to contest the suspension. *Id.* at (6)(b). However, these protections are not afforded to individuals who have already lost their full driving privileges and are now operating a motor vehicle on a restricted license. As previously stated, a cancellation of a restricted license is governed by Florida's Rules of Administrative Procedure, and Rule 15A-10.031(2)(b) only requires a "face to face" meeting. Based on the record currently before this Court, the DUI programs complied with the relevant administrative rules. Absent documentary evidence (such as transcripts), there is nothing in the record suggesting that Petitioner was not afforded procedural due process. Accordingly, the Petition is **DENIED**. (COOPER, DANIEL, and DEES, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Competent substantial evidence supported finding that officer lawfully stopped licensee's vehicle as it was leaving bar—Officer was responding to dispatch call regarding threats of violence at bar and disturbance involving vehicle, licensee's vehicle matched make, model, and color of vehicle described in dispatch, and witnesses identified licensee as driver of vehicle involved in crash at bar

JON CHRISTOPHER WOOD, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2022-CA-010876-O. October 23, 2024. Petition for Writ of Certiorari from the decision of the Department of Highway Safety and Motor Vehicles Lynne Ringers, Hearing Officer. Counsel: Warren W. Lindsey, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

(Before HIGBEE, KRAYNICK, and ASHTON, JJ.) Petitioner, Jon Christopher Wood ("Petitioner"), seeks review of the "Findings of Fact, Conclusions of Law and Decision" issued by a hearing officer of the Department of Highway Safety and Motor Vehicles ("DHSMV" or "Respondent") affirming the suspension of Petitioner's driving privilege for refusal to submit to a breath, blood, or urine test under section 322.2615, Florida Statutes (2022).

Factual Summary

On July 10, 2022, Petitioner was arrested for driving while under the influence (DUI) in violation of section 316.193, Florida Statutes. On October 25, 2022, Petitioner participated in a formal review hearing contesting the automatic suspension of his driving privilege for failure to acquiesce to a lawful breath test on the basis that his initial stop by Winter Park Police Department ("WPPD") was unlawful.

At the hearing, the hearing officer took into evidence thirteen exhibits, including, but not limited to: the arrest report, the arrest affidavit, an affidavit of refusal, and two witness statements. Counsel for Petitioner moved to invalidate the suspension on the basis that the record evidence contained no basis for reasonable suspicion for WPPD to conduct a traffic stop of Petitioner's vehicle, a red Honda Pilot. Nonetheless, the hearing officer concluded based on the record evidence that WPPD Officer Campbell was responding to a dispatch call which identified a red Honda Pilot involved in a disturbance with threats to do harm and a crash at a local bar and denied that motion. The hearing officer subsequently affirmed the order of suspension of Petitioner's driving privilege.

Standard of Review

"The duty of the circuit court on certiorari review of an administrative agency is limited to three components: whether procedural due process was followed; whether there was a departure from the essential requirements of the law; and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter,* 643 So. 2d 692, 695 (Fla. 5th DCA 1994); *see also Education Development Center, Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

Analysis

Petitioner's sole argument is that the hearing officer departed from the essential requirements of law by concluding that the traffic stop initiated by WPPD Officer Campbell was lawful in the absence of competent, substantial evidence.

In reviewing whether findings are supported by competent, substantial evidence, "It involves a purely legal question: whether the record contains the necessary quantum of evidence. The circuit court is not permitted to go farther and reweigh that evidence (e.g., where there may be conflicts in the evidence), or to substitute its judgment about what should be done for that of the administrative agency." *Lee County v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996, 1003 (Fla.

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

2d DCA 1993) (citing *Bell v. City of Sarasota,* 371 So. 2d 525 (Fla. 2d DCA 1979)). "Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence . . . As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Fla. Dep't of Highway Safety & Motor Vehicles v. Baird,* 175 So. 3d 363, 366 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2160a] (quoting *Dusseau v. Metro. Dade County Bd. of County Commissioners,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]).

In this case, the hearing officer determined and made a factual finding that WPPD Officer Campbell pulled over Petitioner's red Honda Pilot leaving the scene in response to call from dispatch that a red Honda Pilot was involved in a crash and threats of violence at a local bar. This decision was based on the evidence and exhibits taken into the record at the time of the hearing. The arrest report narrative references WPPD Officer Campbell responding to a dispatch call "in reference to a disturbance (threats of violence) and a red Honda Pilot vehicle leaving the crash scene after damage was committed on the property." Further, two witness statements are in the record which reference Petitioner as the driver of a red Honda Civic which "backed into a support beam."

Petitioner argues that the arrest report's reference to a traffic crash investigation which was not included in the record, as well as the lack of specific wording that the red Honda Pilot "was involved" in the reference to the dispatch call in the arrest report undermines the hearing officer's conclusion that the initial stop of Petitioner's vehicle was lawful. Petitioner further cites to numerous distinguishable cases involving situations where law enforcement engaged in unlawful stops based on reports which did not include any indication of criminal activity and/or involved failures by law enforcement to corroborate specific details of the call. *See Freeman v. State*, 22 Fla. L. Weekly Supp. 875a (Volusia Cty. Ct. 2014) [Editor's note: Driver's license suspension case] [Editor's note: *see also*, *State v. Freeman*, 21 Fla. L. Weekly Supp 681a [Criminal DUI case]] , *Hall v. State,* 366 So.2d 865 (Fla 4th DCA 1979). However, in the instant case, the dispatch call in question did reference specific criminal activity (threats of violence and a potential hit and run) and specifically identified the make, model, and color of Petitioner's vehicle which was subsequently observed leaving the scene by WPPD Officer Campbell. Accordingly, the record contained competent, substantial evidence in support of the hearing officer's conclusion that the initial stop was lawful.

Accordingly, the Court **DENIES** Petitioner's Petition for Writ of Certiorari.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath or blood alcohol level—Lawfulness of detention—Officer who stopped vehicle for traffic infraction and noted indicia of impairment during initial detention did not unreasonably detain licensee while waiting for arrival of another officer to conduct DUI investigation—There was no evidence that stopping officer or other responding officers were qualified to conduct DUI investigation—Forty-five-minute extension of detention while awaiting DUI investigator was not unreasonable under circumstances

PAUL HULS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Osceola County. Case No. 2022-CA-010657-O. October 28, 2024. Petition for Writ of Certiorari from the decision of the Department of Highway Safety and Motor Vehicles Samantha Simpkins, Hearing Officer. Counsel: David S. Katz, for Petitioner. Kathy A. Jimenez-Morales, Chief Counsel, Driver Licenses, DHSMV, for Respondent.

(Before LAURENT, JORDAN, and CRANER, JJ.) Petitioner seeks review of the "Findings of Fact, Conclusions of Law and Decision" issued by a hearing officer of the Department of Highway Safety and Motor Vehicles ("DHSMV") which affirmed an order suspending Petitioner's driving privilege for driving with an unlawful breath or blood alcohol level under section 322.2615, Florida Statutes (2022).

RELEVANT FACTS

(JAMES CRANER, J.) On August 15, 2022, Petitioner was stopped at approximately 4:30pm by Deputy Sotolongo of the Orange County Sheriff's Office, for a traffic infraction. Deputy Sotolongo observed Petitioner make an illegal U-turn, followed by a second U-turn and an immediate turn into the left lane which caused Deputy Sotolongo to apply his brakes and swerve into the median to avoid a collision. Upon commencement of a traffic stop, Deputy Sotolongo made contact with Petitioner and observed him to be slurring his words. After instructing Petitioner to exit the vehicle and stand by the rear, he noticed Petitioner losing his balance and leaning upon the vehicle for the duration of the traffic stop. At this time, Deputy Sotolongo requested a backup unit for officer safety and requested an officer to conduct a DUI investigation. Shortly after backup arrived and Deputy Sotolongo returned to his vehicle and commenced writing a citation for the initial infraction. Approximately twenty minutes after the initial stop, Deputy Sotolongo completed the citation and rejoined the other officers waiting with Petitioner for another officer to arrive for a DUI investigation.

At approximately 5:37pm, Deputy Del Castillo arrived on scene to begin a DUI investigation and immediately noticed Petitioner's slurred speech, the odor of alcohol, and red and glossy eyes. Petitioner agreed to perform field sobriety exercises for Officer Del Castillo and after failing to successfully complete the exercises Petitioner was placed under arrest for DUI. Petitioner agreed to submit to a breath test and his breath test results were .165 and .171. Petitioner was issued a citation for unsafe and improper U-turn, as well as a citation for DUI pursuant to section 316.193, Fla. Stat. (2022).

Petitioner's driver's license was suspended pursuant to section 322.2615, Fla. Stat. (2022), and Petitioner timely requested an administrative hearing to challenge the lawfulness of his driver's license suspension. At the hearing, the hearing officer took into evidence the self-authenticating records including the traffic citation, arrest affidavit, breath-alcohol test affidavit, and incident report, as well as Petitioner's seven (7) provided photographs taken from Deputy Sotolongo's Body Camera Video. Deputy Sotolongo testified regarding the timeline of the stop, detention, investigation, and arrest. Counsel for Petitioner argued that the duration of the detention, of approximately 47 minutes from the time Deputy Sotolongo completed the initial traffic citation until Deputy Del Castilla initiated the DUI investigation, was unreasonable and warranted reversal of Petitioner's driver's license suspension. The hearing officer concluded that based on the indicators of impairment observed by Deputy Sotolongo, there was sufficient reasonable suspicion to detain Petitioner for further investigation and that a detention of one hour was not an unreasonable amount of time. The hearing officer affirmed Petitioner's driver's license suspension.

STANDARD OF REVIEW

The Court's certiorari review of the administrative decisions of a DHSMV hearing officer requires a three-prong determination. The Court must determine "whether (1) procedural due process has been accorded; (2) the essential requirements of law have been observed; and (3) the administrative findings and judgment are supported by competent, substantial evidence." *Nader v. Dep't of Highway Safety & Motor Vehicles,* 87 So. 3d 712, 723 (Fla. 2012) [37 Fla. L. Weekly S130a].

ANALYSIS

Petitioner presents a single argument in support of his Petition for

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Writ of Certiorari before this Court. Petitioner argues that the duration of his detention, pending the arrival of another deputy to conduct his DUI investigation, was unreasonably long, and therefore the hearing officer's conclusion otherwise amounts to a failure to observe the essential requirements of the law.[1]

Petitioner does not contest the validity of the initial stop, conceding that Deputy Sotolongo had reasonable suspicion for a traffic violation based on his observations. In addition, Petitioner does not contest the initial twenty minutes of the stop during which time Deputy Sotolongo observed indicators of impairment, requested another deputy for a DUI investigation, and completed a traffic citation. Petitioner contends that it is the extension of his detention for another approximately forty-five (45) minutes which transformed his lawful detention into an unlawful one.

Petitioner cites to numerous cases in which courts in this State have held that detentions of lengths varying from ten minutes to as much as forty-five minutes have been deemed unreasonable and illegal. *See State v. Swick,* 24 Fla. L. Weekly Supp. 543a (Cty. Ct. 7th Jud. Cir. 2016), *State v. Freeman,* 21 Fla. L. Weekly Supp. 680a (Fla. Volusia Cty. Ct. March 2014), *State v. Townley,* 25 Fla. L. Weekly Supp. 547a, (Orange Cty. Ct. Aug 16, 2017), *Paul McDonald v. State of Florida, Department of Highway Safety and Motor Vehicles,* 23 Fla. L. Weekly Supp. 71a (Fla. 7th Cir. Ct. June 2015).

The *Paul McDonald* case is perhaps the most facially similar. In that case, our sister circuit dealt with a Petition appealing the decision of a DHSMV hearing officer. There the petitioner was stopped by one officer, who completed his initial citation but requested another officer to perform a DUI investigation. The second officer did not arrive for more than an hour and the circuit court determined that this delay was unreasonable in light of (among other cases) the Fifth DCA's decision in *Williams v. State,* 869 So. 2d 750 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D879a]. However, with all due respect to our sister circuit, its reliance on *Williams* was misplaced.

The *Williams* case involved a traffic stop for a window tint and obscured tag, which was impermissibly extended until a K-9 arrived and was able to sniff the vehicle resulting in an arrest for possession of drug paraphernalia and a firearm. In that case, as opposed to in cases such as the instant case where the initial officer noticed indicia of impairment sufficient for reasonable suspicion of DUI, there was no reason to extend the detention for a traffic infraction even a minute longer than necessary to effect the traffic citation. This case simply is not applicable to the current situation.

Instead, both Petitioner and Respondent cite to the decision of the United States Supreme Court in *Rodriguez v. United States,* 135 S. Ct. 1609 (2015) [25 Fla. L. Weekly Fed. S191a]. In *Rodriguez,* the Supreme Court found that a driver cannot be detained for any longer than necessary to issue a traffic citation without probable cause or a founded suspicion of criminal activity for a continued detention. Florida appellate courts have also maintained that the duration of a traffic stop should be limited to the preparation of a citation unless an officer "possesses a reasonable or well-founded suspicion of criminal activity so as to justify an investigatory stop." *State v. Pye*, 551 So. 2d 1237 (Fla. 5th DCA 1989). Unquestionably, Deputy Sotolongo possessed reasonable suspicion of DUI sufficient to warrant extension of his initial stop for the purpose of a DUI investigation, yet the question remains whether a delay of forty-five (45) minutes while waiting for another officer to conduct the DUI investigation is reasonable.

Petitioner argues that the fact that neither Deputy Sotolongo, nor any of the other deputies who responded prior to Deputy Del Castillo, made any steps to conduct a DUI investigation contributed to the unreasonableness of the extended detention. There is no evidence in the record regarding whether Deputy Sotolongo or the other responding deputies were qualified or permitted to undertake a DUI investigation, although Petitioner argues that they could have done so. This fact distinguishes at least one of the cases cited to by Petitioner in which the record showed that the initial officer had conducted numerous DUI investigation and waited for another officer solely because he didn't want to do the investigation himself. *See State v. Swick,* 24 Fla. L. Weekly 543a (Cty. Ct. 7th Jud. Cir. 2016). Accordingly, the fact that Deputy Sotolongo or the other responding deputies did not conduct the official DUI investigation and instead waited for Deputy Del Castillo does not necessarily mean that the detention was unreasonably extended.

In *Shenuski v. State of Florida, Department of Highway Safety and Motor Vehicles,* 2021-AP-000002 [32 Fla. L. Weekly Supp. 2a],[2] another panel in this Circuit decided earlier this year that the indicia of impairment observed by an initial officer, such as erratic driving, the odor of alcohol, and bloodshot eyes, satisfied the reasonable suspicion requirement to justify a detention extended by approximately fifteen minutes to wait for a secondary officer to conduct a DUI investigation. Although the detention was extended longer in this case, we conclude that, in light of the circumstances, the hearing officer did not depart from the essential requirements of law such that it amounts to a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1024 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D1005a].

Based on the foregoing, the Court **DENIES** Petitioner's Petition for Writ of Certiorari, filed November 23, 2022. (JORDAN, J., concurs. LAURENT, J., dissents based on *State v. Townley,* 25 Fla. L. Weekly Supp. 547a, (Orange Cty. Ct. Aug 16, 2017) and *Paul McDonald v. State of Florida, Department of Highway Safety and Motor Vehicles,* 23 Fla. L. Weekly Supp. 71a (Fla. 7th Cir. Ct. June 2015).)

---

[1]Although Petitioner couches his argument in terms of a lack of competent, substantial evidence, the hearing officer made a ruling finding the detention and arrest to be lawful based on the records and deputy testimony. Petitioner disagrees with this conclusion as a matter of law and this Court will treat Petitioner's argument as one alleging that the decision failed to comply with the essential requirements of the law.

[2]This decision was filed with the Ninth Circuit Clerk in Osceola County on February 15, 2024.

* * *

Municipal corporations—Code enforcement—Unpermitted docking of vessel—Town that adopted chapter 162 procedure for county court review of code enforcement citations was also authorized to enact town code providing for administrative review hearings before special magistrate rather than county court—State law does not preempt town from enacting or enforcing ordinances governing mooring of vessels on navigable waters of Florida—Special magistrate's final order imposing fine and lien against sales and leasing company for apartment complex at which boat was moored, not against owner of boat, violated section 162.09(3) by imposing order against property not established to be owned by violator where there was no evidence that company was responsible for boat owner's violations—Further, company was deprived of notice required by due process where company did not receive citations for mooring violations—Fact that company was provided notice of hearing does not satisfy due process where hearing notice did not inform company that town was seeking to hold it liable for boat owner's violations, nature of those violations, or that company's property could be subject to a lien

VIA SALES & LEASING INC., Appellant, v. TOWN OF LAUDERDALE-BY-THE-SEA FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-012006. Admin. Hearing Case Nos. 23020002 and 23020004. October 17, 2024. Appeal from the Town of Lauderdale-By-The-Sea, Broward County; Tom Ansbro, Special Magistrate. Counsel: Ryan E. Willits, Willits & Associates, P.A., Boca Raton; and Christopher S. Salivar, Christopher S. Salivar,

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

P.L.L.C., Delray Beach, for Appellant. Laura K. Wendell, Weiss Serota Helfman Cole & Bierman, P.L., Coral Gables, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief and the applicable law, without oral argument, the Special Magistrate's March 2, 2023, Order is hereby **REVERSED** as set forth below.

On January 31, 2023, Inspector Banyas, a senior code enforcement officer for the Town of Lauderdale-By-the-Sea ("Appellee") received an report that a vessel was docked at a dock abutting the Whittier Towers apartment complex ("Whittier Towers"). Via Sales and Leasing Inc. ("Appellant") owns a long-term proprietary lease interest in Unit 312 of 1439 South Ocean Boulevard in the Whittier Towers.

On February 1, 2023, Inspector Banyas visited the dock and observed J. Murray Troup's ("Mr. Troup") vessel tied to the dock. Inspector Banyas then personally served Mr. Troup with a citation for violating the Appellee's Code of Ordinances ("the Code") section 30-311(e)(1)a., which prohibits watercraft from being docked "except at an approved dock. . .within a standard mooring area or a marina mooring area designated pursuant to a conditional use approval." The citation identified Mr. Troup as the violator and did not reference Appellant. The citation assessed a fine of $250 for the violation, which was due and payable to Appellee immediately. The citation further indicated that an appeal could be had if written notice was submitted to Appellee within 10 business days of the date of the citation. Finally, the citation did not identify any prior warning or violation and did not provide for a period to cure the violation.

The following day, Inspector Banyas returned to the site to again observe the vessel still moored at the same dock. Inspector Banyas again personally issued a citation to Mr. Troup. The second citation assessed a fine of $500 against Mr. Troup for a repeat violation of section 30-311(e)(1)a. of the Code. As before, the second citation did not provide a period to cure the violation or reference Appellant.

Subsequently, Mr. Troup sent an email requesting a hearing before a special magistrate regarding the two citations. Mr. Troup did not reference Unit 132 or Appellant. In response, Appellee sent out two notices of hearing. One notice was addressed to Mr. Troup and the other was addressed to Appellant.

On February 23, 2023, the Appellee's Special Magistrate heard the two citations simultaneously. During the hearing, Inspector Banyas testified that Mr. Troup was the owner of two units within Whittier Towers. When asked by the Special Magistrate if he lived at Whittier Towers, Mr. Troup responded that he did not live there full-time and that he is from Canada. He further admitted that he was a shareholder of Whittier Towers.

The Special Magistrate upheld the citations. He then asked Inspector Baynas whether the citation would be recorded against the units that Mr. Troup owned. Inspector Baynas indicated that the liens would be recorded against Mr. Troup. The Special Magistrate agreed. Mr. Troup then stressed that the proceedings had nothing to do with the property at Whittier Towers.

After the hearing, the Special Magistrate entered the Final Order against Appellant and not Mr. Troup. The Final Order indicates a street address, 1439 S Ocean Blvd, Lauderdale By the Sea, FL 33062 312. The Final Order further finds that Appellant committed the violations, rather than Mr. Troup. Appellant timely filed suit with this Court on March 30, 2023.

The Standard of Review

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

Jurisdiction of the Special Magistrate

Appellant asserts that the Special Magistrate lacked jurisdiction to consider the matter for two reasons: 1) the Appellee is required to send appeals of this nature to the county court for review and 2) the Appellee and Special Magistrate are precluded from enacting or enforcing section 30-311(e)(1)a. of the Code because it is preempted by Florida law. For the following reasons, the Court finds that the Special Magistrate had jurisdiction to consider the matter.

Appellant contends that because Appellee has adopted the procedures authorized in Part II of Chapter 162, the citations at issue herein were reviewable by the county court rather than by an enforcement board or Special Magistrate. Appellant specifically points to section 162.21(3)(a), Florida Statutes, which provides that a code enforcement officer is authorized to issue "a citation to a person when, based upon personal investigation, the officer has reasonable cause to believe that the person has committed a civil infraction in violation of a duly enacted code or ordinance and that the county court will hear the charge."

However, the Legislature did not limit a municipality's code enforcement system to the exact procedures set forth in Parts I or II of Chapter 162. *Verdi v. Metro. Dade Cnty.,* 684 So. 2d 870, 872 (Fla. 3d DCA 1996) [22 Fla. L. Weekly D8a]. Section 162.03(2), Florida Statutes, expressly authorizes a municipality to adopt an alternative system to the exact procedures laid out in Parts I and II of Chapter 162 and did not prohibit a municipality from combining any features of these parts. *Id.* Accordingly, Appellee was authorized to enact section 6.5-9 of the Code to provide for administrative hearings before a Special Magistrate rather than county court.

Next, Appellant cites to sections 327.60 and 327.4109, Florida Statutes, to argue that Appellee is preempted from enacting or enforcing ordinances governing the conduct of persons or vessels upon the navigable waterways of Florida. Section 327.60(2) states that the chapter does not function to prevent the adoption or enforcement of any ordinance relating to the operation of vessels, except for an enumerated list provided for within the subsection. In order to make its argument, Appellant points to section 327.60(3)(f), which prohibits the regulation by ordinance of the anchoring of certain vessels outside of marked boundaries of mooring fields. This is distinguishable from the ordinance at issue herein because anchoring and mooring are not synonymous and the statute does not treat them as such. For instance, anchoring does not involve affixing a vessel to a dock, rather, it involves dropping an anchor into the water to keep a vessel immoble.

Appellant also references section 327.4109(4), Florida Statutes, which prohibits the operator of a vessel from mooring its vessel to an unpermitted or unauthorized structure that is on or affixed to the bottom of the waters of this state and is punishable as a noncriminal infraction. Section 327.4109(4), clarifies that it is not applicable to private mooring owned by the owner of privately submerged lands. Appellant argues that because there was an open question during the proceedings below of whether the dock constituted private mooring owned by Whittier Apartments, the Special Magistrate was precluded from determining whether the dock was located on privately owned lands excluded from the authority of section 327.4109(4). This

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

argument fails because, as Appellee points out, nothing in this section preempts or is otherwise inconsistent with Appellee's ability to enact and enforce the ordinance at issue.

Due Process

Perhaps the most salient issue Appellant presents is the lack of evidence on the record below that Appellee intended to cite Appellant for a violation committed by Troup and then subsequently place a lien on property owned by Appellant. The record shows that Troup was issued two citations by Inspector Banyas for mooring his vessel at a dock with questionable permitting status. Nowhere on the citations is Appellant listed or referenced as a violator.

In its Response, Appellee argues that Appellant did not raise this argument during the proceedings below and therefore it is not preserved for appeal. It is well-settled that issues not properly preserved are waived. *State v. Clark,* 373 So. 3d 1128, 1131 (Fla. 2023) [48 Fla. L. Weekly S217a]. In order to be preserved for further review on appeal, an issue must be presented to the lower court, and the specific legal issue to be argued on appeal or review must be part of that presentation in order to be preserved. *Tillman v. State,* 471 So. 2d 32, 35 (Fla. 1985). Otherwise, the argument is waived. *See Simmons v. State,* 934 So. 2d 1100, 1117 n.14 (Fla. 2006) [31 Fla. L. Weekly S285a].

However, the crux of Appellant's argument on this issue is that the lack of a citation against Appellant amounts to a lack of notice violative of Appellant's due process rights. It is well-settled that a denial of due process constitutes fundamental error which may be raised for the first time on appeal. *Ray v. State,* 403 So.2d 956, 960 (Fla.1981) ("[F]or error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process."). "To justify not imposing the contemporaneous objection rule, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' " *State v. Delva,* 575 So.2d 643, 644-45 (Fla.1991). In other words, the doctrine of fundamental error applies when an error has affected the proceedings to such an extent that it equates to a violation of the individual's fundamental right to due process. As will be explained below, these actions culminate to effectively deny Appellant's due process rights, and therefore are reviewable by this Court even if not properly preserved below.

After the hearing, the Special Magistrate entered the Final Order against Appellant and not Mr. Troup. The Final Order further finds that Appellant committed the violations, rather than Mr. Troup, although there is no record below of Appellant receiving a citation from Appellee or of any evidence tying Mr. Troup to Appellant.

