Volume 33, Number 1, May 30, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

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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.

- **LANDLORD-TENANT—EVICTION—JURY TRIAL—WAIVER. A Spanish-speaking tenant did not knowingly waive the right to a jury trial by signing a 40-page lease containing a jury trial waiver where the lease was written in English and was not explained to the tenant in Spanish before the lease was signed. Moreover, the tenant's level of sophistication and experience was low, she was not represented by counsel before or during the signing of the lease, and her opportunity to negotiate the terms of the agreement was quite limited.** *608 INVESTMENTS LLC v. ROMAN. County Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed February 11, 2025. Full Text at County Courts Section, page 20a.*

- **REAL PROPERTY—JUDICIAL SALE—SURPLUS FUNDS. The presumption that the original owners of property purchased at a judicial sale were entitled to any surplus funds generated by the sale was rebutted where the city filed an affidavit of debt and motion to intervene, seeking to collect the surplus funds to pay a fine owed by the original owners for code violations.** *RIVIERA AT BONAVENTURE HOMEOWNERS ASSOCIATION, INC. v. MOSMARTNEY INVEST, LLC. County Court, Seventeenth Judicial Circuit in and for Broward County. Filed February 11, 2025. Full Text at County Courts Section, page 29a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
COUNTY COURTS	County court opinions.
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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Community caretaker doctrine—Officer responding to tip from citizen informant that there was man believed to be intoxicated sleeping in vehicle in bar parking lot was entitled to conduct welfare check where he found licensee asleep behind wheel of running vehicle—Hearing officer's finding that deputy had founded suspicion for investigatory stop was not supported by competent substantial evidence where licensee did not appear to be in need of immediate aid once awake and officer did not believe that licensee was impaired prior to requesting that he exit vehicle

DANIEL MARACICH, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County, Appellate Division. Case No. 2024-CA-001145-WS. January 30, 2025. Petition for Writ of Certiorari. Counsel: Christopher Blaine, for Petitioner. Linsey Sims-Bohnenstiehl, DHSMV, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE came before the Court on the Petition for Writ of Certiorari, filed April 25, 2024, by Daniel Maracich ("Petitioner"), represented by Christopher Blaine, Esquire; the Response to Petition for Writ of Certiorari, filed September 18, 2024, by the State of Florida, Dept. of Highway Safety and Motor Vehicles ("Respondent"); and, the Petitioner's Reply, filed October 6, 2024. Upon review of the briefs, record, and being otherwise fully advised, the Court finds that the Petition for Writ of Certiorari must be granted as set forth below.

BACKGROUND FACTS

Petitioner appeals the Findings of Fact, Conclusions of Law and Decision ("DMV Order"), entered March 27, 2024, by Chaandi McGruder, Hearing Officer ("Hearing Officer"), affirming the license suspension imposed by the Respondent after the Petitioner refused to submit to a breath test. The Hearing Officer upheld the Petitioner's eighteen-month license suspension, effective January 28, 2024, for driving under the influence.[1] The Hearing Officer denied Petitioner's motion to invalidate the license suspension based on *Danielewicz v. State,* 730 So.2d 363 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D793a], with the following findings:

> The stop can be construed as a welfare check, which was reasonable given that Petitioner's vehicle was running and the complainant believed the driver was impaired. *See Dept. of Highway Safety & Motor Vehicles v. DeShong,* 602 So.2d 1349, 1352 (Fla. 2d DCA 1992)(acknowledging that "a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether driver is ill, tired, or driving under the influence in situations less suspicious that that required for other types of criminal behavior").
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> Although Petitioner was legally parked in a parking space, here, Deputy Bews had a suspicion of impairment based on the complainant's initial call to 911. The complainant described the vehicle to the 911 dispatcher and stated he believed the subject was intoxicated. An encounter "becomes an investigative stop when the citizen is asked to exit the vehicle." *Danielewicz v. State,* 730 So.2d 363. "An investigatory stop must be based on founded or reasonable suspicion that the vehicle's occupants committed, are committing or about to commit a crime." *Batson v. State,* 847 So.2d 1149, 1150 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1478a] (quoting *Davis v. State,* 695 So.2d 836, 837 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1506a]). Actual physical control of a motor vehicle under the influence is a crime. *See* Section 316.193, Florida Statutes. *The documented suspicion of impairment provided a well-founded suspicion of criminal activity at the time of the welfare check that was not present in Danielewicz. (emphasis added).*

The Pinellas County Sheriff's Office Offense Report states that, on January 28, 2024, at 4:27 a.m., Deputy Tyler Bews, of the Pinellas County Sheriff's Office, was dispatched to 325 Main Street, Dunedin (Blur Nightclub), to conduct a welfare check on a male subject that was asleep inside a black Mercedes SUV in the parking lot. The Offense Report states: "Call notes advised the complainant was requesting a welfare check on a male subject that was asleep inside a black Mercedes SUV in the parking lot. Call notes also indicated the complainant believed the subject was intoxicated."