On appeal to this Court, Appellant does not dispute that Mr. Troup is associated with Appellant in some capacity. However, the record below is absent of any indication that Appellant is responsible for the violation committed by Mr. Troup. Section 162.09(3), Florida Statutes, states that "a certified copy of an order imposing a fine. . .may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists or upon any other real or personal property owned by the *violator*. . ." Appellee points to no authority for the recording of a Special Magistrate's final order against property which has not been established to be owned by the violator or upon the land on which the violations exist. In this way, the Special Magistrate's final order against Appellant for the violation committed by Mr. Troup is at a minimum violative of section 162.09(3).

However, this error also functioned to deprive Appellant of due process. The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Procedural due process requires both fair notice and a real opportunity to be heard. *Keys Citizens For Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]. The specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. *Id.* As the Supreme Court has explained, due process, "unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

In criminal proceedings, it is well-established that due process of law requires the State to allege every essential element when charging a violation of the law to provide the accused with sufficient notice of the allegations against him. Art. I, § 9, Fla. Const.; *M.F. v. State,* 583 So.2d 1383, 1386-87 (Fla.1991). It is a denial of due process when there is a conviction on a charge not made in the information or indictment. *Price v. State,* 995 So. 2d 401, 404 (Fla. 2008) [33 Fla. L. Weekly S821a]. Generally, the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial. *Id.*

Although the proceedings below were not criminal in nature, the same due process principles are implicated. In quasi-judicial proceedings, the quality of due process to which a party is entitled is not the same as in a full judicial proceeding. *Jennings v. Dade Cnty.,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. *Id.* Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. *Id.* Typically, a quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Id.* However, as stated above, due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey,* 408 U.S. at 481.

The record shows that Appellant was never cited with a violation of the Code. Therefore, Appellant lacked notice that Appellee intended to charge it with a violation based on the conduct of Mr. Troup. Appellee argues that Appellant had notice because the record shows that Appellant was sent a notice for the hearing. However, nowhere on the notice did Appellee inform Appellant that the Town was seeking to hold it liable for the violations of Mr. Troup, what those violations were, or that Appellant's properties could be subject to a lien. Certainly, Mr. Troup as an individual was afforded such notice because he was issued two citations informing him of the alleged violations to the Code for which Appellee sought to hold him liable. Appellant was not given the same notice and therefore was denied a meaningful opportunity to prepare and be meaningfully heard.

Accordingly, the Special Magistrate's Final Order dated March 2, 2023, in favor of Appellee is hereby **REVERSED** consistent with this Opinion. (BOWMAN, GARCIA-WOOD, and ODOM, JJ., concur.)

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Municipal corporations—Code enforcement—Unpermitted temporary removal of dolphin piling—City code requiring building permit for building or structure to be erected or existing building to be moved, altered, or added to or enlarged does not require building permit for temporary removal and replacement of dolphin piling—Dolphin piling is not building or structure within meaning of code—Argument that current activity is erection, not reinstallation, because there is no record of pilings being previously permitted was waived where argument was not advanced at hearing

JOHN and MARIA BIGGIE, Appellants, v. CITY OF DEERFIELD BEACH, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-022647 (AP). October 17, 2024. Appeal from the City of Deerfield Beach Code Enforcement, Special Magistrate, Douglas Gonzales. Counsel: Scott J. Edwards, Scott J. Edwards, P.A., Boca Raton; and Christopher Sajdera, Sajdera, P.A., Boca Raton, for Appellants. Matthew T. Ramenda, Weiss Serota Helfman Cole & Bierman, P.L., Boca Raton, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, appendix, the record and the applicable law, this Court dispenses with oral argument, and the Final Order in case number 23090042, issued on November 21, 2023, by the Special Magistrate for the City of Deerfield Beach Code Enforcement, is hereby **REVERSED** as set forth below.

This is a plenary appeal of a final administrative action. A de novo standard of review is applied to the lower tribunal's conclusions of law. *Recovery Racing, LLC v. Maserati N. Am., Inc.,* 261 So. 3d 600, 602 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D213a]. The lower tribunal's findings of fact are reviewed under a competent, substantial evidence standard. *Id.*

The issue before this Court concerns the interpretation of a local ordinance for the City of Deerfield Beach ("the City") which is reviewed de novo. Municipal ordinances are subject to the same rules of construction as state statues. *Rinker Material Corp. v. City of N. Miami,* 286 So. 2d 552, 553 (Fla. 1973). Therefore, a municipal ordinance must be interpreted by considering the plain and ordinary meaning of the words used in the ordinance. *Id.* at 554. A municipality is bound by the wording of its code because property owners and residents have the right to depend on the wording of the code. *Town of Longboat Key v. Islandside Property Owners Coalition, LLC,* 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2058a]. The plain meaning of a municipal ordinance cannot be displaced by the municipality's self-serving interpretation or how the municipality has historically enforced the ordinance. *Id.* If the plain language of the ordinance is unambiguous, it cannot be construed in a way which would modify, limit, or extend those express terms. *City of Miami v. Gabela,* 390 So. 3d 65, 68 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D2213a].

In this case, a property owner temporarily detached a dolphin piling in the canal behind his home to provide access for a barge to remove a boat lift from his dock. Afterwards, the removed dolphin piling was placed back in its original position. The property owner was cited with a violation of Section 98.113(a) of the City of Deerfield Beach Municipal Code ("Code").

Section 98.113(a) states in pertinent part:

> No building or structure shall be erected and no existing building shall be moved, altered, added to, or enlarged until a permit therefore has been issued in accordance with the South Florida Building Code.

At the hearing below, the Special Magistrate found: ". . . I do believe that a building permit is required to remove that pile and then to put it back in, despite the fact that it's going into the same position."

When Section 98.113(a) is parsed, or broken into parts, it demonstrates that a building permit must be issued for: (1) a **building** or **structure** to be **erected**; and (2) an **existing building** to be moved, altered, added to or enlarged.

The terms 'building' and 'structure' are defined in Section 98.3 of the Code. And, while all buildings are structures, not all structures are not buildings. Per the Code's definitions, a building has a roof supported by columns or walls. The Code also defines a "dolphin" or dolphin piling which is a driven pile used as a fender for a dock, a mooring, or guide for watercraft. Therefore, a dolphin pile is clearly a structure and is not a building.

The term "erect" is not defined. Per the City's Code, an undefined term "shall carry its normal meaning as defined in the most recent edition of Webster's New Collegiate Dictionary." Both parties referenced the online Merriam-Webster Dictionary. After careful consideration, this Court determines that the proper contextual definition for the verb "erect" in the ordinance is "to build." The Court notes that the other dictionary definitions (i.e.: to fix in an upright position, to cause to stand up, to direct upward, etc.) suggest movement or alteration. However, as the context of the Section 98-113(a) demonstrates, permits are only required for the movement or alteration of existing buildings, ***not*** structures. Because permits are ***not*** required to move or to alter structures, the alternative Merriam-Webster definitions of erect cannot be used. Accordingly, the only contextually appropriate definition of "erect," per the ordinance at issue, is "to build." Therefore, the plain language of Section 98-113(a) only requires a permit for a structure, such as a dolphin piling, when it is erected, or built, not when it is moved. Thus, the temporary detachment of the previously constructed dolphin piling in September 2023 did not require a permit.

The City also argued that even if the dolphin piling was a structure, per the City's "intent and interpretation" of the Florida Building Code, a permit was still required in this situation. However, a city's interpretation of its own ordinances is improper if it violates the clear and ordinary meaning. Here, if the City desires specific meaning for the term **erect** or to require permits to move, alter, add to, or enlarge **structures**, the City may amend, modify or change its Code by the legislative process.

Lastly, in the City's Answer Brief, the alternative argument is proposed that because the City has no record of the dolphin piles being previously permitted, the 2023 activity was an erection, not a reinstallation. However, per the transcript, this argument was not advanced at the hearing. Rather, the parties, and the Special Magistrate, focused on the removal of one pile that was put back in the same position. Further, the permitting and final inspection issue was disputed at the hearing, and the Special Magistrate did not make a finding regarding the 2007 permitting issue. Therefore, the Court does not consider this alternative argument.

In sum, the Court finds that the record before it does not support the Special Magistrate's decision to issue the ordinance violation based on the Special Magistrate's failure to apply the plain language of Section 98-113(a) of the City of Deerfield Beach Municipal Code. Accordingly, the November 21, 2023 Final Order by the Special Magistrate of the City of Deerfield Beach Code Enforcement Board is hereby **REVERSED.** (BOWMAN, GARCIA-WOOD, and ODOM, JJ., concur.)

* * *

Arbitration—Waiver—Defendant waived right to arbitration by failing to comply with court order requiring filing of arbitration schedule and notice of compliance with schedule and by failing to make any effort toward arbitration

WINSTON M. VANCOOTEN, Plaintiff, v. ALLY FINANCIAL, INC., Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24004727. Division 25. November 1, 2024. Shari Africk Olefson, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Gillian D. Williston and Richard Ivers, Virginia Beach, Virginia, for Defendant.

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

AGREED ORDER

THIS CAUSE having come to be heard, at a CMC hearing set by the Court on October 28 on Zoom, and reset for October 29, 2024 in person,[1] upon the Court's Order on Defendant's Motion to Stay Litigation Pending Arbitration, filed August 20, 2024 (Prior Order), Order to Show Cause filed October 24, 2024 (Show Cause Order) [DE 28]. Attorney Joshua Feygin appeared on behalf of the Plaintiff, WINSTON MICHAEL VANCOOTEN along with Winston Michael Vancooten. Attorneys Richard Ivers and Gillian D. Williston appeared on behalf of Defendant, ALLY FINANCIAL, and Amika Thornton appeared as corporate representative of ALLY FINANCIAL. Having thoughtfully reviewed the Court file, including that certain Prior Order, Defendant's Motion to Compel Arbitration, filed June 19, 2024 (Arbitration Motion) and Defendant's Notices of Compliance, filed August 26, 2024, September 12, 2024, and October 7, 2024 (Compliance Notices), heard argument of counsel, and being otherwise advised in the premises, based upon the substantial competent information and prevailing legal authority, the Court hereby FINDS, ORDERS AND ADJUDGES as follows:

1. That, the Court hereby finds the Defendant to be non-compliant with the Prior Order [DE 21].

2. That, the Court heard the Motion at a thirty (30) minute special set hearing on August 14, 2024, after which the Court entered the Prior Order.

3. That, the Prior Order granted Defendant until October 15, 2024 to complete Arbitration. Defendant was ordered to "file a schedule of deadlines to complete the arbitration process" by August 25, 2024,[2] and to "file verification of compliance with all deadlines. . .on the first day of every month" (Compliance Reports).

4. That, Defendant never filed the Schedule. That, Defendant filed those certain Compliance Notices, each of which, rather that verify compliance with the Schedule, merely reflects that Plaintiff is non-compliant.

5. That, Defendant never filed, set nor had heard any Motion to Compel around Plaintiff's alleged non-compliance, nor any Motion to Extend the Stay prior to its expiration, nor any Motion to Amend the Prior Order, no took any other action whatsoever, notwithstanding the passage of over sixty (60) days and the entire Court ordered Arbitration stay period. Moreover, the Court doesn't concur with Defendant's argument that Defendant was unable and only Plaintiff was able to file the Court Ordered Schedule and Compliance Notices.

6. That, the Arbitration stay expired October 15, 2024. The Court finds Defendant materially failed to comply with the Prior Order, failed to inform the Court, and failed to make any effort whatsoever towards Arbitration and, as such, waived its right to Arbitration. The Defendant shall have ten (10) days to respond to the Complaint. If a motion to dismiss is filed, Defendant shall set the same for hearing the same day it is filed with such hearing to occur within ten (10) days of filing.

7. That, the Prior Order, Show Cause Order, and this Order are clear and unambiguous. Compliance is within Defendant's control. Defendant's non-compliance thus far is over a long-term period of sixty (60) days and the knowing and willful filing of multiple non-compliant Compliance Notices. As such, it has rendered the Court's ability to administer the case unnecessarily difficult and prejudiced the Plaintiff by way of delay, added time and cost. The Court defers further sanctions at this time.

---

[1]Plaintiff appeared in person, Defendant appeared again via Zoom notwithstanding the Court clear and unambiguous directive at the hearing the prior day that it was being re-set for the explicit purposes of appearing in person with clients, particularly given the possibility of sanctions.

[2]Contact Division for hearing

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Volume 32, Number 9
January 31, 2025
Cite as 32 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Criminal law—Driving under influence—Evidence—Statements of defendant—Accident report privilege—Defendant's statements during crash investigation are not protected by accident report privilege where defendant did not report accident and fled scene—Pre-*Miranda* statements made during roadside criminal investigation are admissible where casual conversation during which statements were made did not constitute custodial interrogation, statements were spontaneously made, and defendant was not subject to formal arrest when statements were made—Post-*Miranda* statements are admissible where statements were made knowingly, intelligently, freely, and voluntarily after waiving *Miranda* rights

STATE OF FLORIDA, Plaintiff, v. ANDRES MIGUEL TRUJILLO, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. A9KTW9E. November 6, 2024. Marcus Bach Armas, Judge. Counsel: Maria Perez and Maria Paula Molano, Miami, for Plaintiff. Laura Marino and Jude Faccidomo, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND ADMISSIONS

THIS MATTER is before the Court upon Defendant's Motion to Suppress Statements and Admissions (the "Motion"), filed on October 4, 2024, pursuant to Florida Rule of Criminal Procedure 3.190(h). Having considered the Motion, the applicable law, the argument of counsel, and the evidence presented at the evidentiary hearing held by the Court on November 6, 2024, the Court finds and concludes as follows:

I. PRELIMINARY MATTERS

Defendant Andres Trujillo was charged with one count of driving under the influence arising out of an incident that took place on June 21, 2024. By way of the Motion, Defendant seeks to suppress certain statements and admissions he made to law enforcement officers during the course of their investigation, including statements made during a crash investigation, as well as pre-Miranda and post-Miranda admissions made during a subsequent criminal investigation. As grounds therefor, Defendant contends that the aforementioned statements and admissions must be excluded because they: (a) are protected by the accident report privilege codified at § 316.066, Fla. Stat.; and/or (b) were obtained in violation of Defendant's Miranda rights.

The Court held an evidentiary hearing on the motion on November 6, 2024 at 11:00 a.m. in Courtroom 4-10 at the Richard E. Gerstein Justice Building. Present at the hearing were Defendant and his attorneys, Laura Marino, Esq. and Jude Faccidomo, Esq., along with the assistant state attorney assigned to this case, Maria Molano, Esq. At the hearing, the State presented testimony from Miami-Dade Police Department Officer R. Lape and played the relevant portions of his body-worn camera footage from the incident date. The Defense cross-examined Officer Lape but called no other witnesses.

II. FINDINGS OF FACT

Having considered and weighed the evidence presented at the hearing, the Court makes the following findings of fact:

1. Officer Lape has been employed with the Miami-Dade Police Department for approximately 1.5 years.

2. On the night of June 21, 2024, Officer Lape responded to the scene of an accident in western Miami-Dade County, Florida.

3. The accident was reported to law enforcement by the victims of the alleged hit-and-run; at no time did Defendant report the subject accident to law enforcement.

4. Officer Lape was assigned to investigate the incident and was wearing body-worn camera at all times material, which body-worn camera footage was admitted into evidence by stipulation as State's Exhibit 1.

5. While conducting a traffic crash investigation, Officer Lape was advised by two (2) persons involved in the accident that the party responsible for the accident had demonstrated strange behavior (i.e., a "blank stare") following the collision and then fled the scene of the accident in a white Jeep (the "Jeep").

6. After directing Officer Lape to the area where the Jeep had fled, Officer Lape located the Jeep parked in the swale of a residential street. When Officer Lape approached the vehicle, Defendant Andres Trujillo ("Defendant") was unconscious behind the wheel of the vehicle.

7. Officer Lape then drew his weapon, woke up Defendant, and ordered him to put his hands up, open the door and exit the Jeep while the officer secured the scene and determined whether the Defendant had any weapons in the vehicle.

8. Once Defendant exited his Jeep, Officer Lape secured the scene and holstered his weapon. He then asked the Defendant "are you alright?" and asked the Defendant to walk over to Officer Lape's vehicle.

9. Once the scene was secured and Officer Lape's weapon was holstered, the nature of the discussion immediately became less formal and more conversational. Notably, Officer Lape did not tell the Defendant that he had to answer questions, that he was not free to leave, that he was under arrest, or that he would be arrested if he did not answer questions.

10. While the Defendant was temporarily detained in an open and public area for roadside questioning in connection with this traffic stop, Defendant was asked to produce a driver's license and was also asked to walk a few feet towards Officer Lape's vehicle.

11. Notably, Defendant was not handcuffed, nor he physically restrained or directed by Officer Lape as he walked over to Officer Lape's vehicle; rather, Officer Lape allowed the Defendant to walk ahead of him freely and without restraint until he reached Officer Lape's vehicle a few feet away, at which point Officer Lape advised the Defendant that he was conducting a traffic crash investigation, patted him down for weapons, and proceeded to discuss the subject accident with Defendant.

12. Approximately ten (10) minutes into the interaction with Defendant, during which the Defendant asked questions (e.g., whether the parties in the other vehicle were injured) and made certain admissions regarding the subject car accident (the "Crash Statements"), Officer Lape advised the Defendant that he was changing hats and commencing a criminal investigation to determine whether Defendant was driving under the influence.

13. In response to Officer Lape's request for Defendant to perform field sobriety exercises and an observation by a different officer that Defendant could barely stand, Defendant volunteered that "he had weed" and then stated that he knew "weed is a controlled substance" and did not have a medical marijuana card (the "Pre-Miranda Statements").

14. The Defendant was later arrested for driving under the influence and taken to the local police station for processing. Approximately two (2) hours after Officer Lape first located the Defendant for roadside questioning, Defendant was given verbal and written Miranda warnings and signed a form acknowledging same.

15. After being read his Miranda rights and waiving same in writing, Defendant was interrogated about the subject incident and asked if he had consumed any illegal drugs, to which he responded in the affirmative, specifying that around 7:30 p.m.-8:00 p.m., he consumed "weed" and "it was strong" (the "Post-Miranda Statements").

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

III. CONCLUSIONS OF LAW

A. The Accident Report Privilege Does Not Apply to the Crash Statements

Admissibility of the Crash Statements turns on the applicability of the accident report privilege, which states, in relevant part:

> [e]ach crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated.

§ 316.066(4), Fla. Stat. (2024).

Here, the accident report privilege does not apply for two independent reasons. First, the accident report privilege "does not confer any benefit or privilege on a person who abandons [their] duty to remain at the scene." *Williams v. State*, 208 So. 3d 196, 196 (Fla 3d DCA 2016) [41 Fla. L. Weekly D2405a]. In the instant case, the Defendant fled the scene of an accident; consequently, he is not entitled to invoke the accident report privilege as a matter of law. *State v. Hepburn*, 460 So. 2d 422, 424-25 (Fla. 5th DCA 1984); *see also State v. Ferguson*, 405 So. 2d 294 (Fla. 4th DCA 1981).

Even if Defendant had not fled the scene, however, he would still be precluded from invoking the accident report privilege with respect to the Crash Statements. This is so because Defendant did not report the accident, and the accident report privilege statute "does not confer an exclusionary privilege to statements made by an alleged hit and run driver who did not report the accident;" rather, the privilege applies only "to statements in an accident report made by persons involved in an accident *who report that accident*." *Id.* (emphasis added). Because Defendant did not report the accident at issue, and because Defendant fled the scene of the accident that was the subject of the Crash Statements, the Defendant's request to exclude the Crash Statements pursuant to Florida's accident report privilege must be denied.

B. Defendant's Pre-Miranda Statements are Admissible Because He Was Not in Custody

The Court concludes that Officer Lape was not required to give Miranda warnings because Defendant was not in custody at the time he made the Pre-Miranda Statements. To protect a suspect's Fifth Amendment right against self-incrimination during a custodial interrogation, that person must be informed of his or her Miranda rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also Bannister v. State*, 132 So. 3d 267, 275 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D117a]. "Miranda warnings apply whenever a person is in the custody of the police and the police subject him or her to express questioning, or its functional equivalent, to a degree that the police should reasonably expect to elicit an incriminating response." *Bannister*, 132 So. 3d at 275 (emphasis in the original) (citation omitted). "Where . . . the custody . . . prong is absent," however, "Miranda does not require warnings." *Id.* (citations omitted); *see also State v. Blocker*, 360 So. 3d 742, 749 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D867a] (observing that the safeguards provided by Miranda apply only if an individual is in custody *and* subject to interrogation—i.e., where either the custody or interrogation prong is absent, Miranda does not require warnings) (internal citations omitted).

The *Blocker* case, which has substantially similar facts to the case at bar, provides helpful guidance in this respect. In *Blocker*, a case that also involved a crash investigation that subsequently transformed into a DUI investigation, the defendant was involved in an accident with a police vehicle. *Id.* at 744. The crash investigation commenced with one officer and later turned into a DUI investigation led by a different officer.[1] *Id.* After finding the accident report privilege inapplicable to the statements made during the DUI portion of the investigation, the *Blocker* court concluded that the officer conducting the DUI investigation was *not* required to give Miranda warnings because the Defendant was not in custody during the DUI investigation. *Id.* at 749. Citing a line of Florida cases relying on the Supreme Court's decision in *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), the *Blocker* court noted that "persons temporarily detained in a roadside stop are not in custody for purposes of *Miranda*" because such a stop does not constitute a "custodial interrogation." *Id.* (cleaned up).

Here, as in *Blocker*, the Defendant has "failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest." *Id.* The Defendant was not placed in handcuffs or zip-ties,[2] placed in the back of a police car, transported to a different location, shouted at, or overwhelmed by a show of force. Nor was he interrogated or subject to "aggressive police conduct objectively indicative of a formal arrest." *Id* at 750. Rather, the encounter that resulted in the Defendant's Pre-Miranda Statements was casual and conversational, with both Defendant and Officer Lape behaving in a surprisingly cavalier fashion (e.g., Defendant leans back against Officer Lape's patrol car and appears very relaxed during their discussion).[3] And while Officer Lape may have known at the time of the initial encounter with Defendant that he was likely to take Defendant into formal custody at some point, that intent was not expressed to Defendant prior to his utterance of the Pre-Miranda Statements, and the case law is clear that an officer's "unarticulated plan has no bearing on the question [of] whether a suspect was 'in custody' at a particular time." *Id.* at 750 (citing *Berkemer*, 468 U.S. at 442).

Applying these concepts to the case at bar, the Court concludes that the Defendant was not in custody for Miranda purposes when he made the Pre-Miranda Statements to Officer Lape. First, the casual nature of the conversation between Defendant and Officer Lape that resulted in the Pre-Miranda Statements did not constitute a custodial interrogation. Second, Defendant's incriminating statements were not made in response to an interrogation; rather, they were spontaneously offered up by Defendant as an explanation for his imbalance when a nearby by officer observed that Defendant could barely stand. And finally, Defendant was not subject to the restraints of a formal arrest when he made the Pre-Miranda Statements. As such, Defendant's Pre-Miranda Statements are admissible.

C. *Defendant's Post-Miranda Statements Were Freely and Voluntarily Made*

Finally, Defendant moves the Court to exclude Defendant's Post-Miranda Statements on the grounds that they were not given knowingly, intelligently, freely, and voluntarily. Having reviewed the evidence and considered the totality of the circumstances of the Post-Miranda Statements, the Court finds no evidence to support the defense's contention that Officer Lape "intentionally withheld Miranda to obtain a full confession" and concludes that the Post-Miranda Statements were given by Defendant knowingly, intelligently, freely and voluntarily after having been read his Miranda rights and waiving same in writing without any evidence of coercion or duress.

IV. RULING

Based on the foregoing, it is therefore ORDERED AND ADJUDGED that Defendant's Motion to Suppress is hereby DENIED.

---

[1]In the instant case, Officer Lape did not contact a second officer to conduct the criminal investigation, as was the case in *Blocker*. Instead, Officer Lape advised Defendant that he was "changing hats," concluding the crash investigation, and commencing a criminal DUI investigation. Because Officer Lape properly changed

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

hats with adequate notice to Defendant, there was no need to contact a second deputy to conduct the criminal investigation; the requisite separation between the two investigations was accomplished by Officer Lape properly changing hats and explaining same to the Defendant.

[2]Defendant did voluntarily place his hands behind his back during portions of the conversation with Officer Lape, making it appear as though he was handcuffed. However, the record evidence quite clearly indicates that Defendant was not handcuffed during the interaction that resulted in the Pre-Miranda Statements.

[3]*See also Burns v. State* 661 So. 2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D634c], where an officer viewed erratic driving and detected signs of impairment once the vehicle was stopped, and the driver exited the car. The *Burns* decision, like the instant case, involved a traffic stop in which the driver "was asked for his license and registration and to perform field sobriety tests[,] [t]he stop was short . . . , occurred in a public area, only one officer was present, and the tests were simple." The *Burns* court concluded that driver was not in custody for Miranda purposes because though "his freedom of action was curtailed, as it is in any detention, [the defendant] did not bring forth any evidence that he was subjected to any restraints comparable to those found in a formal arrest."

* * *

Criminal law—Sentencing—Correction—U.S. Supreme Court's decision in *Erlinger v. U.S.*, which requires that jury resolve question whether predicate violent felonies necessary for application of Armed Career Criminal Act were committed on different occasions, does not apply to Florida habitualization statutes—Florida habitualization statutes pose simple questions as to whether defendant committed statutorily-identified crimes within certain number of years from date of release or last conviction and, accordingly eligibility for habitualized sentence does not involve fact-laden inquiry that requires jury findings

STATE OF FLORIDA, Plaintiff, v. COURTNEY MOORE, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F22-6128. October 25, 2024. Milton Hirsch, Judge.

ORDER ON AMENDED MOTION TO CORRECT SENTENCING ERRORS

> For many years as a trial judge in the state and federal systems I have endeavored faithfully to understand and apply precedents established by the opinions of appellate courts. This was not a blind obedience to a legalistic formula embodied in the rule of *stare decisis*. It was the result of a simple belief that the laws which regulate the conduct, the affairs, and sometimes the emotions of our people should evidence not only the appearance but also the spirit of stability.
>
> . . .
>
> A comparatively new principle of pernicious implications has found its way into our jurisprudence. Lower courts may feel free to disregard the precise precedent of a Supreme Court opinion if they perceive a "pronounced new doctrinal trend" in its later decisions which would influence a cautious judge to prophesy that in due time and in a proper case such established precedent will be overturned explicitly.

Browder v. Gayle, 142 F. Supp. 707, 718-19 (M.D. Ala. 1956) (Lynne, J., dissenting) (footnote omitted).[1]

On June 21 of this year, the United States Supreme Court issued its opinion in *Erlinger v. United States*, 144 S.Ct. 1840 (2024) [30 Fla. L. Weekly Fed. S329a]. Erlinger was a federal criminal defendant who was sentenced according to the terms of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Pursuant to those terms Erlinger, charged with being a felon in possession of a firearm, was amenable to an enhanced sentence of at least 15 years, up to life in prison, if he had three prior convictions for violent felonies "committed on occasions different from one another." At issue in *Erlinger* was "whether ACCA's occasions inquiry"—*i.e.*, the determination whether the predicate violent felonies were in fact committed on "occasions different from one another"—"must be resolved by a jury." *Erlinger*, 144 S.Ct. at 1848. Because "deciding whether those past offenses occurred on three or more different occasions is a fact-laden task," *id*. at 1851, "Mr. Erlinger was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id*. at 1852.

Erlinger involved the interpretation of a federal statute. With respect to the interpretation of colorably analogous Florida statues it is not binding. It may, of course, be highly instructive if the appellate courts of this state deem Florida's habitualization statutes to be closely analogous to ACCA; less instructive otherwise. Courtney Moore was sentenced by my predecessor, sitting without a jury, as a "prison releasee reoffender ("PRR")," Fla. Stat. § 775.082(9), and a habitual offender ("HO"), § 775.084. In the motion at bar, Moore's principal claim[2] is that the teaching of *Erlinger* as to ACCA should be applied to Florida's PRR and HO statutes, and that he is therefore entitled to a resentencing. At that resentencing, he demands a jury determination of the factual predicate for habitualization.

In making this argument, counsel for Mr. Moore acknowledges that the law of Florida is, at present, against him. Cases such as *Maye v. State*, 2024 WL 1796831 (Fla. April 25, 2024); *Ryland v. State*, 360 So. 3d 784 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D724b]; and *Robbinson v. State*, 784 So. 2d 1246 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1240d], teach that a judge, acting without a jury, may determine the factual predicate for habitualization. Recall that *Erlinger* describes determination of the ACCA habitualization predicate as a "fact-laden" inquiry. *Erlinger*, 144 S.Ct. at 1851. Whether criminal conduct occurred on one, or two, or three separate "occasions," as ACCA employs that term, turns upon the dates of the crimes, the duration of the crimes, the manner and method by which the crimes were committed, the nature of the crimes, the participants in the crimes, and a host of other factors. *See, e.g., United States v. Pope*, 132 F.3d 684 (11th Cir. 1998). By contrast, habitualization as a prison releasee reoffender poses the simple question: Did the defendant commit any of the statutorily-identified crimes within three years of being released from jail or prison? *See* Fla. Stat. § 775.082(9). And habitualization as a habitual offender poses the simple question: Did the defendant commit any of the statutorily-identified crimes within five years of the date of his last conviction or his release from custody? *See* Fla. Stat. § 775.084(1)(a). Ordinarily the court need do no more than take judicial notice of the court files, Fla. Stat. § 90.202(6), to determine whether the predicate has been met. There is nothing "fact-laden" about this. In the majority of cases, the defense concedes the habitualization predicate. It did so here, *see* n. 3, *infra*.

Taking his cue from Hamlet, Moore treats it as a foregone conclusion that Florida's courts will, sooner or later, abandon their present jurisprudence and adopt the jurisprudence of *Erlinger*. "If it be now, 'tis not to come; if it be not to come, it will be now; if it be not now, yet it will come." Wm. Shakespeare, *Hamlet* Act V, sc. 2. If and when the law changes, defendants who have preserved the *Erlinger* issue may be entitled to resentencing.[3] Until it does, I must bear in mind the admonition offered by Judge Lynne in the quoted material appearing at the outset of this order. I must follow controlling decisional authority as it presently exists; and not as I, or the litigants who appear before me, imagine it may exist in future. I may not, and do not, "feel free to disregard . . . precedent . . . [whenever I] perceive a 'pronounced new doctrinal trend'."

As to his first and principal claim, Defendant's motion is respectfully denied. As to his second and third claims, his motion is granted as provided in n. 2, *supra*.

---

[1]Riding home on a Montgomery, Alabama, city bus after a tiring day of work, Mrs. Rosa Parks, a black seamstress, refused to give up her seat to white man as required by local law. The date was Dec. 1, 1955, now regarded by many as the beginning of the modern civil rights movement. Mrs. Parks was arrested.

The Black community was spurred to consider a boycott of the municipal bus system. An organizational meeting was held at the Dexter Avenue Baptist Church, at the conclusion of which the young minister of that church was elected to lead the

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

boycott. His name was Martin Luther King.

Montgomery's forty thousand Blacks stayed off the city buses for more than a year. They car-pooled when they could. They gave each other rides when they could. And they walked.

The boycott, and the violent reaction of some members of the White community, garnered national attention. Dr. King and his notions of nonviolent resistence became symbols of the new Black response to segregation.

The boycott itself never really forced the white power structure of Montgomery to integrate the buses. But on June 5, 1956, a three-judge panel of the U.S. District Court ordered desegregation of the bus system in *Browder v. Gayle, supra*. That opinion was later affirmed by the Supreme Court. Shortly thereafter, as members of the national and international press watched and photographed, Martin Luther King and his supporters boarded a Montgomery city bus and were able to sit in any empty seat.

The two-judge majority in *Browder* was made up of Judges Richard Rives and Frank M. Johnson. Their heroism in *Browder* and other civil-rights cases is memorialized in Bass, Unlikely Heroes (Univ. Ala. Press 1981). The excerpted dissent was authored by Judge Seybourn Lynne. He was moved to dissent, not by feelings of racial prejudice, but by a profound respect for precedent and *stare decisis*. That, too, is a lesson worth remembering.

[2]Mr. Moore makes two ancillary claims: that the court must enter a corrected sentencing order clarifying when the PRR portion of his sentence is to be served, so that the Florida Department of Corrections can properly calculate his release date and "gain time;" and that the court should correct a scrivener's error in the sentencing order to reflect that Mr. Moore is not required to serve a minimum term of imprisonment pursuant to his HO status. Counsel for the State generously and properly conceded that Moore is entitled to some form of relief on these claims. Counsel for Mr. Moore is therefore directed to prepare a draft amended sentencing order as to these two claims, show it to counsel for the State, and then submit it for my signature.

[3]Counsel for the parties disagree as to whether Mr. Moore's present motion preserves the *Erlinger* issue, or whether the time for preservation passed at or before the imposition of sentence. I express no view on this dispute. Given my determination that the existing state of the law in Florida precludes the *Erlinger* relief that Moore seeks, my views on preservation would be *dicta* at best.

In the same vein, I note that both the principal dissent in *Erlinger* and the brief concurrence offered by Chief Justice Roberts emphasize that *Erlinger* error is subject to harmless-error analysis. *See, e.g., Erlinger*, 144 S.Ct. at 1860 (Roberts, C.J., concurring). As the motion at bar acknowledges,

> At [Moore's] sentencing, Mr. Moore's trial attorney conceded that he qualifies as both a prison releasee reoffender . . . and [a] HFO . . . . The State introduced evidence of Mr. Moore's prior convictions, his prison release date, and the fact that his prior convictions had not been set aside or pardoned. . . . The Court conducted a colloquy with Mr. Moore, and he conceded that the State's exhibits and factual proffer were accurate.

Amended Motion to Correct Sentencing Errors 3. So if, as Mr. Moore's counsel envisions, the appellate courts of this state soon change the decisional law to require a jury determination of habitualization predicates, those appellate courts will also have to determine whether harmless-error analysis applies to defendants such as Moore who were sentenced without a jury determination but upon an ample factual foundation. That issue is not presently before me, and I do not attempt to resolve it. I do no more than note in passing that a motion to correct sentence pursuant to Rule 3.800, such as the motion at bar, must allege that the sentence could not have been entered on any set of facts, *see, e.g., Bover v. State*, 797 So. 2d 1246 (Fla. 2001) [26 Fla. L. Weekly S652a]; and that here, as noted in the excerpted paragraph *supra*, Mr. Moore conceded the existence of facts sufficient to support habitualization.

* * *

Consumer law—Motor vehicle sales—Florida Deceptive and Unfair Trade Practices Act—Plaintiff is entitled to recover purchase price of vehicle from motor vehicle dealer where dealer made false, deceptive, and misleading statements with regard to sale of vehicle to plaintiff and perpetrated fraud on plaintiff in connection with sale

AHMED SABER AL-ABOODY, An Individual, Plaintiff, v. TAMPA AUTO SOURCE, INC., A Florida Corporation, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 23CA015007. October 24, 2024. Jennifer X. Gabbard, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Tampa Auto Source, Inc., Pro se, Defendant.

DEFAULT FINAL JUDGEMENT AS TO DEFENDANT TAMPA AUTO SOURCE, INC.

THIS CAUSE having come on before the Court on Tuesday, October 23, 2024, on the Motion for Entry of Final Judgment After Default filed herein by Plaintiff, Ahmed Saber Al-Aboody, an individual, [Editor's note: Address redacted], Westland, Michigan 48186, against Defendant, Tampa Auto Source, Inc., a Florida corporation, 7610 N Florida Ave, Tampa, Florida 33604, and the Court having considered the argument of counsel and being otherwise fully informed in the premises, it is thereupon

ORDERED AND ADJUDGED:

1. That the Motion for Entry of Final Judgment After Default is and the same is hereby **GRANTED** as more particularly described below.

2. Default Final Judgment is entered in favor of Ahmed Saber Al-Aboody and against Tampa Auto Source, Inc. for violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Section 501.201, *et seq*. and the Magnusson Moss Warranty Act ("MMWA"), 15 U.S.C. §230, *et. seq.*

3. This Court finds that the Defendant violated Florida Statute §320.27(9)(b) 3 by misrepresenting or making false, deceptive or misleading statements with regard to the sale of the subject vehicle and Florida Statute §320.27(9)(b)13 by perpetrating fraud upon Ahmed Saber Al-Aboody in connection with the sale of the subject vehicle.

4. Each of these violations is a *per-se* violation of FDUTPA. *Steven Michael Cox v. Porsche Financial Services, Inc.,* 16-23409-CIV, 2020 WL 837167 (S.D. Fla. Feb. 19, 2020); *see* § 501.203(c), Florida Statutes.

5. It has been established through case law, that when a product is rendered valueless as a result of a defect, the appropriate measure of damages under FDUTPA is the purchase price of the product. *See Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. 3d DCA 1984) (*Citing Raye v. Fred Oakley Motors, Inc.*, 646 S.W.2d 288, 290 (Tex. App. 1983).

6. Thus, in accordance with the proofs submitted in support of said motion, Plaintiff, Ahmed Saber Al-Aboody, do have, receive and recover from Defendant, Tampa Auto Source, Inc., a Florida corporation, the principal sum of Thirty-Two Thousand Two Hundred and Eight Dollars and 10/100 Cents ($32,208.10) together with prejudgment interest in the amount of $3,894.22 accrued beginning June 05, 2023 through entry of this Final Default Judgment, along with post-judgment interest accruing at the statutory rate of 9.5% per annum beginning on the date this Default Final Judgment is entered, as calculated by Florida's Chief Financial Officer pursuant to Section 55.03(1), Florida Statutes, for all of which let execution issue.

7. It is further ordered and adjudged that Tampa Auto Source, Inc., shall complete under oath Florida Rule of Civil Procedure Form 1.977 (the "Fact Information Sheet"), including all required attachments, and serve it on Ahmed Saber Al-Aboody's attorney within 45 days from the date of this Final Default Judgment, unless the final judgment is satisfied or post-judgment discovery is stayed. Tampa Auto Source, Inc's Fact Information Sheet is attached to this Final Default Judgment as Schedule "A."

8. That the Court reserves jurisdiction to determine the entitlement to and amount of attorney's fees and costs of Plaintiff, Ahmed Saber Al-Aboody upon subsequent application.

9. That the Court retains jurisdiction to enter further orders and rulings as necessary, including orders compelling Tampa Auto Source, Inc to complete the Fact Information Sheet, including all required attachments, and serve it on Plaintiff, Ahmed Saber Al-Aboody's attorney.

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Insurance—Property—Attorney's fees—Statutory attorney's fees provision in section 627.70152(8) affected substantiative right and cannot be applied retroactively to insurance policy in effect prior to its enactment—Version of section 627.428 in effect at time policy was issued applies—Motion to strike claim for attorney's fees denied

SHIRLEY HOLMES, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY, Defendant. Circuit Court, 14th Judicial Circuit in and for Calhoun County. Case No. 07-2023-CA-000026-CAAM. November 20, 2024. Brandon J. Young, Judge. Counsel: Frantz Nelson, Levin Litigation, PLLC, Hollywood, for Plaintiff. Nicholas Monk, Conroy Simberg, Tallahassee, for Defendant.

ORDER DENYING MOTION TO STRIKE PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES AND COSTS

THIS CASE came before the Court on November 7, 2024, for hearing after notice on Defendant's Motion to Strike Plaintiff's Claim for Attorney's Fees and Costs filed on July 26, 2024. The Court having considered the same, the arguments presented and Plaintiff's Amended Complaint and otherwise being fully advised, the Court finds and orders as follows.

1. On March 31, 2023, Plaintiff filed her initial complaint for breach of contract relating to a property insurance policy that commenced prior to a reported loss on October 10, 2018. Plaintiff filed an amended complaint on June 1, 2023.

2. Defendant asserts Plaintiff's claim for attorney's fees and costs is due to be stricken based on statutory changes.

3. Defendant asserts Fla. Stat. §627.428 was amended in 2022 and repealed in 2023 and does not apply to this action, and Plaintiff's claim for attorney's fees on that basis should be stricken.

4. However, the Court must apply the version of Fla. Stat. §627.428 that was in effect at the time the policy was issued. *See Menendez v. Progressive Express Ins. Co., Inc.,* 35 So. 3d 873, 876 (Fla. 2010) [35 Fla. L. Weekly S222b] (quoting *Hassen v. State Farm Mut. Auto. Ins. Co.,* 674 So. 2d 106, 108 (Fla. 1996) [21 Fla. L. Weekly S102c]) (" '[T]he statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract.' ").

5. Further, the statutory attorney's fees provision in Fla. Stat. §627.70152(8) affected a substantive right and cannot be applied retroactively to the subject policy. *See Hughes v. Universal Prop. & Cas. Ins. Co.,* 374 So. 3d 900, 910 (Fla. 6th DCA 2023) [49 Fla. L. Weekly D153a]; see also *Cole v. Universal Prop. & Cas. Ins. Co.,* 363 So. 3d 1089, 1094 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D916a] ("[T]he right to attorney's fees in subsection (8) is substantive and not able to be applied retroactively[.])

It is, therefore,

ORDERED AND ADJUDGED that Defendant's Motion to Strike Plaintiff's Claim for Attorney's Fees and Costs is denied.

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Volume 32, Number 9
January 31, 2025
Cite as 32 Fla. L. Weekly Supp. ____

COUNTY COURTS

Garnishment—Dissolution of writ—Person of interest identified in garnishee's answer and served with notice of right to dissolve writ has statutory right to file motion to dissolve writ within 20 days of service of notice, but cannot challenge garnishment by filing affidavit under provisions of section 77.16—Section 77.16 applies only to individuals not disclosed in garnishee's answer—Untimely affidavit claiming ownership of funds in bank account stricken

CHASE BANK USA, N.A., Plaintiff, v. LUKASZ FENIK, Defendant, v. BANK OF AMERICA, N.A., Garnishee. County Court. 1st Judicial Circuit in and for Okaloosa County. Case No. 2007 CC 004513 S. November 7, 2024. Jonathan Schlechter, Judge. Counsel: Shafritz and Associates, P.A., Delray Beach, for Dove Investment Corp., Assignee.

FINAL JUDGMENT IN GARNISHMENT

THIS CAUSE came before the Court on the Judgment Assignee, DOVE INVESTMENT CORP., Motion for Final Judgment in Garnishment on Confession of Garnishee, the Court having heard the evidence presented and argument of the parties, and otherwise being advised in the premises, the Court finds as follows:

FACTS

1. Judgment Assignee moved for a writ of garnishment. *See* DIN 65.

2. Judgment Assignee alleged that the funds in the bank ccount were owed by Defendant. *See* DIN 65.

3. Judgment Assignee obtained a Writ of Garnishment to be served upon Garnishee. *See* DIN 66.

4. Thereafter, Garnishee answered. *See* DIN 71.

5. Judgment Assignee provided a copy of Garnishee's answer and a Notice of Right to Dissolve the Garnishment to Defendant and Jennifer Stoffel, an individual who's name appeared on the bank account according to Garnishee's Answer. *See* DIN 73 and DIN 74.

6. DIN 73 and DIN 74 were filed on or about April 2, 2024.

7. Defendant did not file a Motion to Dissolve nor did Defendant claim an exemption from Garnishment.

8. Ms. Stofel did not file a Motion to Dissolve the Garnishment.

9. On September 13, 2024, Judgment Assignee filed a Motion for Final Judgment in Garnishment on Confession of Garnishee. *See* DIN 87.

10. On September 13, 2024, Defendant filed an Opposition to Motion for Final Judgment in Garnishment on confession of Garnishee. *See* DIN 89.

11. On October 21, 2024, Ms. Stoffel filed a sworn affidavit claiming ownership of the funds in the bank account. *See* DIN 94.

ANALYSIS

Garnishment is a statutory process that is controlled by Chapter 77, *Florida Statutes.* "Garnishment proceedings are statutory in nature and require strict adherence to the provisions of the statute." *Zivitz v. Zivitz,* 16 So.3d 841 (Fla. 2nd DCA 2009) [34 Fla. L. Weekly D1024a]. Section 77.055, *Florida Statutes* provides in pertinent part, "a notice advising the recipient that he or she must move to dissolve the writ of garnishment within 20 days after the date indicated on the certificate of service in the notice if any allegation in plaintiff's motion for writ of garnishment is untrue."

Section 77.07(2), *Florida Statutes* provides as follows:

> The defendant and any other person having an ownership interest in the property, as disclosed by the garnishee's answer, shall file and serve motion to dissolve the garnishment within 20 days after the date indicated in the certificate of service on the defendant and such other person of the plaintiff's notice required by s. 77.055, stating that any allegation in plaintiff's motion for writ is untrue. On such motion this issue shall be tried, and if the allegation in plaintiff's motion which is denied is not proved to be true, the garnishment shall be dissolved. Failure of the defendant or other interested person to timely file and serve the motion to dissolve within such time limitation shall result in the striking of the motion as an unauthorized nullity by the court and the proceedings shall be in a default posture as to the party involved.

Here, Ms. Stoffel's ownership interest was disclosed by Garnishee's answer and Judgment Assignee provided timely notice of the garnishment to Ms. Stoffel. Ms. Stoffel did not file a motion to dissolve within twenty days "after the date indicated in the certificate of service on the defendant and such other person of the plaintiff's notice[.]" *Fla. Stat.* 77.07(2).

Ms. Stoffel asserts an ability to claim ownership in the funds pursuant to section 77.16(1), *Florida Statutes* which states:

> If any person other than defendant claims that the debt due by a garnishee is due to that person and not to the defendant, or that the property in the hands or possession of garnishee is that person's property and shall make an affidavit to the effect, the court shall impanel a jury to determine the right of property between the claimant and plaintiff unless a jury is waived.

The Fourth District Court of appeal explained the statutory garnishment process as follows:

> Upon service of a writ of garnishment, the garnishee must serve an answer which, pertinent to the present case, must indicate whether the garnishee has property of the defendant under his or her control, or knows of any other person indebted to the defendant. *See* § 77.04, Fla. Stat. (1997). Once that information is received the garnishor must send notice to those persons disclosed in the garnishee's answer informing them of the garnishment and advising them of their right to move to dissolve the writ. § 77.055. The statutory right to move to dissolve the writ is granted only to the defendant and any other person having an ownership interest in the property, *as disclosed by the garnishee's answer.* § 77.07(2). The statutes contemplate that other persons who claim an ownership interest in the debt due by the garnishee, or in property in the hands or possession of the garnishee, may assert such claim by filing an affidavit under the provisions of section 77.16. (italics included in original).
>
> *Navon, Kopelman & O'Donnell, P.A. Synnex Informaion Tech& Inc.,* 720 So. 2d 1167, 1168 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2615a].

Here, Ms. Stofel was identified by the garnishee's answer as an interested person. To contest the Judgment Assignee's allegation contained in the motion for writ of garnishment that Defendant owned the funds Ms. Stofel was required to comply with *Fla. Stat. 7.055 and* 77.07(2). Ms. Stoffel failed to file a motion to dissolve within 20 days of the date listed on the certificate of service for the notice of right to dissolve writ with which she was served. The provisions of section 77.16, *Florida Statutes,* are for individuals that were not named in the Garnishee's answer.

THEREFORE, it is ORDERED AND ADJUDGED as follows:

1. Affidavit of Jennifer L. Stoffel is stricken as untimely pursuant to Section 77.07.

2. Court finds in favor of Judgement Assignee, Dove Investment Corp. Garnishee shall pay to Judgment Assignee, Dove Investment Corp., the total amount of $3,279.78.

3. The Court reserves jurisdiction to award fees and costs.

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Insurance—Personal injury protection—Attorney's fees—Multiple suits for same claim—Where medical provider sent claim to two separate law firms and ostensibly provided authority to both firms to file suit, and insurer settled dispute and obtained voluntary dismissal in suit in which service of process was first perfected, law firm that represented provider in separate suit was not entitled to award of attorney's fees based on insurer's post-suit payment in dismissed suit—It would be against public policy for insurer to be forced to pay double attorney's fees under these circumstances—Further, doctrines of equitable estoppel, collateral estoppel, and res judicata apply to prevent recovery of attorney's fees in multiple suits based on same claim—Finally, section 627.736(15) prohibits award of attorney's fees for claim that should have been brought in prior action

HALLANDALE BEACH ORTHOPEDICS, INC., a/a/o Carina Rudi, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-007556-SP-26. Section SD03. July 25, 2024. Lissette De la Rosa, Judge. Counsel: Thomas Joseph Wenzel, for Plaintiff. Selena Villadiego, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT BASED ON POST-SUIT PAYMENT

THIS CAUSE having been before the Court and after hearing arguments of the parties on Plaintiff's Motion for Entry Of Final Judgment Based On Post-Suit Payment, and the Court being otherwise fully advised in the premises, it is hereby:

ORDERED and ADJUDGED as follows:

Plaintiff ("*Hallandale Beach Orthopedics, Inc. a/a/o Carina Rudi")*, filed two substantively identical lawsuits regarding PIP benefits for date of loss 9/21/2020 and date of service 1/28/2021.[1]

Plaintiff, represented in this action by *Steinger, Green & Feiner*, seeks entry of final judgment against Defendant Infinity based on an alleged post-suit payment to Plaintiff.

On February 28, 2023, *Steinger, Green & Feiner* filed the instant action and served Infinity on *May 23, 2023.*

The Koretsky Law Firm filed suit on April 23, 2023, but was able to perfect service to Infinity first on *May 10, 2023.*

Infinity settled the dispute with *The Koretsky Law Firm* and Plaintiff filed a Notice of Voluntary Dismissal with Prejudice on August 3, 2023.

Although the suit by *Steinger, Green & Feiner* was filed first, Infinity was served with *The Koretsky Law Firm's* suit first.

"When two actions between same parties are pending in different circuits, jurisdiction lies in circuit where service of process is first perfected." *See Mabie v. Garden St. Management Corp*., 397 So. 2d 920, 921 (Fla. 1981); *see also Martinez v. Martinez*, 153 Fla. 753, 15 So.2d 842, 844 (Fla. 1943) (in case of conflict between courts of concurrent jurisdiction the one first exercising jurisdiction acquires control to the exclusion of the other.); *see also Suggs v. Cowart*, 437 So. 2d 238, 240 (Fla 5th DCA 1983) ("One lawsuit will resolve all questions arising from this dispute. The parties should not be burdened with two cases involving the same issues, when one will take care of the problems").