Upon arrival, Deputy Bews observed the vehicle to be lawfully parked, actively running, and with the driver, later identified as the Petitioner, sleeping in the driver's seat. Petitioner's head was slumped over and his eyes were closed. Deputy Bews positioned his cruiser in a "pinch" manner for overall safety.

Deputy Bews knocked on the driver's side window and Petitioner slowly awoke. Petitioner did not appear surprised by Deputy Bews' presence. Deputy Bews asked Petitioner to step out of the vehicle to ensure he was alright and not in need of medical attention. Petitioner slowly exited his vehicle and Deputy Bews observed several signs of impairment, to include that Petitioner was unsteady on his feet, had a strong odor of alcohol, glassy and watery eyes, a flushed and sweaty face, and that he slurred and mumbled some of his words.

Petitioner stated that he was taking a nap while waiting for his Uber. In response to Deputy Bews' questioning, Petitioner stated that he was not in need of medical attention and was adamant that he felt okay to drive and wanted to leave. Based on his observations, Deputy Bews asked Petitioner a series of health questions and then asked Petitioner to participate in field sobriety exercises, which Petitioner refused. Petitioner was placed under arrest for DUI and subsequently refused to submit to a breath test.

After arresting Petitioner for DUI, Petitioner spoke with the complainant, Samuel Vinson, who was the manager of Blur Nightclub. As set forth in the Offense Report:

> Samuel advised that he often works nights at Blur and sees intoxicated people frequently. Samuel advised he typically tries to check on intoxicated people prior to calling law enforcement. Samuel advised him and his staff had seen Samuel's vehicle idling for roughly the past two hours with Daniel in the driver's seat sleeping. Samuel stated prior to calling 911, he had woken Daniel up to ask him if he was okay. Samuel stated that Daniel was advising he was waiting on an Uber to come and pick him up. Samuel does not recall seeing Daniel inside of Blur and has no prior affiliations with Daniel until this occurrence. This concluded my contact with Samuel.

Petitioner timely requested an administrative hearing before the DMV's Bureau of Administrative Reviews to challenge the lawfulness of his license suspension. A telephonic hearing was held on March 18, 2024, wherein Petitioner was represented by Timothy Sullivan, Esquire. The arresting officer, Deputy Bews, appeared telephonically and testified.[2] The Hearing Officer admitted twelve documents received from the Pinellas County Sheriff's Office into evidence, without objection. As set forth in the transcript of the administrative hearing, the following documents and exhibits were admitted:

DDL1—Florida DUI Uniform Traffic Citation (AI9MV9E);
DDL2—DUI Packet cover sheet;
DDL3—Petitioner's Florida Driver's License;
DDL4—Breath Alcohol Test Affidavit;
DDL5—Affidavit of Refusal to Submit to Breath Test;

DDL6—Implied Consent Warning;
DDL7—Affidavit of True Copy;
DDL8—Field Sobriety Test Form;
DDL9—Consent Arrest Affidavit;
DDL10—Florida Uniform Traffic Citation (AIUOFFE);
DDL11—Notification of Driver's License Hearing; and,
DDL12—Case Master Report, Offense Report, and Supplements;

During the evidentiary hearing, counsel for Petitioner asked Officer Bews a series of questions regarding his welfare check of Petitioner. Officer Bews testified that Petitioner was sleeping, breathing, and was not bleeding, coughing or vomiting. In response to direct questioning, Deputy Bews testified several times that he did not believe Petitioner was impaired at the time he asked him to exit the vehicle and that he was conducting a welfare check.[3]

After the evidentiary portion of the hearing concluded, Petitioner's counsel orally motioned to invalidate the license suspension arguing that Petitioner's arrest was the result of an unlawful seizure and detention. Petitioner's counsel argued that, based on *Danielewicz v. State,* 730 So.2d 363 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D793a] and *Popple v. State,* 626 So.2d 185 (Fla. 1993), Deputy Bews lacked the requisite reasonable suspicion at the point Deputy Bews asked Petitioner to exit his vehicle, at which time it ceased being a welfare check and became an investigatory stop. The Hearing Officer entered its DMV Order affirming the Petitioner's license suspension finding that Deputy Bews had a suspicion of impairment based on the complainant's initial call to 911. Petitioner timely sought certiorari review of the DMV Order.