Steinger, Green & Feiner now seeks entry of final judgment based on the Defendant's settlement with *The Koretsky Law Firm* in an attempt to collect attorneys' fees and attempts to shift the burden to Defendant to notify Plaintiff's counsel of the multiple suits.

However, it would be onerous to put the full burden on Infinity when the behavior resulting in this issue is instigated by the Plaintiff, who sent this claim to two separate firms and ostensibly provided authority to both firms to file suit.

It would be against public policy for Infinity to be forced to pay **double attorney's fees** in circumstances where the Plaintiff filed two identical lawsuits on a single claim and may lead to incentivizing filing of multiples suits for a single claim.

Aside from public policy, Plaintiff is equitably estopped from proceeding:

> Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct. Equitable estoppel thus functions as a shield, not a sword, and operates against the wrongdoer, not the victim. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001) [26 Fla. L. Weekly S465a]. (equitable estoppel is the effect of voluntary conduct of party that absolutely precludes, both at law and in equity, asserting rights which may have otherwise existed against another party who, in good faith, relied upon such conduct and changed their position for the worse).

The doctrine of collateral estoppel may likewise apply. "Collateral estoppel, also known as estoppel by judgment, serves as a bar to relitigation of an issue which has already been determined by a valid judgment." *Stogniew v. McQueen*, 656 So.2d 917, 919 (Fla. 1995) [20 Fla. L. Weekly S208a].

Additionally, there are issues of res judicata:

> The law is well settled that when a fact, an issue, or a cause of action has been decided by a court of competent jurisdiction, neither of the parties involved shall be allowed to call into question and relitigate the thing decided, so long as the judgment or decree stands unreversed.

Agb Oil Co. v. Crystal Expl. & Prod. Co., 406 So. 2d 1165, 1167 (Fla. 3d DCA 1981).

Similarly, Plaintiff may not collect attorneys' fees twice under §627.736(15) which states:

> "**(15) All claims brought in a single action.**—In any civil action to recover personal injury protection benefits brought by a claimant pursuant to this section against an insurer, all claims related to the same health care provider for the same injured person shall be brought in one action, unless good cause is shown why such claims should be brought separately. If the court determines that a civil action is filed for a claim that should have been brought in a prior civil action, the court may not award attorney's fees to the claimant."

Finally, Plaintiff's reliance on *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So.2d 217 (Fla. 1983) and *Stewart v. Midland Life Ins. Co*., 899 So.2d 331 (Fla. 4th DCA 2002) [30 Fla. L. Weekly D552a] as its entitlement to reasonable attorneys' fees and costs pursuant to Fla. Stat. §627.428 is misplaced and not applicable here. These cases do not stand for the proposition that settlement of a lawsuit with one firm amounts to a confession of judgment entitling a *different firm* on a *different lawsuit* the ability to collect attorney fees.

Infinity paid for the Plaintiff's attorney's fees with *The Koretsky Law Firm* and to the extent that *Steinger, Green & Feiner* seeks payment for its services is an issue that should remain with Plaintiff and its counsel.

Likewise, Plaintiff's reliance on *Brown v. Vt. Mut. Ins. Co*., 614 So. 2d 574 (Fla. 1st DCA) and *Heller v. Held*, 817 So. 2d 1023 (Fla. 4d DCA 2002) [27 Fla. L. Weekly D1323b], are misplaced and not applicable to the facts here (*Brown* dealing with attorney Evans representing two different Plaintiffs' Brown and City Federal; and *Heller* dealing an attorney seeking enforcement of a charging lien against the former clients' family members who issued settlement funds directly to Plaintiff without proving notice to the attorney).

Accordingly, for the reasons stated above, Plaintiff's Motion for Entry of Final Judgment Based on Post-Suit Payment is DENIED.

---

[1]Although the instant lawsuit does not list what date of service is at issue, the Plaintiff's notice of filing docket number 19 contains a 627.736 demand letter showing the date of service to be 1/28/2021.

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Insurance—Personal injury protection—Coverage—Deductible—Spouse of insured—Declaratory action seeking determination that application of deductible to insured's wife is not permissible under statute providing that insured may elect deductible to be applied to insured and resident "dependent relatives," but may not elect deductible to apply to any other persons covered under policy—Where there is no claim that wife is not dependent within meaning of statute or that she is not dependent under restrictive definition of financial dependent urged by medical provider, there is no need for declaration—Motion to dismiss granted

ADVANCED DIAGNOSTIC GROUP, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-152944-CC-26. Section CC02. October 15, 2024. Miesha S. Darrough, Judge. Counsel: Thomas Joseph Wenzel, Plantation, for Plaintiff. Shadae Moss, Riverview, for Defendant.

ORDER OF DISMISSAL

This MATTER came before the Court for hearing on September 26, 2024, on the Defendant's Motion to Dismiss Plaintiff's Amended Petition for Declaratory Relief. For the reasons set forth herein, the Defendant's Motion to Dismiss Plaintiff's Amended Petition for Declaratory Relief filed on 05/07/2024 is GRANTED.

This cause of action seeks a declaratory judgment where "Petitioner is in doubt as to whether Respondent possesses adequate evidence of the aforementioned purported deductible election." (See Paragraph 11 of Plaintiff's Amended Petition). Plaintiff alleged that Defendant lacked reasonable proof that was the dependent of Thomas Jones." (See Paragraph 14 of Plaintiff's Amended Petition) Plaintiff is outrage that a wife is automatically assumed to be the dependent of her husband.

Defendant moves to dismiss the petition for failure to state a cause of action. In ruling on a motion to dismiss, the court is "required to accept the factual allegations of the complaint as true and to consider those allegations and any inferences to be drawn therefrom in the light most favorable to the non-moving party." *Siegle v. Progressive Consumers Insurance Company,* 819 So. 2d 732, 734 (Fla. 2002) [27 Fla. L. Weekly S492a]. The Court concludes that the motion to dismiss is well-founded and the complaint has failed to allege the jurisdictional prerequisites for obtaining a declaratory judgment.

Plaintiff seeks a declaratory judgment. As such, Plaintiff claims a bona fide doubt about their rights, status, immunities, powers or privileges. S. 86.021, Fla. Stat. (2020); *People's Trust Insurance Co. v. Valentin,* 305 So. 3d 324 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D754b]. The requisites for declaratory relief are: 1) a bona fide, actual, present and practical need for the declaration; 2) a present ascertained or ascertainable state of facts or a present controversy about a state of facts; 3) a power, privilege, immunity or right of the party seeking relief must be dependent on the facts or the law applicable to the facts; 4) another person or persons must have an actual, present and adverse interest in the subject matter; 5) the adverse interests must be before the court; and 6) the declaration must not be merely giving legal advice. *May v. Holley,* 59 So. 2d 636 (Fla. 1952). The pleading must alleged facts showing a bona fide, adverse interest between the parties concerning the power, privilege, immunity or right of the pleader, the pleader's doubt and a showing the pleader is entitled to have that doubt removed. *Treasure Chest Poker, LLC v. Dept. of Business and Professional Regulation, etc.,* 238 So. 3d 338 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1478a]. These requirements are jurisdictional. *Id.*

There is no dispute that Maryellen Stanley Jones is related to the policyholder by marriage. There is no claim that she does not reside in the same household as the insured. There is no contention by the Plaintiff that Maryellen Stanley Jones is not a dependent. There is no dispute that Maryellen Stanley Jones is listed on the Policy's Declaration page as an insured person or that the deductible is to apply to her.

Plaintiff support for this case is the claim that the Defendant presumes that spouses are "dependents" as stated in section 627.739(1) and that this term has the only meaning that Plaintiff seeks to ascribe to it. This argument must fail for several reasons. There is no claim that Maryellen Stanley Jones is not a dependent within the meaning of the statute, or that she is not a dependent using the Plaintiff's definition of financial dependent. There is no bona fide need for a declaration based on present, ascertainable facts and therefore, the Court lacks jurisdiction to render declaratory relief.

The Court is persuaded by the Volusia County Court opinion, that the 5th District Court of Appeals issued a per curiam opinion affirming the County Court opinion granting Defendant's Motion to Dismiss. See *South Florida Injury Centers, Inc., a/a/o Era Marshall v. Progressive American Insurance Company,* 29 Fla. L. Weekly Supp. 132a; *South Florida Injury Centers, Inc., a/a/o Era Marshall v. Progressive American Insurance Company,* 5D21-630 (September 12, 2022).

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED, that the Defendant's Motion to Dismiss is hereby GRANTED and this case is dismissed with prejudice.

* * *

Insurance—Personal injury protection—Jurisdiction—Medical provider's action against nonresident insurer—Minimum contacts—Dismissal of complaint—Failure to produce any evidence that nonresident insurer had sufficient minimum contacts with Florida

ARTANG REHABILITATION CENTER, Plaintiff, v. PROGRESSIVE COUNTY MUTUAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-106815-SP-26. Section HI01. October 16, 2024. Milena Abreu, Judge. Counsel: Kenneth B. Schurr, Coral Gables, for Plaintiff. Bridgid Napier, Progressive PIP House Counsel, Riverview, for Defendant.

DISMISSAL BASED UPON THE GRANTING OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

THIS CAUSE having come before the Court for hearing on August 28, 2024, and the Court having reviewed the file, motion, hearing argument of the parties, and being otherwise advised in the premises, finds as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2023, the Plaintiff filed a Complaint for Damages and Non-Monetary Relief arising out of the Florida PIP Statute with respect to claimant Luis Acosta's February 9, 2023 motor vehicle accident in Florida and subsequent treatment with Plaintiff. At the time of loss, claimant was the named insured covered under a Texas auto policy issued by Defendant to the claimant in Texas.

Plaintiff served the Defendant on September 7, 2023, and filed an Amended Complaint on December 21, 2023. Plaintiff never moved for leave of court to amend the complaint as required by Florida rule of Civil Procedure 1.190, and therefore the Court cannot consider the Plaintiff's amended complaint.

On October 23, 2023, the Defendant filed a Motion to Dismiss for lack of Jurisdiction in response to Plaintiff's complaint which was heard by on December 22, 2023. The Court Denied Defendant's Motion *without* Prejudice, to allow the Plaintiff to take discovery limited to the issue of Jurisdiction.

The Defendant responded to Plaintiff's initial discovery in addition to Plaintiff depositing Defendant's Corporate Representative, Debora Henry on 5/25/24. Plaintiff did not file the transcript or any exhibits from the deposition, or file anything in opposition to Defendant's Motion to Dismiss.

On January 17, 2024, Defendant Filed its renewed Motion to Dismiss for Lack of Personal Jurisdiction. To support its motion, on February 9, 2024, the Defendant filed the Declaration of Litigation

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Underwriting Specialist Debra Henry. According to the testimony, the Defendant, Progressive County Mutual Insurance Company was incorporated in the State of Texas, is a resident of Texas, with its main business address in Texas. The witness testifies that the Defendant does have agents within the State of Florida, does not have any business locations within the State of Florida, does not transact business, sell insurance, or underwrite insurance policies within the State of Florida.

The Declaration Page for the subject policy, attached to Defendant's witness' Declaration, verifies that at the time of policy inception on November 9, 2022, the claimant provided a Texas address, and that the Policy was underwritten by Progressive County Mutual Insurance Company.

Artang Rehabilitation Center failed to provide an affidavit or sworn proof to meet its burden and rebut the Defendant's evidence. Although Plaintiff filed an affidavit of its custodian of records asserting the claimant provided a Miami address at the time of treatment, the Plaintiff did not in any way address whether Defendant had sufficient minimum contacts within the State of Florida to establish jurisdiction by a Florida Court.

LEGAL ANALYSIS

A motion to dismiss should be granted when the complaint fails to state a claim upon which relief may be granted. Fla. R. Civ. P 1.140(b)(6). While all Florida residents are subject to the jurisdiction of Florida courts, nonresident defendants are only subject to Florida court jurisdiction if there are strict constitutional and statutory requirements met.

"The Florida Supreme Court has described the two-step process required to be applied by a trial court in its determination of personal jurisdiction over a particular defendant." *Rollet v. de Bizemont*, 159 So.3d 351, 355 (3d DCA 2015) [40 Fla. L. Weekly D627a]. "First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statue; and if it does, the second inquiry is whether sufficient minimum contacts are demonstrated to satisfy due process requirement. *Id.*; *see also Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). If the Plaintiff's allegations are sufficient, "a defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position." *Id.* If the Defendant files a legally sufficient affidavit, **the burden then shifts to "the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained**." *Id. See also Unified Medical, LLC, a/a/o Roberto Prin*, Case No. 3D23-01, (3d DCA, 2024) [49 Fla. L. Weekly D189a].

For a nonresident defendant to be subject to the jurisdiction of Florida courts, one of the specific acts enumerated in §48.193, otherwise known as Florida's long-arm statute, must be qualifying.

Minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *See Burger King Corp. v. Rudzeewics,* 471 U.S. 462, 474, 105 S.Ct. 2174, 2183 (1985) *cited by Hartcourt Companies, Inc. v. Hogue,* 817 So.2d 1067 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1351a]. *See also The Schumacher Group of Delaware, Inc. v. Fritz Dictan*, Case No. 3D20-1571 (3d DCA 2021) [46 Fla. L. Weekly D1983a]. (finding that there must be a substantive connection between the basis of the cause of action and the activity in the state).

CONCLUSION

Assuming without finding that Plaintiff met the first part of the two-part test to determine personal jurisdiction over a particular defendant as required by the Florida Supreme Court, the Burden shifts to Defendant to produce an affidavit to rebut the allegations within the complaint. *See Venetian Salami Co,*, at 402. The Defendant met its burden by filing sworn evidence to rebut the allegations in Plaintiff's complaint.

The Plaintiff in turn, failed to rebut the evidence provided by Defendant, or to meet its burden to prove that Progressive County Mutual Insurance Company had sufficient minimum contacts with Florida to establish that Florida Courts have Jurisdiction over the Defendant.

Plaintiff has failed to produce any evidence to establish how personal jurisdiction would be exercised by this Florida Court over the nonresident defendant. Plaintiff did not file a response to Defendant's Motion to Dismiss. The only evidence before this Court, is that Luis Acosta, while a Texas Resident, purchased an Auto Insurance Policy from a Texas entity which does not transact business within the State of Florida. This Court afforded the Plaintiff an opportunity to conduct discovery following the Defendant's initial Motion to Dismiss to obtain evidence to establish jurisdiction. Simply stated, Plaintiff failed to provide facts to establish that the Defendant has sufficient minimum contracts with Florida.

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. Plaintiff's Complaint and this case are hereby DISMISSED, with prejudice. The Plaintiff shall take nothing by this action and the Defendant shall go forth hence without day.

The Clerk is ordered to close the case.

* * *

Insurance—Personal injury protection—Summary judgment—Evidence—Written statement by insured person with respect to accident or injury to person or property—Examination under oath—Motion for reconsideration of order denying insurer's motion for summary judgment, arguing that court erred in excluding transcript of insured's EUO from evidence, is denied—Transcript of oral EUO was not admissible under provisions of section 92.33 where copy was not provided to declarant at time of EUO—Statute prohibits use of such written statement for any purpose in any civil action when copy was not provided to declarant

MANUEL V. FEIJOO, M.D., et al., a/a/o Jose D. Maradiaga, Plaintiff, v. ASCENDANT COMMERCIAL INS. INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-013187-SP-25. Section CG01. November 3, 2024. Jorge A. Perez Santiago, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Jill Carabotta, Carabotta | Steakley , PLLC, for Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

This matter came before the Court on Friday, November 1, 2024 on Defendant, Ascendant Commercial Insurance Inc.'s, Motion for Reconsideration filed on October 31, 2024. Defendant asks the Court to reconsider its order denying the parties' cross-motions for summary judgment issued orally at the hearing and then in writing two days later. Defendant claims the Court "erroneously excluded" the pre-suit compulsory examination under oath transcript of Jose D. Maradiaga, Defendant's insured (the "EUO Transcript").[1] For the reasons explained below, the EUO Transcript cannot be used as summary judgment evidence because it is inadmissible at trial and cannot be used for any purpose in this civil action. Thus, Defendant's Motion for Reconsideration is denied.

ANALYSIS

Defendant argues that the Court's order denying summary judgment because the EUO Transcript is inadmissible is wrong because the insured's EUO Transcript is admissible against Plaintiffs, Manuel V. Feijoo, M.D., and Manuel V. Feijoo, M.D., P.A., a/a/o Jose D. Maradiaga, because it is a party admission (*see* Fla. Stat. § 90.803(18)), as a statement against the insured's pecuniary interest

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

(*see* Fla. Stat. § 90.804(2)(c)), and as past recollection recorded (*see* Fla. Stat. § 90.803(5)).

The latter two arguments were raised for the first time in Defendant's Motion for Reconsideration. That is, Defendant did not argue the EUO Transcript was admissible as a statement against interest or past recollection recorded (or on any other grounds other than as a party admission) in its three versions of its motion for summary judgment, its opposition to Plaintiff's cross-motion for summary judgment, or at the summary judgment hearing. Plaintiff's opposition to summary judgment, for instance, included 16 pages of argument that the EUO Transcript was inadmissible for multiple reasons.[2]

Those grounds included but were not limited to: (1) section 90.804(2)(a), Florida Statutes; (2) section 92.33, Florida Statutes; and (3) section 90.803(6), Florida Statutes. Defendant's written response and argument at the summary judgment hearing ignored those arguments. And when Plaintiff raised those arguments at the hearing, the Court interrupted the argument and stated it did not need to hear them because Defendant's exclusive grounds for admissibility of the EUO Transcript was section 90.803(18), Florida Statutes. Defendant did not disagree with the Court's understanding of Defendant's argument and this comment did not prompt Defendant to argue any other potential grounds supporting the EUO Transcript's admissibility.

Defendant, instead, argued only that the EUO Transcript is admissible against Plaintiffs as a party admission pursuant to section 90.803(18), Florida Statutes, and, at the hearing, emphasized that examination under oath transcripts are like affidavits, which is "[a] voluntary declaration of facts written down and sworn to by a declarant, usu. before an officer authorized to administer oaths." *See* AFFIDAVIT, Black's Law Dictionary (12th ed. 2024) (emphasis added). This is the sole argument advanced by Defendant and rejected by the Court on summary judgment.

The Court still believes the whole EUO Transcript is inadmissible under the plain language of section 90.803(18), Florida Statutes:

> (18) ADMISSIONS.—A statement that is offered against a party and is:
>
> (a)The party's own statement in either an individual or a representative capacity;
>
> (b)A statement of which the party has manifested an adoption or belief in its truth;
>
> (c)A statement by a person specifically authorized by the party to make a statement concerning the subject;
>
> (d)A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or
>
> (e)A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

Id. The Court does not readily see under which subsection this situation fits. And Defendant never bothered to tell the Court which subsection specifically applied. Instead, Defendant cited cases that predate the statute's adoption (1976), do not cite the statute at all, or involved familial relationships or relationships much more closely aligned than that of a patient and his medical provider such that the relationship could have met the requirements under the plain language of section 90.803(18), Florida Statutes.

But even if Defendant is right about section 90.803(18), and the Court ignores that Defendant potentially waived its new arguments and concludes Defendant is right about sections 90.804(2)(c) and 90.803(5) (it probably is), the EUO Transcript is still inadmissible and cannot be used for any purpose in this action under section 92.33, Florida Statutes.

Section 92.33, Florida Statutes, provides:

> Every person who shall take a written statement by any injured person with respect to any accident or with respect to any injury to person or property shall, at the time of taking such statement, furnish to the person making such statement a true and complete copy thereof. Any person having taken, or having possession of any written statement or a copy of such statement, by any injured person with respect to any accident or with respect to any injury to person or property shall, at the request of the person who made such statement or his or her personal representative, furnish the person who made such statement or his or her personal representative a true and complete copy thereof. No written statement by an injured person shall be admissible in evidence or otherwise used in any manner in any civil action relating to the subject matter thereof unless it shall be made to appear that a true and complete copy thereof was furnished to the person making such statement at the time of the making thereof, or, if it shall be made to appear that thereafter a person having possession of such statement refused, upon request of the person who made the statement or his or her personal representatives, to furnish him or her a true and complete copy thereof.

Id.[3]

Defendant's counsel conceded that the insured was not provided a copy of the EUO Transcript the day his statement was made. In fact, she stated the transcript was prepared and provided to only Plaintiff two years after the insured's examination under oath was taken. And the EUO Transcript also states a copy of the transcript was requested. *See* Index No. 108 at 30 (court reporter certified "that a review of the transcript WAS requested"). Thus, the record makes clear that the insured was not provided a copy of the EUO Transcript the day his statement was taken even though he specifically requested it. the open questions are whether a transcript of an oral examination under oath is a "written statement" and, if it is, then whether the insurer took a written statement by "any injured person with respect to any accident or with respect to any injury to person or property."

The latter question has a clearer answer. A cursory review of the EUO Transcript shows the examination under oath was not limited to the supposed material misrepresentation. Defendant's adjuster asked multiple questions about the accident and the insured's injuries. *See* Index No. 108. In any event, Defendant's adjuster would not have taken the examination under oath nor would it have had the right to unless the insured had an accident and was injured. Thus, the examination under oath was taken "with respect to any accident or with respect to any injury to person or property."

Finally, although it may not immediately fit one's perception of what is a "written statement," an examination under oath transcript does fit the plain meaning of a "written statement." An examination under oath transcript is clearly written. And its contents are the statements of an insured taken by the insurer.

This interpretation is supported by the few cases that have interpreted or applied section 92.33, Florida Statutes, since it was enacted in 1951.

In *United Sand & Material Corp. v. Florida Indus. Comm'n*, 201 So. 2d 451, 453 (Fla. 1967), the Florida Supreme Court held that section 92.33, Florida Statutes, did not bar use of a transcription of an interview between the claimant and the adjuster on cross-examination of the claimant or the testimony of a court reporter about her notes made at the interview. However, the Florida Supreme Court reached this conclusion not because a court reporter's transcription is not a written statement, but because section 92.33, Florida Statutes, does not apply to worker's compensation proceedings.

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

In *Am. Nat'l Prop. & Cas. Co. v. Duque*, 607CV959ORL22KRS, 2008 WL 11336909, at *8 n.10 (M.D. Fla. Dec. 2, 2008), the district court judge considered at summary judgment an examination under oath transcript. However, it rejected application of section 92.33, Florida Statutes, to the examination under oath transcript not because it is not a written statement but because section 92.33, Florida Statutes is inapplicable to federal courts sitting in diversity. *Id.*; *see also Pasternak v. Pan Am. Petroleum Corp.*, 417 F.2d 1292, 1295 (10th Cir. 1969) (explaining that the Fifth Circuit Court of Appeals in *Monarch Ins. Co. of Ohio v. Spach*, 281 F.2d 401, 410 (5th Cir. 1960) held that section 92.33, Florida Statutes, did not apply to a statement made by the president of the insured, under oath, taken by the insurance company not because it was not a written statement but because the federal rules of evidence, not Florida law, applied); *Monarch Ins. Co.*, 281 F.2d at 410 (assuming "evidence cannot qualify under (3) state rule because the statute prohibits its use").

Finally, in *Fendrick v. Faeges*, 117 So. 2d 858, 860 (Fla. 3d DCA 1960), the Third DCA concluded that a pre-suit statement made by an injured person and given to an employee of appellant's counsel was inadmissible because a copy of that statement was not provided to the injured person. *Id.* ("Clearly, this statute makes inadmissible any statement by an injured person relating to his injuries or property damage growing out of an accident until it is shown that a copy of the statement made was furnished to the person making the same.").

Defendant tried to distinguish this final case because the insurer took the insured's oral statement, under oath, and transcribed it later. The Court is unable to discern why that is not a distinction without a difference or why those "distinctions" otherwise matter based on the plain language of the statute.

Specifically, the statute broadly applies where any person takes any kind of written statement (*e.g.*, under oath, signed, transcribed, not transcribed, notes) from an injured person concerning certain subject matter. If that written statement is not provided to the person making the statement at the time it is made, then the penalty for not letting the person who made the statement see the statement when the statement was made is inadmissibility as evidence or for any use in any manner in any civil action. This sanction is harsh. Justice Drew's dissent in *United Sand* explains why:

> We can take judicial knowledge of the fact that written statements by any person made at the time they are given carry far more probative value before a court or jury than oral statements so made. If such statements are to be used as the statute said 'in any manner in any civil action relating to the subject matter thereof', the law provides and common justice requires that the person making such statement shall have an opportunity promptly to examine the same and then register any objection to the accuracy thereof rather than being required at some distant date in the future to pit his memory against a written document taken down and transcribed by a fallible human being.

Id. at 454-55 (Drew, J., dissenting).

It is not hard to see why the public policy concern addressed in section 92.33, Florida Statutes, matters here. In this case, the court reporter had to transcribe (presumably based on notes and an audio recording) the adjuster's questions that were interpreted from English to Spanish and the insured's answers that were interpreted from Spanish to English. And although the insured never saw a copy of his statement (it was transcribed two years later), and the Defendant no longer has the audio recording, the Defendant is relying on this transcription of his statements to avoid paying for the medical services he obtained following a car accident.