STANDARD OF REVIEW AND ISSUES RAISED

The Circuit Court, sitting in its appellate capacity, must determine whether: (1) the tribunal afforded the parties due process of law; (2) the order meets the essential requirements of law; and, (3) the order is supported by competent substantial evidence. *Haines City v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citations omitted*). The Circuit Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Dept. of Highway Safety & Motor Vehicles v. Stenmark,* 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (*citations omitted*). "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." *Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs.,* 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Competent substantial evidence is evidence that is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). As further analyzed by the Florida Supreme Court in *Wiggins v. Dept. of Highway Safety and Motor Vehicles,* 209 So.3d 1165, 1172-73 (Fla. 2017) [42 Fla. L. Weekly S85a]:

> A court conducting section 322.2615 [suspension of license; right to review] first-tier certiorari review faces constitutional questions that do not normally arise in other administrative review settings. Every case involving a license suspension contains a Fourth Amendment analysis of whether there was reasonable suspicion to stop the vehicle or probable cause to believe that the driver was in physical control of the vehicle while under the influence of alcohol. § 322.2615(7)(b) 1. With that, first-tier review under this particular statute demands a close review of the factual record to determine whether the hearing officer's findings were supported by competent, substantial evidence and whether the essential requirements of the law were applied. *Nader,* 87 So.3d at 723.[4] Some consideration of the evidence is inescapable in the competent, substantial evidence determination. These are legal questions that call for an unbiased review, rather than being solely left to the discretion of a hearing officer who is actually employed by the Department. While a policy that provides deference to the agency fact-finder may be appropriate in special areas such as zoning or policy decisions, which involve concepts that require a certain level of expertise that can be provided by a nonlawyer, the same does not hold true for the questions of constitutional law that arise under section 322.2615. It is no wonder, then, that the Legislature created a statute to tailor review for this narrow situation.
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> Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence. Competent, substantial evidence must be reasonable and logical. *Gonci v. Panelfab Prods., Inc.,* 179 So.2d 856, 858 (Fla. 1965). It follows that a competent, substantial evidence analysis demands an honest look at the evidence available. Otherwise, we are asking judges to simply parrot the findings of the hearing officer, thus reducing the task of a constitutional judge to providing a predetermined stamp of approval. . . The law under section 322.2615 is not designed to protect the decision of the hearing officer, but to preserve due process and justice. The Legislature clearly intended that the circuit court conduct a meaningful review of the record.

Petitioner's argument focuses on the second and third prongs of review: that there is not competent and substantial evidence to support the Hearing Officer's findings of fact and that the Hearing Officer departed from the essential requirements of law in concluding that Petitioner's detention was lawful in the absence of reasonable suspicion of criminal activity. The Court agrees with Petitioner on both counts.

LAW AND ANALYSIS

The Court finds that the Hearing Officer was charged with determining, by a preponderance of the evidence, whether there was sufficient cause to sustain, amend, or invalidate the license suspension, based on three criteria:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances;
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer;[5] and,
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months. *See* § 322.2615 (7)(b)1.-3., Fla. Stat.

Petitioner takes issue with the first criteria, arguing that Deputy Bews' welfare check lead to an unlawful search and seizure when he asked Petitioner to exit his vehicle without the requisite suspicion of criminal activity.

In analyzing the issues presented, the Court finds that there are three levels of police-citizen encounters: (1) a consensual encounter wherein the citizen can voluntarily comply with an officer's request and is free to leave; (2) an investigatory stop wherein an officer may temporarily detain a citizen if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime; and, (3) an arrest wherein an officer must have probable cause that a crime has been committed. *K.W. v. State,* 328 So.3d 1022, 1025 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1462b] (*citing Popple v. State,* 626 So.2d 185, 186 (Fla. 1993)).

Welfare checks fall under the community caretaking doctrine and are considered consensual encounters, such that law enforcement can conduct such checks when necessary without constitutional implications. *Daniels v. State,* 346 So.3d 705, 708 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1870b] (*citations omitted)*. The community

caretaker standard permits a law enforcement officer to detain an individual, even without reasonable suspicion that a crime has occurred, is occurring, or is about to occur. *R.A. v. State,* 355 So.3d 1028, 1034 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D288a] (*citations omitted)*; *Taylor v. State*, 326 So. 3d 115, 117 [46 Fla. L. Weekly D1641a] (Fla. 1st DCA 2021)(finding that welfare checks fall under the community caretaking doctrine and are deemed lawful as long as they are totally devoid from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute)(*citations omitted); Vitale v. State,* 946 So.2d 1220, 1221 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D164a] (finding "[t]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid")(*citations omitted)*. Once law enforcement has satisfied their concern for the welfare of the person, a continued detention is not permissible unless there is a reasonable suspicion that the person has committed, or is committing, a crime. *Id.*

As explained in *R.A. v. State, supra*:

> A determination of whether a seizure occurred "is a fact-intensive analysis in which the reviewing court must consider the totality of the circumstances." *Golphin v. State,* 945 So.2d 1174, 1183 (Fla. 2006) [31 Fla. L. Weekly S845a]. However, "[i]t is well established that an officer does not need to have a founded suspicion to approach an individual to ask questions." *Popple v. State,* 626 So.2d 185, 187 (Fla. 1993).

When conducting this fact-intensive analysis, the totality of the circumstances must be considered from the 'standpoint of an objectively reasonable officer.' " *Daniels,* 346 So.3d at 709; *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a] (finding courts should use a strict objective test asking only whether any probable cause for a stop existed, not whether the basis believed by a law enforcement officer was accurate).

There is no dispute that Petitioner was in actual physical control of his vehicle as he was found in the driver's seat with the car running and could drive away. *State v. Fitzgerald,* 63 So.3d 75, 78 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1076a] (finding driver is in actual physical control of a vehicle when the keys were close enough for the driver to use them and drive away)(*citations omitted*). There is also no dispute that Deputy Bews was responding to a tip from a citizen informant, whose information is at the high end of the tip-reliability scale.[6] *Calhoun v. State,* 308 So.3d 1110, 1114 (Fla. 1st DCA 2020) [46 Fla. L. Weekly D48a] (explaining that information provided by a citizen informant is presumed highly reliable because their motivation is the promotion of justice and public safety and they can be held accountable for the accuracy of the information given)(*citations omitted)*. Deputy Bews was fully entitled to investigate the situation and conduct a welfare check based on the complainant's tip.

A consensual encounter generally becomes an investigative stop when a driver is asked to exit a vehicle. *Dermio v. State,* 112 So.3d 551, 556 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a]; *Danielewicz v. State,* 730 So.2d 363, 364 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D793a] (*citations omitted)*. Hence, at the point Deputy Bews asked Petitioner to exit his vehicle, he needed to articulate the need for a continued welfare check or a well-founded suspicion that Petitioner was involved in criminal activity. *Id.; Popple,* 626 at 188 ("[w]hether characterized as a request or an order, we conclude that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show of authority which restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply"); *Santiago v. State,* 133 So.3d 1159, 1164-65 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D452a] (finding that "[a]bsent a reasonable suspicion that a crime has occurred, is occurring, or is about to occur, an officer may not convert a consensual encounter into an investigatory stop by ordering a citizen out of a parked car").

Looking objectively at the facts of this case, Deputy Bews failed to articulate a need for a continued welfare check nor a well-founded suspicion that Petitioner was involved in criminal activity. In response to direct questioning, Deputy Bews repeatedly testified that he did not believe Petitioner was impaired and, after being asked multiple times in a variety of ways, Deputy Bews could not articulate that Petitioner was in need of immediate aid; Petitioner was awake, breathing, and not bleeding, coughing, or vomiting. In conducting a fact-intensive analysis and reviewing the case law, the Court concludes that the continued welfare check, and subsequent DUI investigation, were unlawful.

The Second District Court of Appeal provides guidance and legal precedent on the issues presented. In *Daniels, supra,* the defendant, Elliott Daniels, appealed the trial court's denial of his motion to suppress and subsequent conviction for DUI. At approximately 8:30 p.m., a citizen informant ("CI") contacted 911 to report finding Daniels asleep in his truck with his lights on. A video, admitted by stipulation, showed that the truck was parked within the entrance/exit of a business parking lot and facing outwards as if Daniels was preparing to pull onto an adjacent road. EMS arrived and, after medically clearing Daniels, left the scene. The testifying deputy stated that he first spoke with the CI, who stated he found Daniels slumped over in his seat, with his seatbelt on, and believed that Daniels either had a medical incident or was drunk. The CI stated that once he saw Daniels' fingers move, he believed Daniels was likely intoxicated. *Daniels,* 346 So.3d at 707.

In affirming the trial court, the Second District found that the odd manner the truck was parked, in the entrance/exit and facing outwards with the headlights on, was atypical and that, even though Daniels had been medically cleared, the Court found that the responding deputies were justified in detaining Daniels to resolve any ambiguities. *Id.* at 710-11. In his concurring opinion, Chief Judge Morris writes to address deficiencies in the State's evidence: the State failed to call the CI, the 911 operator, the first responding officers who spoke to the CI, and the EMS technicians. *Id.* at 711. However, in the absence of such evidence, Chief Judge Morris agreed with the majority due to the location and manner in which the truck was parked. *Id*

Similarly, the Respondent failed to call the complainant or the 911 operator for Maracich's administrative review hearing, which is problematic since the record shows that the only information available to Deputy Bews was that the complainant observed a male subject asleep in his vehicle, who complainant believed to be intoxicated. The record is silent as to whether Deputy Bews knew the identity of the complainant, or even the complainant's impressions as relayed to 911, at the time he arrived at the nightclub parking lot and the complainant was not present.[7]

Further, unlike the driver in *Daniels,* Petitioner was not parked in an unusual manner and Deputy Bews did not articulate any ambiguities in what he observed. Indeed, the *Daniels'* Court found that if the driver had been parked in a regular parking spot, asleep, with the headlights on, it would have reversed:

> Had Daniels been discovered by the CI parked in a regular parking spot, asleep, with the headlights on, we would have been constrained to reverse absent additional factors that could lead to reasonable suspicion. This is so even if the engine had been running. *Cf. Danielewicz v. State*, 730 So. 2d 363, 364 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D793a] (concluding that where the appellant was parked in a legal parking spot, with the headlights on and his engine running but where the law enforcement officer observed no traffic infraction, had no reason to believe there was any mechanical problem with the vehicle, and did not testify that he was concerned for the appellant's

personal health, the investigative stop was not based on reasonable suspicion); *Delorenzo v. State*, 921 So. 2d 873, 875 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D737a] (concluding that where the law enforcement officer observed the appellant sleeping in his legally parked vehicle in a public parking lot with the engine running but where the officer did not testify to any observation suggesting that the appellant was either ill or under the influence of alcohol or a controlled substance, there was no reasonable suspicion to support an investigative stop). This court has similarly concluded that being stopped near or partially on the road does not, by itself, give rise to reasonable suspicion of criminal conduct. *See Bent v. State*, 310 So. 3d 470, 471-72 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1904a]. *Daniels,* 346 So.3d at 709.