Accordingly, the EUO Transcript is inadmissible pursuant to section 92.33, Florida Statutes, based on the facts of this case.[4]

CONCLUSION

For the foregoing reasons, the EUO Transcript cannot be used as summary judgment evidence because it is inadmissible at trial and cannot be used for any purpose in this civil action. Thus, Defendant's Motion for Reconsideration is denied.

---

[1]At the latest hearing, Defendant "corrected" the record about the history of this case. It did so when the Court expressed frustration with the *parties'* frantic, disorganized litigation of this case since October 2023. This includes the Defendant's presentation of new arguments in a motion for reconsideration on the eve of trial on a case dispositive issue it has known about since *at least* October 2023. Because the Court disagrees with Defendant's "corrections" to the record which seemed designed to minimize its role in this process, the Court takes the unusual step of discussing in this note the procedural history of this case in painstaking detail. It reflects clearly that the *parties'* litigation strategy or lack of diligence/urgency caused this late-stage litigation scramble.

This lawsuit was filed on October 5, 2017 and served on October 31, 2017. *See* Index Nos. 2, 13. Although Defendant took the insured's examination under oath on June 2, 2016 and filed a portion of the EUO Transcript in its December 31, 2018 Motion for Judgment on the Pleadings (never set for hearing), Defendant did not file any motion for summary judgment on this affirmative defense until January 5, 2023, one month after this matter was first scheduled for trial (December 19, 2022) and several months after summary judgment motions were required to be filed (May 1, 2022) and heard (August 21, 2022). *See* Index Nos. 38, 62, 68, 91. Defendant then filed two other versions of its summary judgment motion just before the April trial was continued to November 2023. *See* Index Nos. 98, 109, 117.

This Court's first introduction to this case came at the October 19, 2023 calendar call. Plaintiff had filed in advance of the calendar call a motion to strike the EUO Transcript, motion for continuance, and notice of taking the deposition of the insurance agent ("Yanet Padron") who sold the subject commercial auto policy to the insured. *See* Index Nos. 124, 125, 126. None of the filings mentioned the insured's deposition.

The motion for continuance explained that Padron's deposition had been previously scheduled three times and, through no fault of Plaintiff, was suspended or canceled because Padron showed up to the deposition without her identification or failed to appear. *See* Index No. 125. Accordingly, Plaintiff argued Defendant's motion for summary judgment should not be heard. *Id.* Although the Court was cognizant it was Plaintiff's decision not to obtain relevant discovery vital to its case for the last six years, the Court reset the trial to February 2024, set Defendant's motion for summary judgment for hearing on February 7, 2024, and gave the parties four more months to complete discovery. *See* Index Nos. 127, 128, 131. It did so because it was wary that denying the continuance would foreclose the non-movant's opportunity to obtain discovery necessary to oppose an untimely filed motion for summary judgment that Defendant wanted the Court to hear because it could, in fact, be dispositive without a trial.

Plaintiff then filed two motions and a notice asking the Court to continue the February summary judgment hearing and trial. Plaintiff claimed it needed to take Padron's deposition and now needed to take the insured's deposition or obtain his affidavit and would be in trial for a case filed in 2013. *See* Index Nos. 136, 139, 140. It also filed its first (untimely) response to Defendant's motion for summary judgment. *See* Index No. 142. The Court continued the summary judgment hearing and trial period because Plaintiff's counsel was, in fact, at trial. *See* Index No. 143.

At a court-scheduled case management conference held on March 7, 2024, Plaintiff informed the Court that Padron's deposition was set for March 14, 2024 and that the insured was cooperating. *See* Index No. 149.

On April 8, 2024, Plaintiff sought another trial continuance. It argued it needed more time to file a "dispositive" cross-motion for summary judgment because it obtained the insured's affidavit and took Padron's deposition on March 27, 2024 but did not yet have a transcript. *See* Index No. 152. The next day it filed an amended opposition to Defendant's motion for summary judgment and cross-motion for summary judgment. *See* Index No. 153, 154.

The Court then granted on April 10, 2024 what became a ***joint*** trial continuance to June 2024. *See* Index No. 157. This continuance was not based on Plaintiff's motion for leave to amend its reply to the affirmative defenses, which had been filed and pending since December 2023. *See* Index Nos. 133, 134.

After Plaintiff obtained leave to amend its reply to Defendant's affirmative defenses, ***Defendant*** moved to continue the trial because its counsel "recently learned that our current lease will not be renewed" so "trial Counsel will be in the process of moving our location during the month of June 2024." *See* Index No. 169. It separately moved to continue the scheduled June 11, 2024 summary judgment hearing claiming (incorrectly) that the "Court granted Plaintiffs Motion to Strike Examination Under Oath Transcript of Jose Maradiaga." *See* Index No. 170 (confusing Judge King's order in a companion case). Defendant claimed for the time in over six years that it was "critical" that it take the insured's deposition to support its defense and that it would be prejudicial if "Plaintiff is allowed to use the affidavit of the recently located . . . insured . . . without also having an opportunity to depose and cross-examine [him]." *Id.* Defendant's motion did not cite Plaintiff's amended reply to its affirmative defenses as good cause or justification for the continuance or as a reason it needed to take the insured's deposition. And, like Plaintiff, Defendant could have planned for this contingency. But it did not. It had 6.5 years to take discovery and depositions of key persons to prove its material misrepresentation affirmative defense. It did not. It did not even after it learned by at least October 2023 that Plaintiff would argue the EUO Transcript, the evidence upon which Defendant believes its case rests, was inadmissi-

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

ble. And it did not even after Plaintiff sought and obtained continuances of trials and summary judgment hearings to take the insured's deposition ***or*** obtain his affidavit. In other words, Defendant's apparent litigation strategy—rely on its beliefs that the EUO Transcript would be considered at summary judgment, Plaintiff would be unable to take Padron's deposition or find the insured, or, if Plaintiff located the insured through its own efforts, Plaintiff would take his testimony through a deposition so Defendant would have an opportunity to cross-examine him—was backfiring.

Although the Court recognized this, the Court continued the trial another three months to September 2024 to give Defendant time to locate the insured and take his deposition because it had given Plaintiff opportunities to do the same. *See* Index Nos. 172, 177. At the June 12, 2024 hearing on this motion, it asked Plaintiff to voluntarily provide Defendant with the insured's address. Plaintiff refused without a pending discovery request because Plaintiff, which had undertaken no independent efforts to find the insured (and still has not identified any independent efforts taken to find the insured), should not benefit from Plaintiff's efforts to locate him. Defendant then asked the Court to order Plaintiff to provide Defendant with the insured's address, but did not cite any caselaw, statute, or rule that allowed the Court to do so without a pending discovery request. Accordingly, and although the Court disapproved the apparent gamesmanship, the Court declined Defendant's *ore tenus* motion to compel Plaintiff to provide the insured's address.

Six days later, Defendant served Plaintiff with one interrogatory asking Plaintiff to provide the insured's current address. *See* Index No. 173. Although Plaintiff's response was overdue by July 19, Defendant did not file its *ex parte* motion to compel until 20 days later (August 7). *See* Index No. 181. Defendant's motion sought an order compelling Plaintiff to respond to the interrogatory within 10 days of the order.

The Court later reviewed the docket and noticed no depositions or summary judgment hearings had been scheduled. On August 22, it ordered the parties to submit a joint status report within seven days stating, among other things, whether there were any issues impacting the parties' ability to try this case on September 23, 2024. *See* Index No. 182. Unfortunately, the Court did not see Defendant's *ex parte* motion to compel or a proposed order granting the *ex parte* motion to compel, if one had already been submitted by August 22, 2024.

On August 28, 2024, Plaintiff filed its tardy response to Defendant's interrogatory requesting the insured's address. *See* Index No. 183. The next day, the parties submitted *separate* status reports. *See* Index Nos. 184, 185. Both indicated a September 20, 2024 deposition date had been coordinated but never confirmed because Plaintiff did not provide the insured's information to Defendant until August 28, 2024. Thus, the earliest the insured's deposition could be taken was sometime in October. *Id.* The Court again continued the trial. In its order, it wrote:

> To be clear, this is the last party-drive continuance of this matter, absent extenuating circumstances. To be even more clear, neither party can rely on its failure to take action either based on litigation strategy or lack of urgency, such as failing to (i) notice and take the insured's or other main witness' deposition because, among other reasons, it thought the other party would or had to take that witness' deposition or (ii) to ask the Court to compel the other party to provide critical discovery necessary to advance this case forward with impending deadlines.

See Index No. 187. Unfortunately for Defendant, it could not locate the insured.

Without counting the trial continuances that occurred before the Court took over the division, this Court continued the trial and summary judgment hearings for one year. This was more than ample time for both parties to obtain relevant discovery and prepare for trial.

[2]Plaintiff also filed a separate motion to strike the EUO Transcript on October 9, 2023. *See* Index 124.

[3]Section 92.33, Florida Statutes, was last amended in 1995. Accordingly, it does not matter which version of the statute applies.

[4]The Court notes that neither party made a distinction between the admissibility of the whole EUO Transcript versus the admissibility of other forms of evidence about the hearsay statements the insured allegedly made at the examination under oath. The former the Court has concluded is inadmissible under section 92.33, Florida Statutes.

Section 92.33, however, does not apply to the audiotape recording of the examination under oath (Defendant's counsel represented it did not have the audiotape). *See Greyhound Corp. v. Clark*, 347 So. 2d 732, 732 (Fla. 4th DCA 1977) ("[S]ection 92.33 is inapplicable to a tape-recorded statement of an injured party" and its admissibility "would be determined by the usual customary rules of evidence relating to admissibility").

Section 92.33 also does not apply to the in-court testimony of witnesses with personal knowledge of the insured's hearsay statements. The EUO Transcript reveals the following potential witnesses to the hearsay statements: (1) the insured; (2) the interpreter (Carolina Pinero); (3) the court reporter (Jeannette G.Q. Alfonso); and (4) Defendant's PD Adjuster (Nayviv Suarez). Defendant, however, argued that the insured is unavailable for trial because he resides in Georgia. And Defendant did not obtain the affidavits or declarations of any of these potential witnesses, argue the insured's statements could be admissible through the in-court testimony of these witnesses, or, except for the insured they argue is unavailable, list these witnesses as trial witnesses. *See* Index No. 208.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement—Medicare budget neutrality adjustment is not applicable when determining reimbursement amounts under Florida PIP law—Demand letter—Insurer waived issue of defective demand letter by failing to raise issue until after suit was filed—Further, demand letter to which completed CMS-1500 forms and assignment of benefits were attached satisfied statute

UNLIMITED DIAGNOSTIC CENTER, INC., Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-032277-SP-26. Section SD03. December 6, 2024. Lissette De la Rosa, Judge. Counsel: Benjamin Mordes and Jimenez Mazzitelli Mordes, Miami, for Plaintiff.

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

THIS CAUSE having come to before this Court on October 29, 2024, on Defendant's Motion for Final Summary Judgment re: Defective Demand Letter (D.E. #88); Defendant's Motion for Summary Judgment (D.E. #87) and Plaintiff's Motion for Partial Summary Judgment (D.E. #79), and after reviewing the record, hearing argument of counsel, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

FACTUAL BACKGROUND

The underlying facts of this case are not in dispute. This is a breach of contract action brought by UNLIMITED DIAGNOSTIC CENTER INC., ("Plaintiff"') against UNITED AUTOMOBILE INSURANCE COMPANY ("Defendant") for unpaid Personal Injury Protection ("PIP") benefits as a result of Defendant's reduction of Plaintiff's bills for treatment rendered to Defendant's insured, Bryan Azcuy. Defendant issued a policy of insurance to Bryan Azcuy which had coverage for up to $10,000.00 in PIP benefits for the medical treatment of injuries which Bryan Azcuy sustained in a motor vehicle accident on January 5, 2021.

At issue in this case is the Defendant's payment for CPT code 73221, which Plaintiff alleges was underpaid, and the sufficiency of Plaintiff's Pre-Suit Demand Letter ("PSDL").

PROCEDURAL BACKGROUND

The Plaintiff moved for partial summary judgment based on its assertion that the Defendant improperly reimbursed Plaintiff for CPT code 73221. Plaintiff alleges that Defendant improperly utilized a Budget Neutrality Adjustment (BNA) when it calculated payment.

The Defendant moved for summary judgment based on its assertion that Plaintiff failed to comply with conditions precedent to filing suit by allegedly failing to send Defendant a demand letter that meets the requirements of Fla. Stat. § 627.736(10). Specifically, Defendant argues that Plaintiff's demand letter is deficient in that "[t]o date, Plaintiff has yet to specifically provide a Demand Letter in compliance with F.S. 627.736(10) which identifies the exact amount due and owing."

Defendant also moved for summary judgment alleging that it properly reimbursed Plaintiff pursuant to the terms and conditions of the subject insurance policy fulling its requirements under Florida Law. Defendant claims that no additional monies are due or owing to Plaintiff.

Defendant maintains that it made "proper" reimbursement pursuant to its policy of insurance at the 2007 Medicare Part B Fee Schedule. Defendant's Motion for Summary Judgment attaches an Explanations of Benefits for date of service March 16, 2021 in support of its position.

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Plaintiff argues that Defendant's prior reimbursement incorrectly incorporated a BNA, which resulted in an underpayment. The same is discussed further below. Plaintiff claims that Defendant improperly included in its calculation a BNA that reduced the reimbursement for the services rendered. Plaintiff argues that Defendant was not permitted to utilize the BNA.

The Court must analyze whether or not the actual amount paid by Defendant for CPT code 73221 satisfies its obligations under Florida law.

ANALYSIS

CMS uses the Medicare Fee Schedule to reimburse physician services. The Medicare Fee Schedule is funded by Part B and is composed of resource costs associated with physician work, practice expense, and professional liability insurance. The three elements—physician work, practice expense, and professional liability—are assigned numerical variables which are updated year after year. Those variables are also adjusted by geographical location in order to reflect the difference in rates for physician services between locations. *See* Medicare Physician Fee Schedule, American College of Radiology, https://www.acr.org/Advocacy-and-Economics/Radiology-Economics/Medicare-Medicaid/MPFS.

Since 1997, the Medicare Fee Schedule has been derived from a definite formula comprised of specific variable components; it is a calculation method to produce accurate, unified results. *See Federal Register,* 62 FR 211, pp. 59048, 59050-59051 (Oct. 31, 1997); 74 FR 226, p. 61743 (Nov. 25, 2009); 75 FR 228, p. 73181 (Nov. 29, 2010); 76 FR 228, p. 73035 (Nov. 28, 2011); 77 FR 222, p. 68897 (Nov. 16, 2012); 78 FR 237 p. 74234 (Dec. 10, 2013); Social Security Act, 42 U.S.C. 1395w-4, Section 1848(b)(l) ("Establishment of Fee Schedule") respectively. The Medicare Fee Schedule formula has been in place and utilized by Medicare since 1997 to determine the full allowable amount under the Medicare Fee Schedule for physician services rendered. *See Federal Register,* 62 FR 211, p. 59051. The Social Security Act established the Medicare Fee Schedule in 1997 as follows:

> b. ESTABLISHMENT OF FEE SCHEDULES:
>
> 1. IN GENERAL-Before November 1 of the preceding year, for each year beginning with 1998, subject to subsection (p), the Secretary shall establish, by regulation, fee schedules that establish payment amounts for all physicians' services furnished in all fee schedule areas (as defined in subsection (j)(2)) for the year. Except as provided in paragraph (2), each such payment amount for a service shall be equal to the product of:
>
> A. the relative value for the service (as determined in subsection (c)(2)),
>
> B. the conversion factor (established under subsection (d)) for the year, and
>
> C. the geographic adjustment factor (established under subsection (e)(2)) for the service for the fee schedule area.

Social Security Act, 42 U.S.C. 1395w-4, Section 1848(b)(l).

In addition to the Social Security Act, discussed above, the Code of Federal Regulations (42 CPR Part 414), §§ 414.20 and 414.4, further states that:

> [t]he fee schedule amount for a participating supplier for a physician service . . . is computed as the product of the RVUs for the service; the geographic adjustment factor for the fee schedule area; and the CF." A visual representation of the formula to determine the allowable amount for a particular CPT code is:
>
> Medicare Fee Schedule (Non-Facility) = [(Work RVU x Work GPCI) + (Transitioned Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

See Federal Register, 77 FR 222, p. 68897 (Nov. 16, 2012); *Federal Register,* 62 FR 211, p. 59051 (Oct. 31, 1997).

The relevant *Federal Register* editions each specifically state that "[w]e note payment for services under the PFS will be calculated" using the above formula. *Id.* The formula appears in each *Federal Register* from 1997 to the present as a final rule.

Regarding the variables in the formula above, there are three separate Relative Value Units ("RVU") associated with the calculation of the full, allowable amount under the Medicare Fee Schedule: the Work RVU, the PE RVU and the MP RVU. *See Federal Register,* 62 FR 211, p. 59050-59051 (Oct. 31, 1997). "The Work RVU reflects the relative time and intensity associated with furnishing a Medicare PFS service and accounts for 50 percent of the total payment associated with a service." *See* Medicare Physician Fee Schedule: Payment System Fact Sheet Series", published by Department of Health and Human Services, Centers for Medicare & Medicaid Services (December 2012). "The PE RVU reflects the cost of maintaining a practice (such as renting office space, buying supplies and equipment, and staff costs)." *Id.* "The MP RVU reflects the cost of malpractice insurance." *Id.*

Each of the above three RVUs is adjusted (i.e. multiplied) by a corresponding Geographic Price Cost Index ("GPCI"). *See Federal Register,* 62 FR 211, p. 59050-59051 (Oct. 31, 1997). GPCI's "account for geographic variations in the costs of practicing medicine in different areas within the country." *See* "Medicare Physician Fee Schedule: Payment System Fact Sheet Series", published by Department of Health and Human Services, Centers for Medicare & Medicaid Services (December 2012). To determine the full, allowable amount for a particular service, each of the three RVUs is adjusted by the corresponding GPCI. *Id.* Specifically, the Work RVU is multiplied by the Work GPCI; the MP RVU is multiplied by the MP GPCI; and the PE RVU is multiplied by the PE GPCI. The sum of these adjusted amounts (i.e. Work+ MP + PE) is then multiplied by a Conversion Factor ("CF"). *Id.* The CF is determined by a separate formula, changes yearly, and is published in the *Federal Register* and on the Centers for Medicare & Medicaid Services website each year. *See generally Federal Register,* 62 FR 211, p. 59049 (Oct. 31, 1997). Then, to calculate the limiting charge, the sum of the above formula is then multiplied by 1.0925.

The RVU and GPCI amounts for each year are also published and maintained on the website for the Centers for Medicare & Medicaid Services.[1] Despite the yearly variablecomponent updates [for the RVU's, the GPCI's and the CF], the Medicare Fee Schedule formula has remained the same since 1997. The only changes are in the variable component amounts which are published in the *Federal Register* for public comment and later providing notice of final changes. *See* Section 414.4 of the Code of Federal Regulations (stating that when CMS proposes changes to fee schedule areas, those changes are published in the *Federal Register* to allow opportunity for public comment). After considering public comments, CMS publishes the final changes in the *Federal Register. Id.* at Section 414.4(b). This annual publication in the *Federal Register* becomes the Final Rule for the subject year. Thus, it is undisputed that the above-mentioned formula and amounts are to be used to determine the "amount allowed" by the Schedule of Maximum Charges.

The Medicare Fee Schedule provides for the lowest possible reimbursement authorized by the No Fault Act. In other words, an insurance company may not reimburse a medical provider less than the amount proscribed by the Medicare Fee Schedule. *See Nationwide Mutual Fire Ins. Co. v. AFO Imaging, Inc.*, 71 So. 3d 134 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1463b] (". . .the participating physicians schedule of Medicare Part B is the operative fee schedule to be utilized in computing the minimum amount the Insurance Companies were statutorily authorized to remit."); *Windsor Imaging*

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

v. State Farm Mut. Auto. Ins. Co., 19 Fla. L. Weekly Supp. 215b (Broward Cty. Ct., Dec. 12, 2011) ("The No-Fault Act set the floor with respect to the *minimum* reimbursement under Florida Statute 627.736(5)(a)(2)(f). . .").

In the mid-2000's, CMS instituted a plan to offset the increases in its expenditures for the purposes of balancing the Medicare budget. The solution chosen by CMS was to adopt the usage of a Budget Neutrality Adjustor Value, which was to be applied to the Medicare Fee Schedule. A Budget Neutrality Adjuster Value is a value which is injected into the "General Formula" by applying it to the "Work RVU" variable. This new variable is injected into the formula for the purpose of reigning in payments made by Medicare to Medicare beneficiaries in order to balance the Medicare budget. Medicare uses Budget Neutrality Adjustor Values to balance its budget year after year; the numerical value is changed in accordance with Medicare's budget needs.

Fla. Stat. § 627.736(5) allows an insurance carrier to pay the minimum amount owed to a provider by utilizing the allowable amount under the Medicare Fee Schedule for the subject year at issue so long as it is not less than the applicable fee schedule for 2007; however, a clear election of this payment methodology does not authorize the carrier to a carte blanche application of any and all potential Medicare payment reductions. Instead, the Legislature "intended for a specific Medicare schedule to be incorporated into the PIP statute, rather than either, any, or all of the schedules." *SOCC, P.L. v. Mut. Auto. Ins. Co.*, 95 So.3d 903, 908 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1663a]. "Consequently, while an insurer may limit reimbursement to 80% of 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B, no other sources of limitations are permissible under Florida's No Fault law." *Id*.

Plaintiff is seeking the full allowable amount for CPT code 73221 pursuant to the 2007 Medicare Non-facility Limiting Charge Fee Schedule as required by Florida Statutes § 627.736 and Florida jurisprudence and as set forth in the Final Rule that appeared in the Federal Register.

This Court remains bound by the Third District's opinion in *Priority Med. Centers, LLC v. Allstate Ins. Co.*, 319 So. 3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], wherein the Third District held that, "[u]nder the current version of the PIP statute, and giving effect to the 2012 legislative amendment, the highest reimbursement allowable fee schedule of Medicare Part B is the non-facility limiting charge for 2007[.]" *Id.* at 727. Specifically, the Third District reasoned that when the Florida Legislature removed the reference to the "participating physicians fee schedule" in the language of section 627.736(5)(a)(2) and replaced it with "applicable schedule," the legislative intent was to incorporate the Medicare Part B limiting charge into section 627.736(5)(a)(2), which creates a base "floor" amount that an insurer cannot reimburse less than when determining payment pursuant to the schedule of maximum charges. *Id.* 726-27.

Under this backdrop, the Court will examine proper reimbursement per the 2007 non-facility limiting charge.

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

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

74 Fed. Reg. 61927; *see also* 78 Fed. Reg. 74790.

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

> To calculate the payment for every physician service, the components of the fee schedule (physician work, PE, and malpractice RVUs) are adjusted by a geographic practice cost index (GPCI). The GPCIs reflect the relative costs of physician work, PEs, and malpractice insurance in an area compared to the national average costs for each component. Payments are converted to dollar amounts through the application of a CF, which is calculated by the Office of the Actuary and is updated annually for inflation.

76 Fed. Reg. 42772.

In adopting the usage of its Budget Neutrality Adjustor Value, CMS took great care to recognize that its Medicare Fee Schedule was commonly and widely used by private payors to determine the reasonableness of medical charges. CMS was concerned that its adoption of the Budget Neutrality Adjuster Value could cause the resulting reduced payment amounts to be adopted in the private context. In other words, CMS was concerned about the integrity of its Medicare Fee Schedule being compromised by the improper adoption of its Medicare-only Budget Neutrality Adjustor Value.

Accordingly, CMS released a public statement reiterating that the Modified Formula was *solely* to be used for payment of claims by Medicare to Medicare providers and/or beneficiaries:

> Medicare law requires that CMS impose a budget neutrality adjustment if changes in RVUs will cause an increase or decrease in overall fee schedule outlays of more than $20 million, compared with what they would have been in the absence of the changes. CMS estimates that the proposed work RVU changes would increase expenditures by approximately $4.0 billion. CMS is proposing to create a separate budget neutrality adjuster that can be applied just to the work RVUs for Medicare purposes, without changing the number of work RVUs assigned to a particular service. **This would preserve the integrity of the existing work RVU structure, which is often adopted by other payers.**

See Press Release dated June 21, 2006, Centers for Medicare & Medicaid Services, https://www.cms.gov/newsroom/press-releases/cms-announces-proposed-changes-physician-fee-schedule-methodology. (emphasis added).

In PIP matters, such as the instant matter, the Defendant is a private payor whose policy relies on the full allowable amount under the Medicare Fee Schedule to determine the amount it will pay a medical provider. Defendant is neither Medicare, nor a Medicare contractor. Accordingly, due to its policy election, Defendant is required to utilize the Medicare Fee Schedule formula to determine the appropriate, allowable amount due and owing.

The Medicare Fee Schedule formula, which determines the allowable amount under the Medicare Part B participating physicians fee schedule, must be utilized by the carrier to ensure proper payment by private payers to private medical providers. Defendant's failure to properly calculate the allowable amount under the Medicare Part B participating physicians fee schedule resulted in a breach of its insurance policy.

The general formula for calculating the Medicare fee schedule amount for a given service and fee schedule area can be expressed as:

Payment =
[(RVU work x GPCI work) + (RVU PE x GPCI PE) +
(RVU malpractice x GPCI malpractice)] x CF.

71. Fed. Reg. 69629 (the "General Formula").

For the 2007 calendar year, the variable component amounts and full amounts allowed by the Medicare Fee Schedule are as follows for CPT code 73221 for services rendered in "Miami" as defined by Medicare:

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

a. The 2007 Work RVU is 1.35.
b. The 2007 Work GPCI is 1 for a provider located in "Miami."
c. The 2007 Non-Facility PE RVU is 11.98.
d. The 2007 PE GPCI is 1.048 for a provider located in "Miami."
e. The 2007 MP RVU is 0.45.
f. The 2007 MP GPCI is 2.233 for a provider located in "Miami."
g. The 2007 Conversion Factor for the Medicare Participating Fee Schedule is 37.8975.
h. The limiting charge multiplier (which is static) is 1.0925.

Therefore, the Non-Facility Pricing for CPT code 73221 for 2007 is calculated as follows:

Medicare Non-Facility Pricing =
[(Work RVU x Work GPCI) + (Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

[(1.35 x 1) + (11.98 x 1.048) + (0.45 x 2.233)] x 37.8975 =
$14.90989 x 37.8975 =
$565.047556275 (Non-Facility Price)
$565.047556275 x 1.0925 =
$617.31445523 (Limiting Charge)
200% of the allowable amount under Medicare Part B Non-Facility Limiting Charge: $1,234.63 (rounded to two decimal places)
80% of $1,234.64 = $987.70 (Reimbursable Amount)

Pursuant to the CMS Final Rule in 2007, there was an added Budget Neutrality Adjustor Value to balance the budget, which applied a budget neutrality adjustor value of .8994 to the "Work RVU" variable. *See* Federal Register, 71 FR 231 pg. 69628, 69629 (Dec. 1, 2006). Therefore, the calculation for Medicare's budget neutrality was as follows:

[(Work RVU x Budget Neutrality Adjustor (.08994)) x (Work GPCI) + (Non-Facility PE RVU x PE GPCI) + (MP RVU x MP GPCI)] x Conversion Factor

This is the same calculation used by Defendant for the purpose of determining its reimbursement amount for CPT Code 73221:

a. The 2007 Work RVU is 1.35.
b. The 2007 Work GPCI is 1 for a provider located in "Miami."
c. The 2007 Non-Facility PE RVU is 11.98.
d. The 2007 PE GPCI is 1.048 for a provider located in "Miami."
e. The 2007 MP RVU is 0.45.
f. The 2007 MP GPCI is 2.233 for a provider located in "Miami."
g. The 2007 Conversion Factor for the Medicare Participating Fee Schedule is 37.8975.
h. The limiting charge multiplier (which is static) is 1.0925.
i. The 2007 Budget Neutrality Adjustor Value is 0.8994.
[(1.35 x 0.8994 x 1) + (11.98 x 1.048) + (0.45 x 2.233)] x 37.8975 =
$14.77408 x 37.8975 =
$559.9006968 (Non-Facility Price)
$559.9006968 x 1.0925 =
$611.691511254 (Limiting Charge)
200% of $611.69 is $1,223.38 (rounded to two decimal places)
80% of $1,223.38 = $978.70

Recognizing this Court is bound by *Priority Med. Centers, LLC v. Allstate Ins. Co.*, 319 So. 3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], Defendant's utilization of the BNA resulted in an underpayment of $9.00. Defendant improperly added the BNA to the general formula when determining the appropriate 2007 Medicare Non-facility Limiting Charge amount. Therefore, the Defendant fell below the base "floor" amount by utilizing the BNA reduction.

Accordingly, Plaintiff's Motion for Partial Summary Judgment is **GRANTED** and Defendant's Motion for Final Summary Judgment is **DENIED**.

Pre-Suit Demand Letter (PSDL)

On May 12, 2021, and prior to filing of the instant lawsuit, Plaintiff submitted to Defendant a PSDL pursuant to Fla. Stat. § 627.736(10) which referenced date of service March 16, 2021 ("Plaintiff's PSDL").[2] Defendant acknowledges that Plaintiff's PSDL included an attached "CMS-1500" form.

On May 27, 2021, Defendant respond to Plaintiff's PSDL. However, the response did not note any alleged deficiencies within Plaintiff's PSDL. Defendant was on notice of Plaintiff's intent to file suit. Defendant was able to locate the policy holder, claim number, date of loss, name of the claimant, name of the medical provider, and dates of service demanded. The Defendant made a determination that no additional benefits, interest, penalty or postage was due or owing to Plaintiff. This was confirmed by the deposition testimony of Defendant's litigation adjuster, Jennifer McInnis. *McInnis Dep.* at 16:10-16. Defendant's litigation adjuster confirmed that Defendant's response did not deny Plaintiff's claim for any deficiencies or problems with the Plaintiff's PSDL.

On October 28, 2021, the Plaintiff filed suit alleging breach of contract by Defendant. On November 8, 2022, Defendant filed its Amended Answer and Affirmative Defenses, raising as its first affirmative defense an allegation that Plaintiff has failed to serve a valid pre-suit demand letter.

1. The Defendant's response to Plaintiff's PSDL did not reference any deficiencies in Plaintiff's PSDL.
2. The Defendant has waived the issue of any alleged deficiencies in Plaintiff's PSDL.
3. Even if the alleged deficiencies had not been waived, Plaintiff's PSDL is legally sufficient.

ANALYSIS

The pre-suit notice requirement of the PIP statute is intended to place insurance carriers on notice of intent to initiate suit and provide the carrier with a last ditch effort to resolve PIP claims without litigation. Fla. Stat. § 627.736(10).

The record evidence before this Court reflects that Plaintiff served Defendant with a PSDL prior to filing suit. Defendant was placed on notice of Plaintiff's intent to file suit and took advantage of the opportunity by fully identifying the claim; however, the Defendant made a determination and responded to the PSDL. Further, the record before this Court reflects that when responding to Plaintiff's PSDL, the Defendant failed to note any deficiencies. The first time the issue was raised was when Defendant filed its Amended Answer and Affirmative Defenses, alleging a failure on the part of Plaintiff to meet the pre-suit notice requirements of the PIP statute. The pre-suit notice requirement of the PIP statute is intended as a final effort to resolve PIP claims without litigation. Having failed to note any deficiencies with Plaintiff's PSDL, this Court finds, as a matter of law, that Defendant has waived its right to assert any deficiencies post-suit. This result is confirmed by decisional precedent from the 11th Judicial Circuit sitting in its appellate capacity. *See United Automobile Insurance Company v. Juan Manuel Perez,* 18 Fla. L. Weekly Supp. 31a (Fla. 11th Jud. Cir. Nov. 8, 2010).

A. **Plaintiff's PSDL was sufficient.**

When interpreting a statute, it is always wise to begin with the text itself. Section 627.736 provides, in pertinent part:

(10) Demand letter.—
a. As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
b. The notice must state that it is a "demand letter under s. 627.736" and state with specificity:

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; *and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due.* A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement.

Fla. Stat. § 627.736 (10). (emphasis added).

In the present case, as can be seen from Exhibit D of Defendant's Motion, Plaintiff attached its assignment of benefits and a completed CMS-1500 Health Insurance Claim Form to its pre-suit demand letter. It is undisputed that Plaintiff sent Defendant a PSDL dated May 12, 2021 which attached the CMS-1500 Health Insurance Claim Form and the assignment from the patient, Brian Azcuy. *See* Exhibit "D" of Defendant's Motion for Summary Judgment.

This issue recently came before the Third District in the case of *Mercury Indemnity Company of America v. Pan Am Diagnostic of Orlando*, 368 So. 3d 27 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1131a] *review denied*, SC2023-1305, 2024 WL 244389 (Fla. Jan. 23, 2024). In *Mercury*, the Third District Court of Appeals held that a medical provider's attachment of a completed Center of Medicare and Medicaid Services (CMS) 1500 form to a pre-suit demand letter satisfied the statutory requirement for "an itemized statement specifying exact amount." The Third District Court noted that "a plain reading of the statute reveals two alternative methods for providing a compliant demand letter containing the statutorily required information: (1) providing 'an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due'; or (2) 'a completed form satisfying the requirements of paragraph (5)(d). . .may be used as the itemized statement.' " *Id.*

Thus, the facts of the present case fall squarely within the binding authority of *Mercury*, under which this Court is bound. Plaintiff attached a completed CMS-1500 form to its PSDL. The Court finds that Plaintiff's PSDL complied with the requirements of Florida law. Accordingly, Defendant's Motion for summary judgment is DENIED.

B. **Defendant has waived any argument regarding deficiencies in Plaintiff's PSDL.**

The Plaintiff argues that, even assuming its PSDL was deficient for not computing the exact amount owed, prior payments made, or containing math errors, the Defendant waived these deficiencies by not raising any issue with the PSDL until after litigation was initiated, which constitutes a waiver. In *United Automobile Ins. Co. v. Juan Manuel Perez,* 18 Fla. L. Weekly Supp. 31a (Fla. 11th Jud. Cir. Nov. 8, 2010), the insurance carrier, United Automobile, raised numerous issues in its motion for summary judgment challenging the Plaintiff's PSDL. The Court rejected the carrier's arguments, stating that the questions raised could have been remedied if the Defendant made some inquiry. Instead, "the insurance company waited until after suit was filed to make known the reason it did not pay the bill, by including the existence of the defective demand letter in its amended affirmative defenses. By failing to raise that easily remedied issue until after suit was filed; the insurance company waived it." *Id.* Like in *Perez,* here the Defendant failed to raise any issue with the Plaintiff's PSDL until after suit was filed. The insurance company was in the best position to advise Plaintiff of any defects in its PSDL.

Once an insurance carrier sends a PSDL and *the response fails to take issue, with any specificity, of the alleged non-compliance with the Plaintiff's PSDL,* then the carrier cannot come back post-litigation and raise the issue for the first time once litigation is initiated. To allow such conduct would encourage carriers not to send demand letter responses or send demand letter responses without raising any issue as to the demand letter and allow them to "sit on their hands" instead of trying to respond or investigate a claim. Then, after suit is initiated, a carrier can look for any technical defect, even if such a defect had no effect on the ability of the Defendant to evaluate the claim during the 30-day "safe harbor" period, and move to have a case dismissed on summary judgment. Therefore, since the Defendant failed to raise any objection in response to the Plaintiff's PSDL prior to litigation, the defense is now waived.

Defendant has waived the issue of Plaintiff's alleged failure to comply with the statutory requirements governing its PSDL. Defendant was initially presented with a medical bill from the Plaintiff which sought reimbursement for PIP benefits. Defendant did not deny the bill, ask for further documentation related to standing or a valid written assignment, nor did they raise any other purported claim defect. Prior to the lawsuit being filed the Defendant received Plaintiff's PSDL which sought additional PIP benefits. Defendant had the opportunity to apprise the Plaintiff of any alleged deficiencies in its claim submission and yet elected to stay silent. Defendant's silence results in a waiver of claim defects once litigation commenced. Waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Financial Services Inc. v. Saldukas*, 896 So. 2d 707,711 (Fla. 2005) [30 Fla. L. Weekly S115a]. The concept of waiver has been applied to cases for unpaid PIP benefits by the Fifth District Court of Appeals in *Florida Medical & Injury v. Progressive Express Ins. Co.*, 29 So. 3d 329 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D215b] ("If the insurer fails to specify the defect in the form so that it can be rectified . . . it will be deemed to have waived its objection to payment. . . . Once the insurer pays, it will not be heard to refuse payment because of a defect in form").

Accordingly, the Court finds that Defendant has waived the issue of any alleged defects in Plaintiff's PSDL, and Defendant's Motion for Final Summary Judgment re: Defective Demand Letter is **DENIED**.

---

[1]The amounts can be accessed via the CMS website at https://www.cms.gov/medicare/payment/fee-schedules/physician/pfs-relative-value-files.

[2]While other PSDLs were submitted to Defendant by the Plaintiff, the only date of service at issue in the instant lawsuit is March 16, 2021.

* * *

Insurance—Attorney's fees—Entitlement—House Bill 837, which repealed section 627.428, does not apply retroactively to policies issued before its enactment

PHYSICIANS GROUP, LLC, a/a/o Anthony Amos, Plaintiff, v. AMGUARD INSURANCE COMPANY, a foreign profit corporation, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2024 SC 004647 NC. Division B. December 2, 2024. Kennedy Legler, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa; and Nicholas A. Chiappetta, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before this Honorable Court on November 19, 2024, in regard to Defendant's Motion to Dismiss and Defendant's Motion to Strike Plaintiff's Claim for Attorney's Fees and Costs, and the Court having heard arguments from both parties, having reviewed the Motions, file, applicable law, and the Court

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

otherwise being fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss argues that Plaintiff failed to attach a copy of the subject policy. Defendant's motion is **DENIED** on said basis.

2. Defendant's Motion to Dismiss argues that Plaintiff's Complaint failed to state a cause of action. Defendant's motion is **DENIED** on said basis.

3. Defendant's Motion to Dismiss argues that Plaintiff's Complaint should be dismissed for improper venue. Defendant abandoned said argument. As such, Defendant's motion is **DENIED** on said basis.

4. Defendant's Motion to Strike Plaintiff's Claim for Attorney's Fees and Costs argues that House Bill 837, which was enacted on March 24, 2023, removed the provision pertaining to Fla. Stat. 627.428, which provided for the right to entitlement of attorney's fees.

5. Plaintiff filed an Amended Memorandum of Law in Opposition to Defendant's motion, which attached the Business Auto Declarations Page, which reflects that the subject policy was issued on January 23, 2023.

6. This Court finds that House Bill 837 is not to be applied retroactively to policies issued before its enactment on March 24, 2023. As such, Fla. Stat. 627.428 applies. As such, Defendant's Motion to Strike Plaintiff's Claim for Attorney's Fees and Costs is **DENIED**.

7. Defendant has ten (10) days to file an answer.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Nurse practitioners—No merit to argument that plaintiff who is licensed as both chiropractic physician and nurse practitioner should be reimbursed as if his services were provided by physician, not nurse practitioner, where plaintiff could only lawfully prescribe medication and make emergency medical condition determination under nurse practitioner license—PIP insurer is permitted to apply Medicare nurse practitioner 15% reduction to reimburse dually-licensed plaintiff who provided services under nurse practitioner license

REVIVE HEALTH ASSOCIATES, LLC., a/a/o Joshua Grimes, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-095994. Division L. November 6, 2024. Richard H. Martin, Judge. Counsel: David B. Kampf, L. Allen Gaffney, and Michelle E. Strickland, Kampf, Inman & Associates, P.A., Tampa, for Defendant.

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

THIS CAUSE, having come before the Court on Defendant's Motion for Final Summary Judgment Based on Fee Application Per the Policy and in Opposition of Plaintiff's Motion For Summary Judgment, as well as Plaintiff's Motion for Final Summary Judgment, or Partial Summary Judgment, Concerning Nurse Practitioner Payment Guidelines. The Court heard arguments on August 23, 2024. Having reviewed the record and being otherwise advised in the Premises, it is **ORDERED AND ADJUDGED** that:

This suit for breach of contract under an automobile insurance policy for personal injury protection benefits involves a dispute concerning (1) whether the Medicare payment limitation applicable to Advance Practice Registered Nurse/Advanced Registered Nurse Practitioner (APRN/ARNP), that provides payment at 85% of the fee schedule amount, may be a limitation applied in personal injury protection claims, and (2) if the limitation applies to personal injury protection claims, will it apply when the provider alleges to have rendered the service as both a licensed APRN and a licensed chiropractor.

Unless otherwise noted, the following facts appear to be undisputed based on the affidavits and deposition transcripts filed by the parties and the stipulation of facts filed (DN 90). The assignor/patient, Joshua Grimes, treated with a chiropractic provider, Kissimmee Medical and Wellness Center, after an automobile accident. The treating chiropractor referred the patient for a telehealth consultation/examination with Rajnarine Roopnarine at Plaintiff, REVIVE HEALTH ASSOCIATES, LLC, to render an opinion on whether the patient sustained an Emergency Medical Condition pursuant to Section 627.736(1)(a)3, Florida Statutes. Florida No-Fault law requires that a determination of an Emergency Medical Condition be rendered by "a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or and advanced practice registered nurse licensed under chapter 464". Without a written determination of an Emergency Medical Condition by a properly licensed individual, personal injury protection benefits are limited to $2,500. § *627.736(1)(a)4, Fla. Stat.* A licensed chiropractor cannot render a written emergency medical condition determination pursuant to the Florida No-Fault law.

Plaintiff's provider, Rajnarine Roopnarine, holds two healthcare licenses including an APRN license pursuant to Chapter 464 and a Doctor of Chiropractic (DC) pursuant to Chapter 460. The provider treated the patient for one billable service via telehealth services on January 15, 2022, in which the provider examined the patient, prescribed medication (naproxen and cyclobenzaprine) and rendered a determination of an emergency medical condition pursuant to Section 627.736(1)(a)3, Florida Statutes. The medical record created by the provider includes language that the Rajnarine Roopnarine is an APRN and is providing a determination of "an emergency medical condition as defined by Fla. Stat. 627.736".

A licensed chiropractor may not lawfully prescribe the medication prescribed here including naproxen and cyclobenzaprine. § 460.403(9)(c)2, Fla. Stat. The parties agree it would have been unlawful for Rajnarine Roopnarine to prescribe the above referenced prescription drugs to the patient under his chiropractic license.

Plaintiff submitted a bill to Defendant for $250 for the single telehealth visit. The patient's policy of insurance issued by Defendant provided in relevant part:

> ***We*** will limit payment of **Medical Expenses** described in the **Insuring Agreement** of this policy's No-Fault Coverage to 80% of a properly billed and documented ***reasonable charge***, but in no event will ***we*** pay more than 80% of the following ***No-Fault Act*** "schedule of maximum charges" including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers:

(DN 55, at 23) (emphasis in original). This policy language validly provides notice of election to use the schedule of maximum charges as a limitation, including Medicare coding policies and payment methodologies.[1] *State Farm Mut. Auto. Ins. Co. v. MRI Assoc. of Tampa, Inc.*, 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a], *approved*, 334 So. 3d 577 (Fla. 2021) [46 Fla. L. Weekly S379a]; *see also State Farm Mut. Auto. Ins. Co. v. Stand Up MRI of Boca Raton, P.A.,* 322 So. 3d 87 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1210a].

Defendant approved and paid $192.44 of the bill, leaving a balance of $57.56. (DN 90.) Defendant's explanation of benefits stated that the payment was reduced because, "This service was rendered by a nurse practitioner. Recommended allowance per Medicare guidelines is 85% of the applicable Medicare Participating Physician Fee Schedule. (Reference: Medicare Claims Processing Manual, Chapter 12, Section 120)". (*Id.*)

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

The relevant section of the No-Fault Law provides,

> (5) CHARGES FOR TREATMENT OF INJURED PERSONS.—
> (a)
>
> ***
>
> 1. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> ***
>
> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:
>
> (I) The participating physicians fee schedule of Medicare Part B. . . .
>
> ***
>
> 2. For purposes of subparagraph 1., the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect on March 1 of the service year in which the services, supplies, or care is rendered and for the area in which such services, supplies, or care is rendered, and the applicable fee schedule or payment limitation applies to services, supplies, or care rendered during that service year, notwithstanding any subsequent change made to the fee schedule or payment limitation, except that it may not be less than the allowable amount under the applicable schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B. For purposes of this subparagraph, the term "service year" means the period from March 1 through the end of February of the following year.
>
> 3. Subparagraph 1. does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare or workers' compensation. An insurer that applies the allowable payment limitations of subparagraph 1. must reimburse a provider who lawfully provided care or treatment under the scope of his or her license, regardless of whether such provider is entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes. However, subparagraph 1. does not prohibit an insurer from using the Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, to determine the appropriate amount of reimbursement for medical services, supplies, or care if the coding policy or payment methodology does not constitute a utilization limit.
>
> ***
>
> 5. An insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph.

§ 627.736(5)(a), Fla. Stat. (2021).

Plaintiff argues that Rajnarine Roopnarine utilized his experience, skills, and training from both licenses (APRN and DC) to provide the evaluation and management service. Thus, Plaintiff argues it should be paid for services as if performed by a physician, not an APRN, since the provider is a chiropractic physician. This argument is factually and legally incorrect because the only license under which the provider could have "lawfully provided care or treatment" was the APRN license, not the DC license. The provider could not have "lawfully provided care" under Florida law for prescribing the medication and making the emergency medical condition determination under the DC license. The "scope of his or her license", for purposes of § 627.536(5)(a)3., in this case is the APRN license.

"A 'statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts' and is not to be read in isolation, but in the context of the entire section." *Fla. Dep't of Env't Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008) [33 Fla. L. Weekly S493a] (quoting *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001) [26 Fla. L. Weekly S549a]). As the Fourth District Court of Appeal explained in *State Farm Mut. Auto. Ins. Co. v. Stand Up MRI of Boca Raton*, 322 So. 3d 87 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1210a] ("*Stand Up MRI of Boca Raton*"), the subparagraphs of Section 627.536(5)(a) must be read together to achieve a consistent whole, giving meaning to each:

> As written, subparagraph 2 does not modify or limit subparagraph 3, or vice versa, but instead they each separately address subparagraph 1. Subparagraph 2 focuses on what fee schedule should be used when determining the allowable amount referenced in subparagraph 1. Contrary to the county court's conclusion below, subparagraph 2 does not establish a "floor" for reimbursing PIP benefits. Instead, subparagraph 2 provides that the allowable amount in the 2007 Medicare Part B fee schedule must be used when it is higher than the applicable year's Medicare Part B fee schedule's allowable amount. After determining which fee schedule should be used pursuant to subparagraph 2, subparagraph 3 then provides that insurers can use Medicare coding policies and payment methodologies when determining the reimbursement amount. There is no language in subparagraph 3 stating, or suggesting, that subparagraph 2 creates a limitation or restriction in the reimbursement amount.

322 So. 3d at 93. The Fourth District agreed with the insurer's argument that "the schedule of maximum charges is simply a base rate that may be adjusted downwards by applying Medicare coding policies and payment methodologies, such as the [coding policy at issue], to determine the appropriate amount of reimbursement." *Id.* The Fourth District held subparagraph 3 permits insurers to use Medicare coding policies to reduce the reimbursement amount of PIP benefits below the applicable amount under the 2007 Medicare Part B schedule. *Id.* at 94.

Plaintiff's arguments here are contrary to the interpretation of the statute by the Fourth District in *Stand Up MRI of Boca Raton*, which I must follow. The APRN reduction, like the Medicare Multiple Procedure Payment Reduction at issue in *Stand Up MRI of Boca Raton*, is a Medicare coding policy or payment methodology. The plain text of the third sentence of Section 672.536(5)(a)3 permits an insurer to use such a coding policy or payment methodology to reduce the reimbursement amount below the applicable amount under the 2007 Medicare Part B schedule, so long as the coding policy or payment methodology does not constitute a "utilization limit".

Just as subparagraphs 2 and 3 of the statute must be read in harmony with each other, so too must the sentences within subparagraph 3. All three sentences provide guidance on how the Medicare fee schedule is to be applied. The first sentence prohibits "utilization limits" that might otherwise apply. The second sentence requires reimbursement if the provider "lawfully provided care under the scope of his or her license", even if the provider would not have been entitled to reimbursement under Medicare due to Medicare restrictions on the types or disciplines of health care provider who may be reimbursed for particular procedures. The third sentence, added an amendment in 2012, *see* Ch. 2012-197, § 10, Laws of Fla., makes clear that the use of the fee schedule does not prohibit an insurer from using applicable Medicare coding policies and payment methodologies to determine the reimbursement amounts, so long as they do not constitute utilization limits. Nothing in the text of subparagraph 3 suggests that the fee schedule amount is a floor below which the insurer may not proceed when applying applicable Medicare coding policies or payment methodologies. *Stand Up MRI of Boca Raton* interpreted this provision to the contrary.

Plaintiff relies on trial court orders from other county judges in this county, which predate *Stand Up MRI of Boca Raton*. *See Crespo & Assoc., P.A., a/a/o B. Scoi v. GEICO*, 24 Fla. L. Weekly Supp. 721a (Fla. 13th Jud. Cir., November 23, 2016), *Crespo & Assoc. a/a/o D. McCulley v. USAA Serv. Auto. Assoc.*, 28 Fla. L. Weekly Supp. 82a (Fla. 13th Jud. Cir., May 1, 2020), and *Crespo & Assoc., P.A. a/a/o L.*

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Oliver v. Nationwide Ins. Co. of America, Case No.: 18-CC-017540 (Fla. 13th Jud. Cir. May 12, 2021). [Hereinafter referred to as the "Crespo Orders"]. The Crespo Orders determined a no-fault insurer is not able to utilize the APRN Medicare payment limitations. Nearly all of the interpretive rationale of the Crespo Orders is inconsistent with *Stand Up MRI of Boca Raton*. The Crespo Orders find conflict in the sentences of subparagraph 3, where I find none.