In *Dermio, supra,* the Second District Court of Appeal affirmed the denial of the defendant driver's motion to suppress finding that the officer's initial encounter was consensual and the officer's request for the driver to roll down his window did not transform the consensual encounter into an investigatory stop. The facts of *Dermio* are again analogous to the facts of this case: At 3:30 in the morning, a deputy found the driver legally parked at a local bar with the car running and the lights on. The deputy pulled in behind the driver and activated her emergency lights. The deputy approached the driver who appeared to be sleeping with a cell phone lodged between his shoulder and cheek. The driver did not awake when the deputy shined her flashlight into the window, but did awake when the deputy tapped the flashlight on the window. The deputy immediately noted that the driver was "really out of it" and incoherent. After the driver did not respond to the deputy's request to roll down his window, the deputy opened the door upon which she immediately smelled marijuana and developed reasonable suspicion of criminal activity. *Dermio,* 112 So.3d at 553.

In affirming the trial court, the Second District found that the deputy's consensual encounter did not end when she asked the driver to roll down his window, and then opened the door, because the deputy's concerns for the driver's safety had not been alleviated due to him being incoherent and "out of it." *Id. at 556.* Conversely, Deputy Bews was unable to articulate concerns for Petitioner's safety to support his directive for Petition to get out of his vehicle.

In *Danielewicz, supra,* the Second District Court of Appeal reversed the trial court's denial of the defendant driver's motion to suppress. The facts of *Danielewicz* are that the officer pulled into the parking lot of a restaurant/bar at 1:30 a.m. and found the driver legally parked near the rear of the business with the headlights on and engine running. As he approached the vehicle, the officer noticed what appeared to be condensation from the air conditioning. The driver appeared to be asleep but awoke when the officer knocked on the window. The officer asked the driver five times to get out of her car before she unlocked her door and got out. *See Danielewicz,* 730 So.2d at 364.

In reversing the trial court, the Second District found that the officer did not articulate a well-founded suspicion of criminal activity and did not testify that he was concerned for the driver's personal health. *Id.* As the driver's actions were susceptible of being interpreted as innocent conduct, the officer needed additional factors before he could validly stop her. *Id.*

The Court finds that, while *Dermio* and *Danielewicz* did not involve a citizen informant, the facts are very similar this case and, in addition to the case law discussed above, compels this Court to grant certiorari relief. While the Hearing Officer cited to *Danielewicz* in the DMV Order, her finding that there was a documented suspicion of Petitioner's impairment at the time the investigatory stop commenced is not supported by competent substantial evidence in the record and is a departure from the essential requirements of law.

The undisputed testimony of Deputy Bews was that he did not believe Petitioner was impaired and Deputy Bews did not articulate any observations to support a continued welfare check or a founded suspicion of criminal activity, such as being illegally parked,[8] until *after* he asked Petitioner to exit the vehicle. The finding that Deputy Bews had a suspicion of impairment based on the complainant's initial call is refuted by the record. Hence, the Court concludes that certiorari relief must be granted and the DMV Order must be quashed. *Wiggins v. Dept. of Highway Safety and Motor Vehicles,* 209 So.3d 1165, 1175 (Fla. 2017) [42 Fla. L. Weekly S85a] (finding that circuit court applied correct law in quashing hearing officer's findings that were refuted by the record).

WHEREFORE, it is hereby, **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is hereby GRANTED and the DMV Order is quashed. This cause is remanded for action consistent with this order and opinion. **(**LINDA BABB, KIMBERLY BIRD, and JOSHUA RIBA, JJ.)

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[1]This was Petitioner's second DUI for refusal to submit to a breath test, his first occurring on or about August 6, 2017. As related to this second DUI, Petitioner has pending criminal traffic charges in Pinellas County, Case No. 2024-CT-5919 (which includes consolidated Case No. 2024-MM-1247).

[2]Deputy Bridgette Morris, breath test operator, was released from her subpoena.

[3]Deputy Bews responded five times that he did not believe Petitioner was impaired and that he was conducting a welfare check.

[4]*Nader v. Fla. Dep't of Highway Safety and Motor Vehicles,* 87 So.3d 712 (Fla. 2012) [37 Fla. L. Weekly S130a].