I likewise find Plaintiff's reliance upon the Second District's decision in *Nationwide Mut. Fire Ins. Co. v. AFO Imaging, Inc.*, 71 So. 3d 134 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1463b] to be misplaced. In that decision, interpreting the PIP statute as it existed in 2008, the Second District rejected the insurer's arguments that a reduction in reimbursement for MRI services could be made based upon the Medicare Hospital Outpatient Prospective Payment System, which the court said "required the use of an additional, limiting schedule". *Id.* at 137. First, there is no evidence or argument that the APRN reduction arises from a separate fee schedule. Instead, it appears to merely reduce the participating physicians fee schedule allowable amount by 15 percent when the services were rendered by an APRN. Second, the version of the statute upon which the *AFO Imaging* case relied predates the 2012 addition of the third sentence of subparagraph 3, which expressly permits reliance upon Medicare coding policies and payment methodologies.

The sole issue that remains is whether Defendant is able to apply the Medicare coding policy of the APRN 15% reduction to a service where a dual licensed provider performs services under his APRN license which may not legally be performed under his chiropractic physician license. It is undisputed that a dual licensed provider performed services during a single billable encounter, which may only be lawfully rendered under his APRN license, including prescribing medicine and providing a determination that the patient had sustained an emergency medical condition. Further, the parties agree that the Medicare fee schedule applies to the reimbursement of the sole charge at issue, CPT Code 99203. Applicable Medicare coding policies permit a 15% reduction in services which are performed by a non-physician such as an APRN. As a matter of law, Defendant's reduction of 15% pursuant to Medicare coding policies was not a breach of Defendant's policy. Defendant paid Plaintiff all that was due and proper under the policy and Section 627.736, Florida Statutes.

Thus, Plaintiff's Motion for Summary Judgment is hereby **DENIED**. Defendant's Motion for Final Summary Judgment is hereby **GRANTED.** Final judgment is entered in favor of Defendant and against Plaintiff. Plaintiff shall take nothing by this action and shall go hence without day. The Court reserves jurisdiction to determine any claims for attorneys' fees and costs.

In light of the foregoing, the Court reserves ruling as to Defendant's *Ore Tenus* Motion for Involuntary Dismissal/Waiver of Plaintiff's Argument based on Plaintiff's failure to reply and/or Avoidance to Defendant's First and Second Affirmative Defenses.

[1]Plaintiff's argument that Defendant's policy failed to provide notice of electing Medicare's payment guidelines specifically with respect to nurse practitioners must be rejected based on the Fourth District's decision in *State Farm Mut. Auto. Ins. Co. v. Stand Up MRI of Boca Raton, P.A.*, 322 So. 3d 87 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1210a], which held that notice of the specific Medicare payment methodology used for the reduction was not required.

* * *

Insurance—Automobile—Windshield repair—Evidence— Summaries—In order for insurer to admit claims history spreadsheet into evidence, it must make spreadsheet and originals, or duplicates of data from which spreadsheet is compiled, available for examination and copying by plaintiff

SHAZAM AUTO GLASS, LLC, a/a/o Karen Boudreau, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-037364. Division M. October 24, 2024. Lisa A. Allen, Judge. Counsel: Keith P. Ligori, Meaghann C. Ligori, and James T. Tanton, Ligori & Ligori, Tampa; and David M. Caldevilla, de la Parte, Gilbert, McNamara & Caldevilla, P.A., Tampa, for Plaintiff. Lindsey R. Trowell, Ariane J. Smith, and Chloe A. Orta, Smith, Rivkin Radler, LLP, Jacksonville, for Defendant.

ORDER ON PLAINTIFF'S MOTION IN LIMINE CONCERNING THE CLAIMS HISTORY SPREADSHEET

THIS CAUSE came before this Court on October 18, 2024, concerning "Plaintiff's Motion in Limine Concerning the Claims History Spreadsheet" filed on October 7, 2024 (Doc. 141). The Court, having considered the motion, the arguments of counsel, and the record, and being otherwise advised in the premises,

ORDERED AND ADJUDGED as follows:

1. The "Plaintiff's Motion in Limine Concerning the Claims History Spreadsheet" (Doc. 141) is partially granted, as follows:

(a) The Court finds that the Claims History Spreadsheet is a "summary" as contemplated by Section 90.956, Florida Statutes.

(b) Therefore, in order for the Claims History Spreadsheet, or any portion thereof, to be admitted into evidence or otherwise relied upon as a basis for any testimony, the Defendant must comply with all requirements of Section 90.956, including the requirement to "make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both" to Plaintiff's counsel.

(c) The Defendant: (i) shall, by October 28, 2024, serve the Plaintiff's counsel by email with copies of all documents (including electronically stored information) from which such data were obtained, and (ii) shall also produce such documents (including electronically stored information) at trial.

(d) To the extent that any such documents (including electronically stored information) originated from any entity that is not the Defendant, they shall not be admitted into evidence unless the Defendant complies with all applicable requirements of the Florida Evidence Code, including but not limited to authentication requirements and any applicable hearsay exceptions.

2. All other portions of the "Plaintiff's Motion in Limine Concerning the Claims History Spreadsheet" (Doc. 141) are hereby denied, without prejudice to the Plaintiff's ability to raise appropriate objections at trial.

* * *

Insurance—Automobile—Windshield repair—Summary disposition—Insurer is barred from presenting evidence of its created "repair estimate" and is foreclosed from disputing motion for summary disposition as to whether it properly limited reimbursement under policy where insurer shielded itself from discovery of information relating to its method of determining reimbursement price with claims of trade secret privilege

ASAP CAR GLASS, LLC, a/a/o Alex Montemayor, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23025814. Division 73. November 6, 2024. Steven P. DeLuca, Judge. Counsel: Emilio R. Stillo and Rowena Maria Racca, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

THIS CAUSE having come on to be heard on October 31, 2024, on Plaintiff's Motion for Summary Disposition, having reviewed the motion, having reviewed the entire court file, having reviewed all evidence, having reviewed relevant legal authorities, having received argument of counsel, and having otherwise been duly advised in the premises, the Court finds as follows:

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Background and Findings of Fact

1. On or about August 1, 2022, Alex Montemayor ("Montemayor"), sustained damage on the windshield of his vehicle, 1992 Chevrolet Corvette 2 Door Convertible, which necessitated a replacement.

2. On the subject date of loss, Montemayor was insured under an automobile insurance policy issued by Defendant, State Farm Mutual Automobile Insurance Company ("State Farm" or "Defendant").

3. Pursuant to an assignment of benefits from Montemayor, ASAP Car Glass, LLC ("ASAP" or "Plaintiff"), replaced the windshield and submitted an itemized invoice to State Farm in the total amount of $1,146.32.

4. State Farm issued a reduced payment to ASAP in the amount of $467.98 leaving a difference in the amount of $678.34.

5. On March 24, 2023, ASAP, as assignee of Montemayor, filed this breach of contract of action to recover the balance on the invoice.

6. The relevant provisions in the Policy of insurance states as follows:

PHYSICAL DAMAGE COVERAGES

Insuring Agreements

1. Comprehensive Coverage

a. ***We*** will pay for loss, except loss caused by collision, to a covered vehicle.

* * *

c. The deductible does not apply to damage to the windshield of any ***covered vehicle***.

* * *

Limits and Loss Settlement-Comprehensive Coverage and Collision Coverage

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

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

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

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

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

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

(i) The prevailing competitive price;

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

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

The prevailing competitive price means prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by us. If asked, we will identify some facilities that will perform the repairs at the prevailing competitive price.

The estimate will include parts sufficient to restore the covered vehicle to its pre-loss condition.

You agree with us that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

7. State Farm purportedly created an estimate and same was "approved" after ASAP had completed the replacement, submitted its invoice and same was reviewed by State Farm.

8. State Farm posited that provision 1.a.(1)(b) "[A] bid or repair estimate approved by ***us [State Farm]*** . . ." allows State Farm to both create and approve its own repair estimate in order to determine the cost to repair.

9. ASAP argued that State Farm's interpretation of 1.a.(1)(b) is misplaced as the common use or meaning of the operative terms "repair estimate" and "approved" may not be properly interpreted to mean that an insurance company (that is not a windshield repair or replacement shop) may create its own repair estimate after the repair job was already completed. In other words, the language "approved by us [State Farm]" indicates that the "repair estimate" will come from a repair shop before the work is done, at which point State Farm will consider whether or not to approve same.

10. The Policy does not define the terms "repair estimate" and "approved."

11. During discovery, objections and assertions of trade secret privilege were raised in response to the germane issue—what data or methodology was utilized by State Farm to create the "repair estimate" and how it complies with 1.a.(1)(b).

12. Likewise, during the deposition of State Farm's corporate representative, State Farm refused to provide any information that would be helpful to this Court to understand State Farm's position regarding the propriety of creating its own repair estimate as every relevant question was met with defense counsel's objections and instruction to the deponent not to answer.

13. Plaintiff has argued, and this Court agrees, that State Farm cannot assert objections or trade secret privilege as to particular information, and then attempt to use the same information either as a sword or shield to defend their position in the case.

14. The Court also notes that after 588 days of litigating this case and setting deadlines to file and hear all motions for summary disposition, State Farm, without any affidavit, sworn testimony or admissible evidence in support of its untimely filed Motion for Summary Judgment, requested this Court to simply accept their naked and bald assertion that what it did was compliant with the terms of the Policy of insurance.

15. In contrast, Plaintiff's Motion for Summary Disposition was supported by the affidavit of Yoandri Alfonso, the corporate representative and owner of ASAP. The invoiced amount of $1146.32 represents the cost to repair in this claim and Plaintiff is entitled to a judgment in the amount of $678.34 representing the difference between the amount previously paid by the Defendant and the amount of the invoice.

Conclusions of Law

Accordingly, under Rule 7.135, the Court finds that the Plaintiff is entitled to Summary Disposition as to the subject windshield replacement based on the evidence provided. Further, the Court finds the Defendant is foreclosed from disputing Plaintiff's Motion for Summary Disposition as to whether the Defendant properly limited reimbursement pursuant to 1.a.(1)(b). The Defendant cannot both shield itself from inquiry as to the methodology used to determine the price it may reimburse the Plaintiff while arguing to the Court that the methodology was compliant with the terms of the Policy. In conclusion, the Defendant is barred from providing evidence of their created "repair estimate" under the sword and shield doctrine.[1] The Court's ruling is consistent with the rulings based on the sword and shield doctrine in the following cases: *Fabio Castaneda v. Citizens Prop. Ins. Co.*, 19 Fla. L. Weekly Supp. 875a (Broward Cty. Ct. 2012); *Clear Vision Windshield Repair (a/a/o Richard Voss) v. Government Employees Ins. Co.*, 23 Fla. L. Weekly Supp. 649a (Broward Cty. Ct. 2015); *My Clear View Windshield Repair Inc. (a/a/o Gina Holden) v. Government Employees Ins. Co.*, 23 Fla. L. Weekly Supp. 648b (Broward Cty. Ct. 2015).

The Court is also persuaded by the ruling in *Shazam Auto Glass, LLC a/a/o Amber Lee v. State Farm Mut. Auto. Ins. Co.*, case number 18-CC-19789 (Hillsborough Cty. Ct. 2021)(affirmed by the Second District Court of Appeal of Florida in *State Farm Mut. Auto. Ins. Co. v. Shazam a/a/o Amber Lee*, 360 So.3d 712 (Fla. 2d 2023)).

Therefore, it is hereby ORDERED and ADJUDGED that Plain-

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

tiff's Motion for Final Summary Disposition is Granted. Plaintiff shall submit a proposed Final Judgment conforming to the terms of this Order.

[1]*Notwithstanding the Court's ruling based on the sword and shield doctrine there is no admissible evidence pertaining to Defendant's "repair estimate."*

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Exhaustion of policy limits—In absence of proof that insurer acted in bad faith toward plaintiff medical provider, provider cannot overcome exhaustion of benefits defense irrespective of insurer's conduct toward other providers—Payments to another provider for dates of service subsequent to signing of full and final settlement agreement were not issued in bad faith or gratuitous where payments were for dates of service not included in settlement—Further, provider has no standing to dispute payments to another provider except with respect to late-submitted bills

TRI-COUNTY DIAGNOSTIC & IMAGING, LLC, a/a/o Mosther Senatus, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23031940. Division 82. June 18, 2024. Kal Evans, Judge. Counsel: Jenna Levy, for Plaintiff. Tracy Berkman, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

This Cause having come before the Court on June 18, 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 February 13, 2018, Mosther Senatus ("Claimant") sustained personal injuries related to the operation, maintenance or use of a motor vehicle in the State of Florida.

2. TRI-COUNTY DIAGNOSTIC & IMAGING CENTERS, LLC ("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.

4. The $10,000 in PIP benefits available to Claimant under the policy of insurance at issue in this case exhausted with a payment of $1,631.89 in benefits paid to the Plaintiff.

5. Based on the record evidence and argument of counsel, it is indisputable 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.

7. The Motion was litigated 42 days after it was filed. No motion to continue was filed and no motion to continue was made ore tenus.

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 Ins. Co., 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.

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

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 Mutual Automobile Insurance Company,* 137 So.3d 1049, 1057 (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 a $6,300 payment to CJ Family Chiropractic Center ("CJ Family") pursuant to a Full and Final Settlement with respect to previously denied dates of service while Defendant investigated whether fraud occurred, ultimately finding none. Plaintiff alleges that additional payments to CJ Family for subsequent dates of service after the signing of the Full and Final Settlement were gratuitous. The Full and Final Settlement, signed May 22, 2018 included language as follows:

> The undersigned further confirms herein that the provider is no longer treating the patient for the accident that occurred on date of loss referenced above, ***as of the date this document is executed.***

(emphasis added).

However, the Court finds that this qualifying language does not preclude CJ Family from future treatment of the Claimant, nor does it preclude CJ Family from seeking PIP payment for dates of service not included in said Full and Final Settlement. Furthermore, the Court finds there is no allegation, proof or indication that any of the payments issued to CJ Family (or any other provider) were issued in bad faith, nor were they gratuitous.

Additionally, while Plaintiff argued that the $6,300 payment in and of itself was gratuitous, 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 3 (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 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 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.**[2] 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.

---

[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.

[2]Again, the Court has jurisdiction pursuant to Fla. R. Civ. P. 1.510 and Fla. Sm. Clm. R. 7.135.

* * *

Labor relations—Overtime—Defense that plaintiff is exempt from overtime wages as salaried managerial employee is fact-intensive inquiry not appropriate for summary judgment

SULAY ROBAYO, Plaintiff, v. WESTEND OF MIAMI, LC, et al., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24058380. Division 53. November 20, 2024. Robert W. Lee, Judge.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

This cause came before the Court on November 19, 2024 for hearing of the Defendant's Motion to Dismiss with Prejudice, and the Court's having been sufficiently advised in the premises finds as follows:

This case is a four-count Complaint involving a claim for unpaid overtime wages. The Defendant claims that the Plaintiff is a salaried managerial employee, and as a result, is exempt from payment of overtime wages. The Defendant argues that on the face of the Complaint, it is entitled to a dismissal with prejudice. The Court disagrees.

Whether a person is exempt from overtime wages as a salaried managerial employee is a fact intensive inquiry. *See Goussen v. Mendez Fuel Holdings LLC*, 350 F.Supp.3d 1283, 1287-93 (S.D. Fla. 2018). Merely being designated a "manager" as a job title is "insufficient to establish the exempt status of an employee and must be determined on the basis . . . of the employee's salary and duties." *Id.* at 1290-91 (citation omitted). Indeed, such fact-intensive inquiry provides an obstacle to getting summary judgment in many cases, much less a dismissal based on the four corners of the complaint. Moreover, exemptions are in the nature of defenses, which must be "asserted" by the employer. *Id.* at 1288. In this case at this point, the Defendant has not pled any defense based on a statutory exemption. As a result, the Motion is DENIED as to Count I and II.

As for Count III, the Plaintiff agrees that the count is insufficiently pled. As a result, the Plaintiff shall have 20 days to amend its Complaint to more clearly plead this count, failing which the case shall proceed as to Counts I and II only.

As for Count IV, the Plaintiff agrees that the count should be dismissed with prejudice. As a result, Count IV is dismissed without leave to amend.

The Defendant shall have 30 days from the date of this Order to FILE a response to the Amended Complaint, if filed, and if not timely filed, an Answer as to Counts I and II.

* * *

Civil procedure—Pretrial orders—Failure to comply—Sanctions—Striking both parties' demand for jury trial and proceeding to bench trial is appropriate sanction where both parties have willfully failed to comply with pretrial order requiring that they file joint stipulations, including jury instructions and verdict forms, or file motion for extension time with description of delay

ROBERT WOODARD, Plaintiff, v. KATIA MATTOS, et al., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24009123. Division 53. November 19, 2024. Robert W. Lee, Judge.

ORDER ON CASE MANAGEMENT CONFERENCE

This cause came before the Court on November 14, 2024 for case

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

management conference. This case raises the conundrum of the appropriate sanction the Court should enter when both parties fail to comply with a pretrial order.

On July 1, 2024, the Court entered its Order Setting Pretrial Deadlines and Related Requirements. The Order required the parties to file their joint pretrial stipulation no later than 100 days from the date of the pretrial order. The Order specifically provided, "It is the responsbility of all parties to cooperate in good faith in preparation of the Joint Pretrial Stipulation. FAILURE TO COMPLY WITH THIS REQUIREMENT WILL RESULT IN SANCTIONS. [. . .] If either party delays the preparation of the Joint Stipulation, a motion describing the delay must be immediately filed with the Clerk of Court and brought to the Court's attention prior to the deadline" (emphasis in original).

Also, on the same date, the Court issued its Order Setting Case Management Conference (Pretrial Compliance) for November 1, 2024, a date three weeks after the 100-day deadline. Moreover, the Court thereafter reset the case management conference for one additional week, until November 8, 2024. Nothwithstanding the de facto extension given to file a joint pretrial stipulation, the parties failed to comply. Further, neither party filed any motion to extend time, nor any motion describing the delay as required by the pretrial order.

Due to the lack of compliance with the pretrial order, the Court reset the case management conference to November 14, 2024, with notice specifically noting lack of compliance. Additionally, the parties were required to personally appear along with counsel at the reset conference. However, once again, despite giving the parties an additional week to comply, both parties failed to do so. No joint pretrial stipulation was filed, nor did either party file the required motion describing the reason for the delay. Their excuses and finger-pointing at the conference are unavailing, as certainly both could have properly brought these issues timely ot the Court's attention.

Further, as of the date of this Order, five days after the case management conference, the parties have continued to fail to comply. Certainly, if this failure to comply were solely at the feet of the Plaintiff, dismissal might be warranted as a sanction. However, the sanction of dismissal would reward the Defendant in the face of its own failure to comply, particularly in a case such as this when it has become apparent that both parties have willfully failed to comply with the Court's pretrial order. The Court believes that the proper sanction should relate to the heart of the purpose of the pretrial order—having the parties get ready for jury trial.

"Striking a jury demand may be a just sanction" in a given civil case. *Jones-Hospod v. Hospod*, 676 S.W.3d 709, 720-21 (Tex. App. 2023). This is particularly true when the sanction is designed to remedy the misconduct or non-compliance. *See id*. In this case, as the parties have failed to comply with the requirements including the submission of jury instructions and verdict forms, a crucial requirement of the pretrial order, the Court finds that the proper sanction is to strike both party's demand for jury trial and have this case proceed to bench trial. Accordingly, the demand for jury trial in this case is STRICKEN, and the Court shall set the matter for bench trial.

* * *

Small claims—Jury trial demand must be made in writing

WELLS FARGO BANK, N.A., Plaintiff, v. JOHAN KAMPERVEEN, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24040282. Division 53. November 16, 2024. Robert W. Lee, Judge.

ORDER STRIKING JURY DEMAND

This cause came before the Court on November 15, 2024 for case management conference. This small claims case was transferred to this division for jury trial. The Plaintiff asks that this case be transferred back to the credit card (non-jury) division because the docket does not reflect a written jury demand. The Defendant concedes that there is no written jury trial demand, but asserts that it made an oral demand at the small claims pretrial conference.

The Court finds well taken the Plaintiff's position as to jury demand. It takes no linguistic leap, nor scrutiny of Scalia's tome, to determine that the text of Rule 7.150 requires any jury trial demand to be in writing, whether it be made by plaintiff or defendant. Further, the Florida Supreme Court made this point clear when it amended the Rule on July 14, 2022. As a result, the Defendant's "oral" demand for jury trial is hereby STRICKEN.

Nevertheless, the Court declines to transfer this case back to the credit card division for trial. This Court is perfectly capable of handling a bench trial. The Court will set the trial by separate order.

* * *

Landlord-tenant—Eviction—Settlement agreement—Default on date not encompassed by agreement must be addressed through new eviction action

ELI BOHADANAH, Plaintiff, v. BEVERLY WILLIAMS, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE23040987. Division 53. November 13, 2024. Robert W. Lee, Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR FINAL JUDGMENT OF EVICTION

The matter came before the Court this day for hearing of the Plaintiff's Motion for Final Judgment of Eviction. Although the Defendant appeared, the Plaintiff did not. In this case filed more than a year ago, the parties reached a written settlement agreement. By its terms, it governed payments through the end of 2023. The Plaintiff's Motion, however, addresses a purported default in payment in October 2024. This is beyond the terms of the settlement agreement. Any default in payment must be addressed by a new eviction action, if desired. As a result, the Plaintiff's Motion filed in this case is DENIED.

* * *

Criminal law—Driving under influence—Limitation of actions—Tolling—Statute of limitations was tolled where defendant had no reasonably ascertainable place of abode or work within state of Florida between date of filing of capias and date capias was served when defendant turned himself in

STATE OF FLORIDA, Plaintiff, v. JACOB ELTING, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2017-CT-030068-AXXX-XX. June 29, 2020. Rhonda E. Babb, Judge. Counsel: Michael Hill, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Steve Wolverton, Gutin and Wolverton, Cocoa, for Defendant.

AMENDED ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR STATE'S FAILURE TO COMMENCE PROSECUTION WITHIN STATUTE OF LIMITATIONS

[*Amended to include attachments only*]

This cause came before the Court on March 3, 2020, upon the Defendant's Motion to Dismiss for State's Failure to Commence Prosecution Within Statute of Limitations pursuant to § 775.15, Fla. Stat. and Fla. R. Crim. P. 3.190. The Defendant filed his motion on December 20, 2019. Michael A. Hill, Esq. represented the State of Florida. Steve Wolverton, Esq., appeared on behalf of the Defendant. After careful consideration of the Motion, evidence presented, argument of counsel and being otherwise duly advised, the Court finds as follows:

I. Procedural History

On June 2, 2017, the State filed a Motion to Issue Subpoena Duces Tecum of Mr. Elting's medical records from Viera Medical Center to

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

show he was driving under the influence of chemical or controlled substances to the extent that his normal faculties were impaired. On January 9, 2018, a sworn warrant affidavit prepared by the Florida Department of Highway Patrol was filed. Also on the same date, an Amended Information charged Mr. Elting with the following offenses that occurred on April 17, 2017: Refusal to Give Breath, Urine or Blood Test (Count 1), Reckless Driving with Damage to property or Person (Count 2), Driving Under the Influence and Causing Damage or Injury (Count 3), Driving Under the Influence and Causing Damage or Injury (Count 4), Driving Under the Influence and Causing Damage or Injury (Count 5), and Driving Under the Influence (Count 6).

On January 10, 2018, the Court issued a Summons upon Mr. Elting with the last known address at 350 Woodland Avenue, Unit Apt. 6, Cocoa Beach, Florida 32931. On February 7, 2018, the Summons came back unserved stating that on January 31, 2018 per the post office, it was returned to server because the summons was undeliverable as addressed and unable to forward. On February 22, 2018, a Capias was filed with Mr. Elting's last known address at 350 Woodland Avenue, Apt. 6, Cocoa Beach, Florida 32931. The capias was served on December 6, 2019, when Mr. Elting turned himself in. On December 20, 2019, defense counsel filed the Motion to Dismiss for State's Failure to Commence Prosecution Within Statute of Limitations. The Motion alleges that the capias issued on the Amended Information was not executed within the one or two year statute of limitations. The offenses occurred on April 17, 2017.

II. Section 775.15, Florida Statutes (2017)

The defendant filed a motion to dismiss the Amended Information on the ground that the State failed to timely commence prosecution within the two-year statute of limitations for a first degree misdemeanor and within the one-year statute of limitations for a second degree misdemeanor. *See* § 775.15(2)(c)(d), Fla. Stat. Prior to the State filing the Amended Information, Mr. Elting had not been arrested or served with a summons or capias in connection with the offenses at issue. Therefore, to determine when the prosecution "commenced" for purposes of the statutes of limitations, we look to § 775.15(4)(b), Fla. Stat., which states:

> A prosecution on a charge on which the defendant has not previously been arrested or served with a summons is commenced when either an indictment or information is filed, provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay. In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered. The failure to execute process on or extradite a defendant in another state who has been charged by information or indictment with a crime in this state shall not constitute an unreasonable delay.