[5]The Department cannot suspend a driver's license for refusal to submit to a breath test if the refusal was not incident to a lawful arrest, which falls within the Hearing Officer's scope of review. *Dept. of Highway Safety and Motor Vehicles v. Hernandez,* 74 So.3d 1070, 1073 (Fla. 2011) [36 Fla. L. Weekly S243a] (citing to 316.1932(1)(a), Fla. Stat., that a breath test must be incidental to a lawful arrest).

[6]The record shows that the complainant opined that Petitioner was intoxicated, but had not observed Petitioner in Blur Nightclub, did not see him consume alcohol, and, outside of Petitioner sleeping in his vehicle in the early morning hours on a Sunday, did not describe indicia of impairment or illegal activity.

[7]The Court notes, unlike criminal proceedings, the DMV or arresting agency generally does not have counsel present at administrative license revocation review hearings nor subpoena witnesses for these review hearings. As such, the Hearing Officer is constrained to make their decision based solely on the documents submitted by the arresting agency and the testimony and evidence proffered by the driver.

[8]*See, e.g., State v. Bodrato,* 346 So.3d 65, 6667 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1774a] (explaining that officer was justified in asking defendant to exit his vehicle because he was observed committing a traffic infraction); *State v. DeShong,* 603 So.2d 1349 (Fla. 2d DCA 1992)(finding that officer had founded suspicion to conduct traffic stop due to driver's erratic driving); *Schneider v. State,* 31 Fla. L. Weekly Supp. 517a (Fla. 6th Cir. Ct. App. 2023)(denying certiorari relief when officer conducting welfare check observed signs of impairment and open container before asking driver to exit vehicle).

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Officer had objectively reasonable basis for stopping vehicle after pacing vehicle as traveling 45 mph in a 35 mph zone and observing licensee rev engine before accelerating quickly, brake and accelerate sporadically, hit curb, and drive over two traffic cones—Speedometer calibration certificate is not required to support "vehicle pace" in formal review hearing

LUIS MIGUEL SAUCEDA, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. AP24-6. Division 55. February 6, 2025. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HOWARD M. MALTZ, J.) Petitioner, Luis Miguel Sauceda, seeks review of the Final Order issued by the Florida Department of Highway Safety and Motor Vehicles ("the Department") on September 4, 2024. The Final Order affirmed the order of suspension of Petitioner's driving privileges. This Court, having considered the

Petition for Writ of Certiorari and accompanying appendix,[1] as well as the Department's response thereto, finds as follows:

Statement of Case

On April 10, 2024, Petitioner Luis Miguel Sauceda, was stopped by Officer Zachary Schuster of the St. Augustine Police Department after Officer Schuster observed Petitioner speeding, hitting a curb, and running over traffic cones. Officer Schuster's narrative report provided the following account:

> At approximately 0059 hours on 4/10/2024, I observed a reckless driver on N Ponce De Leon Blvd. at King St. I observed a white Ford pickup truck revving its engine prior to accelerating quickly after the traffic light turned green. The vehicle drove northbound from King St, where I then caught up behind it just after it passed Malaga St. I noticed the vehicle was braking and accelerating sporadically as I followed it. I was able to pace behind the vehicle, and I confirmed it was traveling, at the very least, 45mph in a 35mph zone. During this time, the vehicle was in the outside lane due to the inside lane being closed. Construction workers (at least 10) were in this area working on the roadway. At W Castillo Dr., the vehicle then failed to negotiate the curve after passing the traffic light. The vehicle completely ran over two cones on the solid white line dividing the two lanes. I then conducted a traffic stop at Old Mission Ave just off N Ponce De Leon Blvd. I met the driver, Luis Sauceda. I requested his driver's license, registration, and insurance. He fumbled for his driver's license, and then he told me the rest of the documentation was on his phone. While talking to Luis, I observed he had slurred speech. I later had Luis exit the vehicle where he then admitted to drinking at Tini Martini Bar. During this time, I also observed an odor of an alcoholic beverage coming from his breath. I then asked if he would be willing to do field sobriety exercises, and he agreed.

P.A. 8-9.

After Petitioner performed poorly on the field sobriety exercises, Officer Schuster read him his *Miranda*[2] warnings. P.A. 9-10. Officer Schuster then read Petitioner the implied consent warning, and Petitioner refused to provide a breath sample after being requested to do so. P.A. 10. Petitioner was charged with driving under the influence ("DUI") and refusing to submit to breath testing after a prior refusal. Petitioner was also cited for speeding in a construction zone. The citation included a notice of suspension pursuant to section 322.2615, Florida Statutes. As permitted by section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his driver's license suspension. Petitioner filed an Amended Motion to Invalidate Suspension, alleging there was no competent substantial evidence in the record to support the conclusion that he was speeding. The formal review hearing was held on August 21, 2024. The following documents were entered into the record at the formal review hearing:

Exhibit 1—Uniform Traffic Citation # A89HMEE. (P.A. 1)[3]
Exhibit 2—Uniform Traffic Citation # ADRELEO. (P.A. 2)
Exhibit 3—Copy of Petitioner's Florida Driver License. (P.A. 3)
Exhibit 4—Arrest Report Affidavit. (P.A. 4 - 6)
Exhibit 5—Incident Report. (P.A. 7 - 10)
Exhibit 6—Affidavit of Refusal to Submit to Breath Test. (P.A. 11)
Exhibit 7—Booking Information Form. (P.A. 12 - 13)

Present at the hearing via video conference were: Travis Mydock, Esquire, appearing as counsel for the Petitioner, and Officer Zachary Schuster of the St. Augustine Police Department. Officer Schuster was sworn in as a witness. Although Petitioner issued a subpoena for Officer Schuster, Petitioner did not question Officer Schuster, nor did Officer Schuster make an independent statement. P.A. 31. Petitioner presented no other evidence at the hearing. P.A. 25-34.

On September 4, 2024, the Department entered a Final Order Affirming Administrative Suspension, which affirmed the suspension of Petitioner's driving privileges. P.A. 19-24. The Final Order contained the following findings of facts regarding the basis for the stop: Petitioner's vehicle (1) was braking and accelerating sporadically; (2) was paced traveling at least 45-mph in a 35-mph zone while at least 10 road construction workers were present; (3) failed to negotiate a curve; and (4) ran over two of the cones dividing lanes in the construction zone. Additionally, the hearing officer made the following findings concerning Petitioner's behavior once stopped: (1) Petitioner exhibited slurred speech; (2) Petitioner admitted to drinking alcoholic beverages; (3) Officer Schuster smelled the odor of alcohol coming from Petitioner's breath; and (4) Petitioner exhibited six out of six signs of possible impairment when performing the Horizontal Gaze Nystagmus exercise, six out of eight signs of possible impairment when performing the Walk and Turn exercise, and performed poorly on the One Leg Stand exercise.

Jurisdiction

Pursuant to sections 322.2615(13) and 322.31, Florida Statutes, Petitioner seeks review of the hearing officer's order affirming the suspension of his driving privileges. This Court has jurisdiction to consider the Petition for Writ of Certiorari pursuant to Florida Rule of Appellate Procedure 9.030(c)(3).

Standard of Review

A circuit court conducting first-tier certiorari review of an administrative decision is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence. *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1170 (Fla. 2017) [42 Fla. L. Weekly S85a]. The Court is not permitted to weigh or reweigh the evidence upon review of the agency order. *Department of Highway Safety and Motor Vehicles v. Smith*, 687 So. 2d 30, 32 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("A circuit court must review the agency order under the standard of competent substantial evidence and is prohibited from weighing or reweighing the evidence.") Here, Petitioner only challenges whether the administrative findings and judgment were supported by competent, substantial evidence.

Analysis

I. Lawfulness of Stop

Petitioner alleges the lawfulness of the initial stop was not proven by competent, substantial evidence. Specifically, Petitioner argues the record indicates Officer Schuster determined Petitioner was speeding by conducting a "vehicle pace." However, Petitioner argues Officer Schuster's report does not specify how the pacing occurred, and there was no evidence that the speedometer in Officer Schuster's patrol vehicle was calibrated. Additionally, Petitioner argues the record does not contain any details regarding Officer Schuster's training and/or experience in the visual estimation of speed and/or pacing of vehicles to determine speed.

In considering the lawfulness of a stop, the test is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop. *Dobrin v. Florida Dept. of Highway Safety & Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S80a]. Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop. *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (citing *State v. Carrillo*, 506 So. 2d 495 (Fla. 5th DCA 1987)); *Esteen v. State*, 503 So. 2d 356 (Fla. 5th DCA 1987). "The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of

criminal behavior." *Ndow v. State*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a] (quoting *DeShong*, 603 So. 2d at 1352).

This Court finds that based upon the record evidence, Officer Schuster had an objectively reasonable basis for stopping Petitioner. After observing Petitioner's vehicle revving its engine prior to accelerating quickly, then braking and accelerating sporadically, Officer Schuster "was able to pace behind the vehicle" and "confirmed it was traveling, at the very least, 45mph in a 35mph zone." P.A. 08-09. Officer Schuster reported that he observed the erratic driving and speeding while following Petitioner northbound on Ponce De Leon Blvd. at King St. to Malaga St. to W. Castillo Dr., and ultimately to Old Mission Ave. where he stopped Petitioner. The Court finds Officer Schuster's report provides sufficient information supporting his conclusion that Petitioner was speeding. Regarding Petitioner's allegation that a speedometer calibration certificate was not placed into the record, as the Department details in its response, no such certificate is required at a hearing conducted pursuant to section 322.2615. In addition to speeding, Officer Schuster observed Petitioner hit a curb and run over two traffic cones. The Court finds this observation alone would have provided an objectively reasonable basis for stopping Petitioner. *See e.g., Baden v. State*, 174 So. 3d 494, 497 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1913b] ("Erratic driving suffices to establish a founded suspicion and to validate a DUI stop." (citing *DeShong*, 603 So. 2d at 1352)). For these reasons, the Court concludes that the hearing officer's findings are supported by competent substantial evidence, and the Petition for Writ of Certiorari will be denied.