An unexcused delay in executing the capias bars prosecution for the offenses charged. However, in accordance with § 775.15(5), Fla. Stat., a statute of limitations is tolled if a "defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state." *Id*. Further, § 775.15(5) does not require the State to conduct a diligent search or prove that the defendant's absence hindered the prosecution in order for the State to toll the running of the limitations period. *See Robinson v. State,* 205 So. 3d 584, 590 (Fla. 2016) [41 Fla. L. Weekly S541a]. The limitations period may be tolled according to Section 775.15(5), Fla. Stat. which states:

> *The period of limitation does not run during any time when the defendant* is continuously absent from the state *or has no reasonably ascertainable place of abode or work within the state.* This provision shall not extend the period of limitation otherwise applicable by more than 3 years, but shall not be construed to limit the prosecution of a defendant who has been timely charged by indictment or information or other charging document and who has not been arrested due to his or her absence from this state or has not been extradited for prosecution from another state. [*Emphasis added]*.

"When a criminal defendant challenges his or her prosecution as being untimely commenced, the State has the burden to prove that the prosecution is not barred by the statute of limitations." *See Norton v. State,* 173 So. 3d 1124, 1126 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D2076a] (*quoting Cunnell v. State*, 920 So. 2d 810, 812 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D552c].

In this case, the State carried its burden of proof. The State directed this court to the Florida Supreme Court case of *Robinson v. State,* 205 So. 3d 584 (Fla. 2016) [41 Fla. L. Weekly S541a] in construing whether the statute of limitations was tolled under § 775.15(5), Fla. Stat. The *Robinson* Court stated that the period of limitation does not run during any time when the defendant is continuously absent from the state "*or has no reasonably ascertainable place of abode or work within the state*." *Id*. at 590 (*citing* § 775.15(5), Fla. Stat.). "Thus, by use of the conjunction 'or,' the statue expressly differentiates between a defendant who has no reasonably ascertainable abode or place of work in Florida from a defendant who is continuously absent—the statute does not require proof of both." *Id*. Further, the Court emphasized that where the Legislature has not defined words in a statute, the words should be given their plain and ordinary meaning. *Id*. Further, "[w]hether proof of a diligent search should be required for purposes of the tolling provision in section 775.15(5) is a policy matter best considered by the Legislature and not a requirement to be engrafted onto the statute by the courts. This Court has held that legislative intent must not be determined based on 'this Court's view of the best policy.' " [citations omitted]. *Id*. at 591.

III. State's Evidence

In the present case, the State presented competent substantial evidence that the statute of limitations is tolled because the defendant fell within one of the two categories in § 775.15(5), i.e., the defendant had no reasonably ascertainable place of abode or work within the state. The Court has carefully reviewed the State's Evidence. According to State's Exhibit 1 (attached and incorporated herein), Mr. Elting was employed at Odyssey Charter School from August 30, 2016 until February 19, 2018. On the last page of the State's Exhibit 1, it lists 350 Woodland Avenue, Apt. 6, Cocoa Beach, Florida as his address. According to State's Exhibit 2 (attached and incorporated herein), the Employment Eligibility Verification Department of Homeland Security is dated August 29, 2019, and on the first page of the employment application, it lists Mr. Elting's address as P.O. Box 551, Melbourne, Florida 32902.

At the hearing, the State stipulated that between the time the capias was filed on February 22, 2018, until late December 2019, the State did nothing to serve the capias on. Mr. Elting. The statute of limitations had already run on April 17, 2019. The State's review occurred in December 2019, after it learned of the death of the Brevard County Sheriff's K-9 as a result of the incident.

State's Exhibits 1 and 2 establish that from February 19, 2018, the last day Mr. Elting was employed at Odyssey Charter School through August 29, 2019, the first day of his new employment, he did not have a reasonably ascertainable place of work within the state. In addition, Mr. Elting did not have a reasonably ascertainable place of abode within the state. According to the record, the State previously attempted to serve the summons on Mr. Elting's last place of abode—350 Woodland Avenue, Unit Apt. 6, Cocoa Beach, Florida 32931, but the summons came back unserved and returned to server because it was undeliverable as addressed and unable to forward. The capias filed on February 22, 2018, also had a last known address of 350 Woodland Avenue, Apt. 6, Cocoa Beach, Florida 32931. After Mr.

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Elting commenced work on August 29, 2019, he listed a P.O. Box address as his place of abode. A post office box is not a viable address to serve the capias. Mr. Elting turned himself on December 6, 2019. Accordingly, it is

ORDERED AND ADJUDGED:

1. Defendant's Motion to Dismiss for State's Failure to Commence Prosecution Within Statute of Limitations is **DENIED**.

2. The Defendant has the right to appeal this Order within thirty (30) days of its rendition.

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to breath test—Incident to arrest—Motions in limine arguing that breath test refusal should be suppressed because implied consent warning was read and request for test was made prior to arrest—State's motion to strike motions as attempts to relitigate issue decided twice by predecessor judge is granted

STATE OF FLORIDA, Plaintiff, v. STEVEN GRAHAM GALISZEWSKI, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052022CT017438AXXXXX. October 31, 2024. Kelly Ingram, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. R. Scott Robinson, Eisenmenger, Robinson & Peters, P.A., Viera, for Defendant.

ORDER GRANTING STATE'S MOTION TO STRIKE TWO DEFENSE MOTIONS

On September 13, 2024, this cause came on to be heard on the State's "Motion to Strike or Summarily Deny Defendant's Two Motions that Attempt to Re-litigate the 'Incident to Lawful Arrest' Claim that Judge Garagozlo Has Already Rejected Twice," filed August 15, 2024. After hearing argument of counsel and otherwise being fully advised in the premises, the Court finds as follows:

Defendant filed a Motion to Suppress in this case on June 27, 2023. The motion alleged, in pertinent part, that the implied consent warning/request for a breath test was illegally made because the warning/request was given prior to arrest and thus was not "incidental to lawful arrest," as purportedly required by section 316.1932, Florida Statutes (the implied consent statute). Therefore, according to the motion, the Defendant's refusal to submit to the breath test should be suppressed. The motion relied on the cases of *Department of Highway Safety and Motor Vehicles v. Whitley,* 846 So.2d 1163 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a], *Department of Highway Safety and Motor Vehicles v. Hernandez,* 74 So.3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a], and *Department of Highway Safety & Motor Vehicles v. Pelham,* 979 So.2d 304 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D765a].

Thereafter, on March 19, 2024, Judge Garagozlo issued an Order denying the Defendant's Motion to Suppress. Judge Garagozlo explicitly disagreed with Defendant's claim that an arrest must precede the request for the breath test; instead, his order found that pursuant to the implied consent statute, "a lawful arrest must precede the *breath* test; the statute does not indicate that a lawful arrest must precede the *request* or the *implied consent warning*." (Emphasis added). The order also noted that unlike in the *Pelham* case (and unlike the *Hernandez* case), "the facts herein showed that Defendant's arrest was lawful."

Thereafter, on March 29, 2024, Defendant filed a Motion for Reconsideration of Judge Garagozlo's order. The new motion "respectfully disagree[d]" with Judge Garagozlo's ruling. The motion presented the same three cases of *Hernandez, Pelham,* and *Whitley.* In particular, the motion contended that the implied consent statute itself and the case of *Department of Highway Safety and Motor Vehicles v. Hernandez,* 74 So.3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a] require a lawful arrest before implied consent is "triggered."

The State filed a Response to Defendant's Motion for Reconsideration. The motion argued that nothing in the implied consent statute or in the *Hernandez* case addresses the *timing* of the arrest—or the timing of the refusal, the request for the breath test, or the reading of the implied consent warnings. The Response asserted that the issue in *Hernandez* was only whether DHSMV was required to consider the *lawfulness* of a driver's arrest in order to uphold an administrative suspension. The Response further asserted that as to that issue, the Florida Supreme Court in *Hernandez* merely determined that DHSMV *would* have to consider the lawfulness of the officer's actions (i.e., whether the stop was legal, whether there was an illegal detention or arrest, or other issues that could provide a legitimate challenge to the validity of a stop or arrest). The Response also argued that the lawfulness of the arrest was not at issue in the instant case because Judge Garagozlo had previously found the arrest in this case was lawful. Additionally, the Response argued that the *Whitley* case provided no support for Defendant's argument because *Whitley* involved a breath test, not a refusal to submit to a breath test; and there was no dispute that a *breath test* must be incident to lawful arrest.

A hearing was held on the Defendant's Motion for Reconsideration on April 25, 2024. At the close of the hearing, Judge Garagozlo announced that he was denying the Motion for Reconsideration. The ruling was later reduced to a written order on May 13, 2024.

Thereafter, Defendant filed two new motions which sought to raise the "incidental to lawful arrest" argument again. One motion was titled "Motion in Limine Regarding Reading of Implied Consent & Related Civil Penalties," filed May 16, 2024. The other motion was titled "Motion in Limine Regarding Breath Test Refusal," filed August 5, 2024. These motions again cited the same three cases of *Hernandez, Pelham,* and *Whitley.* By the time the second new motion was filed, there had been a change in the assignment of judges; and the undersigned became the judge assigned in the instant case.

On August 15, 2024, the State filed the instant Motion to Strike the two new Defense motions. The State's motion argued that the two new Defense motions improperly attempted to relitigate a legal ground (regarding the "incidental to lawful arrest" argument) because the two new Defense motions were effectively the same motions as the two previous motions that were already rejected by Judge Garagozlo. The motion then argued that: (1) it is improper to continually attempt to reargue points which the Court has already considered and rejected (citing *Yeyille v. Spiegel*, 373 So.3d 1238, 1240 (Fla. 1982), *Goter v. Brown*, 682 So.2d 155 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2109a], and *City of Hollywood v. Diamond Parking, Inc.*, 9 Fla. L. Weekly Supp. 316a (Fla. 17th Cir. Mar. 13, 2002)); and (2) the fact that a successor judge is now presiding over this case only reinforces the State's argument that the two new Defense motions are improper (citing *Hewlett v. State*, 661 So.2d 112, 115 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2099a], *Hull and Company, Inc. v. Thomas*, 834 So.2d 904, 906 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D197a], and *Gemini Investors III, L.P. v. Nunez*, 78 So.3d 94, 97 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D240a]).

During the hearing on the State's Motion to Strike, the Court was not presented with anything to show that the two new Defense motions contained any different argument than what was presented in the two previous Defense motions. Therefore, this Court agrees with the State that the Defendant's two new motions should be stricken.

It is not the position of this Court to change any decision that Judge Garagozlo created. This Court was looking to see if there was something in the two new motions in limine that were different from the motion to suppress. A motion in limine acts a little differently than a motion to suppress. However, the Court finds that the same result is being requested and that this issue has been litigated already, including a rehearing of the original motion. The whole basic issue is whether law enforcement could ask the Defendant to do a breath test

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

prior to a lawful arrest. The two new motions re-address that issue—whether characterized as the suppression of evidence, or whether the jury can hear about the refusal, or whether the jury can hear about the civil penalties related to the refusal.

Judge Garagozlo found that the request for a breath test could be made prior to lawful arrest, but that the actual breath test must have occurred after the lawful arrest. This Court was reading the implied consent statute to interpret it as well, and there's nothing in the statute that says that a law enforcement officer cannot ask for a breath test before lawful arrest, or that implied consent is triggered only after a lawful arrest. It clearly says that the *breath test* must be incidental to lawful arrest.

Based on all that the Court has seen, the Court's research, and reviewing everything, the Court cannot find any different issue being litigated when examining the two new motions together with the two previous motions. Essentially, it's all asking for the same result.

Accordingly, it is hereby ORDERED and ADJUDGED that the State's Motion to Strike the two Defense motions in limine filed on May 16, 2024 and August 5, 2024 is GRANTED.

* * *

Criminal law—Refusal to submit to breath, blood or urine test—Constitutionality of statute—No merit to argument that statute that criminalizes refusal to submit to breath, blood or urine test when license has been suspended for prior refusal is unconstitutional because prior refusal is only proven by preponderance of evidence—Finding of license suspension, not finding of prior refusal, is element of offense and must be proven beyond reasonable doubt—Equal protection—Rational and reasonable basis exists for distinction between license suspension imposed for refusal in driving under influence case and fine imposed for refusal in boating under influence case

STATE OF FLORIDA, Plaintiff, v. STEVEN GRAHAM GALISZEWSKI, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052022CT017438AXXXXX. October 31, 2024. Kelly Ingram, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. R. Scott Robinson, Eisenmenger, Robinson & Peters, P.A., Viera, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DECLARE § 316.1939, FLORIDA STATUTES UNCONSTITUTIONAL AND DISMISS COUNT 1 OF THE INFORMATION

This cause came on to be heard on September 13, 2024 on the Defendant's Motion to Declare § 316.1939, Florida Statutes Unconstitutional and Dismiss Count 1 of the Information, filed May 16, 2024. After hearing argument of counsel and otherwise being fully advised in the premises, the Court finds as follows:

Defendant's Motion alleges that § 316.1939, Florida Statutes, is unconstitutional because (1) the statute unconstitutionally reduces the State's burden of proof, and (2) the statute violates Equal Protection.

The first argument relies on the claim that under Count 1 of the Information (in violation of § 316.1939, Florida Statutes), "the Defendant is being prosecuted for twice refusing to submit to a breath, blood, or urine test." As such, according the Defendant, the prior refusal was only proven by a preponderance of the evidence at an administrative hearing and was not proven beyond a reasonable doubt.

However, the Court finds that the prior refusal itself is not an element of the crime. Rather, as pointed out by the State, the statute requires that the State must prove a current refusal to submit and a prior *suspension* on a driver's license for refusing to submit; and the State must still prove the prior suspension beyond a reasonable doubt. Therefore, the statute does not unconstitutionally reduce the State's burden of proof. This conclusion is consistent with every Florida Court that has ruled on this issue, including a number of Courts in Brevard County. *See,* e.g., *State v. Christensen,* Case No. 2004-CT-059147 (Fla. Cty. Ct., Brev. Cty., May 8, 2007); *State v. Barr,* 28 Fla. L. Weekly Supp. 716a, (Fla. Cty. Ct., Brev. Cty., July 30, 2015); *State v. Buttitta,* 26 Fla. L. Weekly Supp. 27a (Fla. Cir. Ct., 18th Cir., July 6, 2017); *State v. Leiser,* Case No. 2018-CT-47191 (Fla. Cty. Ct., Brev. Cty., April 6, 2021).

As to the Equal Protection argument, the Court finds that there is a rational and reasonable basis to distinguish between a driver's license suspension imposed as a result of a refusal to submit in a DUI case and a fine imposed as a result of a refusal to submit in a BUI case. Thus, there is no Equal Protection violation. *See, State v. Barr*, 28 Fla. L. Weekly Supp. 716a, (Fla. Cty. Ct., Brev. Cty., July 30, 2015).

Accordingly, it is hereby ORDERED and ADJUDGED that the Defendant's Motion to Declare § 316.1939, Florida Statutes Unconstitutional and Dismiss Count 1 of the Information is DENIED.

* * *

Insurance—Property—Employer that may be hampering plaintiff's ability to appear at legal proceedings should be reminded of obligation of reasonable cooperation

BRIAN GARCIA, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX24017834. Division 53. November 22, 2024. Robert W. Lee, Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR CASE MANAGEMENT CONFERENCE

This cause came before the Court for consideration of the Plaintiff's Motion, and the Court's having been sufficiently advised in the premises, rules as follows:

The Motion is DENIED. To the extent that it is a burden for the Plaintiff to have to appear on occasion for his own legal proceeding, this is an issue that should have been addressed by counsel with the client before filing this suit. Further, to the extent Plaintiff's employer may be putting up roadblocks for Plaintiff to appear, counsel should remind Plaintiff's employer that "[a]s a matter of public policy, employers have an obligation of reasonable cooperation where an employee's appear in the court system is required." *Thomas v. Peoplease Corp.*, 877 So.2d 45, 47 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1377a].

* * *

Criminal law—Battery—Evidence—Video recording—Expectation of privacy—Massage therapist who entered massage room with intent to commit battery by touching client inappropriately with his exposed penis did not have reasonable expectation of privacy in massage room and is not entitled to protection against surreptitious recording provided by section 934.03(1) and exclusionary rule of section 934.06—Recording is admissible

STATE OF FLORIDA, Plaintiff, v. THOMAS GREGORY GRASSO, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052020MM046359AXXXXX. April 1, 2022. Kenneth Friedland, Judge. Counsel: Andrew Dressler and Michael Hill, Assistant State Attorneys, State Attorney's Office, Viera, for Plaintiff. Tiffany Troutt, Assistant Public Defender, Viera, for Defendant.

ORDER GRANTING STATE'S MOTION IN LIMINE TO DETERMINE ADMISSIBILITY OF VIDEO

THIS CAUSE came on to be heard before the Court on the State's Motion in Limine to Determine Admissibility of Video. The State was represented by Assistant State Attorneys Andrew Dressler and Michael Hill. The Defendant was represented by Assistant Public Defendant Tiffany Troutt. After hearing the arguments of the parties, reviewing the evidence submitted, otherwise being fully advised of the premises, the Court hereby finds as follows:

FINDINGS OF FACT

On March 30, 2022, the Court held a hearing on the State's motion to determine admissibility of video. During the hearing, the Court took testimony from the victim in this matter, L.W. L.W. testified that

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

on October 7, 2020, she video recorded her massage therapy session with Defendant after being suspicious that Defendant, her massage therapist, had been touching her inappropriately during her previous massage therapy sessions. With this, L.W. video recorded the session by using a small digital video camera that she placed in her purse and confirmed her suspicions that Defendant was touching her inappropriately. She further testified that her only intention was to video record and not audio record the session and that she was unaware that the camera had an audio recording function. Nonetheless, the camera did audio record the ambient noise of the room and this included light off-topic conversation between L.W. and Defendant that has no relevance to the case. Following the hearing, the Court reviewed the video recordings in camera and observed both Victim's and Defendant's conduct and also observed the ambient noise of the room as recorded. On the video, the Defendant could be seen touching L.W. with his exposed penis as well touching her inappropriately in other ways.

CONCLUSIONS OF LAW

The State argues that the video is admissible at trial on two grounds: First, the State argues the video is not subject to Fla. Stat. § 934.06's exclusionary rule because it was not recorded in violation of Fla. Stat. § 934.03(1). Next, the State argues that even if the video was recorded in violation of Fla. Stat. § 934.03, it is still admissible because Defendant does not have a reasonable expectation of privacy from recording that society is ready to recognize given his criminal actions as depicted in the video.

Defendant argues that the video was recorded in violation of Fla. Stat. § 934.03(1) because it was intentionally recorded. Defendant further argues that he did have a reasonable expectation of privacy in the massage room given that he was an employee, and the room was closed to the public.

The Court is aware of Florida's general prohibitions against recording of others without their consent and that this activity is general prohibited by Fla. Stat. § 934.03(1) which states as follows:

> "(1) Except as otherwise specifically provided in this chapter, any person who:
>
> (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;
>
> (b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:
>
> 1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication;
>
> or
>
> 2. Such device transmits communications by radio or interferes with the transmission of such communication. . .
>
> shall be punished as provided in subsection (4)."

Fla. Stat. § 934.03(1) (2022).

The Court is also aware of Fla. Stat. 934.06's exclusionary rule that provides as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter."

Fla. Stat. § 934.06 (2022).

With this however, it is well established under Florida law that "for an oral conversation to be protected under section 934.03 the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable." *Silversmith v. State Farm Ins. Co.,* 324 So.3d 517 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1592b] (quoting *State v. Smith,* 641 So. 2d 849, 852 (Fla. 1994)). In other words, there must be both a subjective reasonable expectation of privacy as well as an objective reasonable expectation of privacy that society is ready to recognize. It is also well established under Florida law that an individual loses that reasonable expectation of privacy when they commit criminal or otherwise unlawful acts. *See State v. Inciarrano,* 473 So.2d 1272 (Fla. 1985) (holding that murder defendant did not have reasonable expectation of privacy that society was ready to recognize in surreptitious recordings made by his victim that ultimately audio recorded defendant murdering the victim); *see also Jatar v. Lamaletto,* 758 So.2d 1167, 1169 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1069a] (holding that surreptitious audio recording of plaintiff was not a violation of Fla. Stat. § 934.03(1) on grounds that plaintiff did not have justified expectation of privacy in the recordings of the extortionate threats he made to defendant).

Here, this Court cannot find that Defendant had a reasonable expectation of privacy that society is ready to recognize that affords him the protections of Fla. Stat. § 934.03(1) and Fla. Stat. § 934.06's exclusionary rule. The video clearly shows Defendant committing battery upon Victim by touching her inappropriately with his exposed penis as well as committing other acts of battery. Given this, this Court finds *Inciarrano* to be instructive as it clearly supports Defendant's loss of his reasonable expectation of privacy. Just like the defendant in *Inciarrano,* Defendant entered that massage room not with the intent to give L.W. a legitimate massage, but instead entered the room "with the intent to do [L.W.] harm" by touching her inappropriately and battering her. *Inciarrano*, 473 So.2d at 1276. As such, any reasonable expectation of privacy Defendant had in the massage room dissolved the moment Defendant began committing battery upon L.W. Therefore, because Defendant does not have a reasonable expectation of privacy given his criminal conduct, he cannot afford himself to the protections of Fla. Stat. § 934.03(1) and the exclusionary rule of Fla. Stat. § 934.06. Accordingly, the surreptitious video recording made by L.W. is admissible at trial and the State shall be allowed to present it to the jury. Therefore, it is

ORDERED and ADJUDGED

that the State's Motion in Limine to Determine Admissibility of Video is GRANTED and the video recordings obtained by L.W. are admissible at trial.

* * *

Headnotes and indexes are copyrighted and may not be duplicated by photocopying, printing, or other means without the express permission of the publishers. 1-800-351-0917

Volume 32, Number 9
January 31, 2025
Cite as 32 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—A judge may create a nonprofit organization devoted to the improvement of the law, the legal system, and the administration of justice— Judge may serve as a board member for the organization with certain limitations

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-16. Date of Issue: November 18, 2024.

ISSUES

1.Can a judge create a nonprofit organization devoted to the improvement of the law, the legal system and the administration of justice?

ANSWER: Yes, the inquiring judge may create the described nonprofit and nonpartisan organization.

2. Can a judge serve as a board member on the proposed organization?

ANSWER: Yes, with limitations, the inquiring judge may serve as a board member.

FACTS

The inquiring judge wishes to create a nonprofit devoted to the improvement of the law, the legal system and the administration of justice. According to the inquiring judge, the purpose of this organization is the promotion of civics literacy and civil discourse. The inquiring judge states that the nonprofit will be an independent, nonpartisan organization focused on promoting civics literacy and civil discourse by educating the public on the judicial branch, the judiciary, landmark judicial cases from a historical and legal context, and the process of judicial decision-making, including the role of a judge.

The nonprofit will be nonpartisan and the be funded through grants. The inquiring judge is silent as to how these grants will be obtained. The inquiring judge acknowledges that the Code of Judicial Conduct prohibits judicial officers from engaging in fundraising activities.

Finally, the inquiring judge wishes to serve as a board member of this organization.

DISCUSSION

Relevant to this inquiry are Fla. Code Jud. Conduct, Canons 2B, 4A, 4B and 4D.

Canon 4B encourages judges to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government.

Canon 4D encourages judges to serve as a member, officer, director, trustee or non-legal advisor of an organization or governmental entity devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice.

The Committee answered both questions asked by the inquiring judge in earlier opinions. First, the Committee does not interpret the Canons as prohibiting the inquiring judge from creating this nonpartisan organization. *See* JEAC Ops. 2004-06 [11 Fla. L. Weekly Supp. 373a], 1999-24 [7 Fla. L. Weekly Supp. 77a]. Second, the Canons do not prohibit the inquiring judge from serving as a board member. *See* JEAC Op. 2000-09 [7 Fla. L. Weekly Supp. 563a].

Such activity is encouraged, especially where it educates the public on the important role of the courts. However, the Committee cautions that the inquiring judge must not engage in fundraising. Nor can the inquiring judge participate in soliciting grants for the organization. The inquiring judge is also reminded that the prestige of judicial office may not be used to solicit any funds or grants. *See* JEAC Op. 2012-36 [20 Fla. L. Weekly Supp. 192a] (*citing* Fla. Code Jud. Conduct, Canons 2B).

Finally, the inquiring judge should not take a personal position on any legal issue that may be presented to a court "as opposed to educating others on the status of the law." *See* JEAC Op. 2000-02 [7 Fla. L. Weekly Supp. 363b].

REFERENCES

Fla. Code Jud. Conduct, Canons 2B, 4A, 4B, 4D and Commentary
Fla. JEAC Ops. 2004-06 [11 Fla. L. Weekly Supp. 373a], 2003-17 [10 Fla. L. Weekly Supp. 1070a], 2000-09 [7 Fla. L. Weekly Supp. 563a], 2000-02 [7 Fla. L. Weekly Supp. 363b], 2000-02 [7 Fla. L. Weekly Supp. 363b], 1999-24 [7 Fla. L. Weekly Supp. 77a]

* * *