Accordingly, it is:

ORDERED AND ADJUDGED that:

The Petition for Writ of Certiorari is hereby DENIED.

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[1]The exhibits to the Petitioner's Appendix will hereinafter be denoted as "P.A. ___."

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[3]Petitioner's attorney objected to Exhibit 1 on the basis that it was illegible.

* * *

Municipal corporations—Code enforcement—Administrative order—Appeals—Discussion of appropriate standard of review for appeals of code enforcement board or special magistrate orders under § 162.11—Reversal is required under either first-tier certiorari test or broader plenary appeal standard where magistrate applied prior version of town code rather than revised code—Remand for new hearing

114 EAST OCEAN LLC, Appellant, v. TOWN OF LANTANA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County. Case No. 50-2023-CA-013685-XXXX-MB. Division AY. February 20, 2025. On Appeal from the Town of Lantana Code Enforcement Special Magistrate. Counsel: Christopher Y. Mills, West Palm Beach; and Clive N. Morgan, Jacksonville, for Appellant. Jeffery Jones and R. Max Lohman, West Palm Beach, for Appellee.

(PER CURIAM.) Pursuant to section 162.11, Florida Statutes, 114 East Ocean LLC, ("Appellant") seeks review of the Order Finding Violation rendered by the Code Enforcement Special Magistrate for the Town of Lantana ("Town") which found Appellant in violation of Section 10.5-23(a) of the Town of Lantana Code of Ordinances ("Town Code"). Appellant is the property owner of 114 East Ocean, Lantana FL ("The Property").

This Court's jurisdiction arises from section 162.11, Florida Statutes, which allows the final administrative orders of a code enforcement board or special magistrate to be appealed to the circuit court. There is, however, some controversy as to the appropriate standard of review for an appeal under section 162.11. The Fifth District Court of Appeal held in *Central Florida Investments, Inc. v. Orange County*, 295 So. 3d 292 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a] that the standard for an appeal under section 162.11 is different from the tree-pronged test under the courts' certiorari jurisdiction.[1]

In *Central Florida Investments*, the district court noted that section 162.11's language provides for a plenary appeal and not an appeal via petition for writ of certiorari. *Id*. at 294. Because a "review by certiorari is not the same as review by appeal," the court held that section 162.11 provides for a greater level of judicial scrutiny on appeal then the standard three-pronged first-tier certiorari test. *Id*. at 294-95. The standard set forth in *Central Florida Investments* is a de novo review of all legal issues before the lower tribunal since a plenary appeal allows the reviewing court to correct all jurisdictional, procedural, and substantive errors. *Id*. at 295. However, while the Court should apply a de novo review of legal issues, section 162.11 does not allow the Court to reweigh the facts or otherwise make new factual findings that differ from the administrative body. § 162.11, Fla. Stat.; *see also M.T. v. Agency for Persons with Disabilities*, 212 So. 3d 413, 415 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1956b] (applying deferential standard of review to factual findings in a plenary review of an administrative decision). However, the Court need not reach the decision of the appropriate standard of review in the instant case, as the error in the instant case requires reversal of the Town's decision under the three prong standard or the broader standard set forth in *Central Florida Investments*, 95 So. 3d at 294.

Section 10.5-23(a) was revised by the Town on May 23, 2022. The prior code stated in part "all required setback areas shall be landscaped, planted and maintained with a combination of sod, flowerbeds, shrubs, hedges, and ground cover" and included mentions of "Xeriscape" ("Prior Code"). The revised code section states in part "All swales shall be maintained in accordance with Chapter 17 of the Town Code of Ordinances" ("Revised Code"). In the instant case, the Town, at both hearings, relied on the Prior Code. The Town Assistant Attorney, Jeffrey Jones, quoted a portion of the Prior Code at the July 20, 2023 hearing. The Prior Code was also introduced at the July 20, 2023 hearing as Exhibit Four by Appellant. At the August 17, 2023 hearing, the Code Enforcement Supervisor, Sam Archer also quoted a portion of the Prior Code. Both the Town Assistant Attorney and Appellant cited to the Prior Code Section language as the Code Section relevant to the violation. The Special Magistrate, the Town Assistant Attorney and the Town Code Enforcement Officers did not mention the Revised Code at any point in the hearings. At the end of the second hearing, the special magistrate found a violation, specifically mentioning that the code "may encourage" Xeriscape but the Property did not "meet the criteria" of the code which "as stated in the testimony" required "the combination of solid flowerbeds, shrubs, hedges and ground cover." The Court notes that the record lacks any indication that the Town considered or applied the Revised Code in the instant case.

This is a clear violation of the essential requirement of law as the Town applied the wrong law at the code enforcement hearings by applying the Prior Code to the violation. It is widely acknowledged that the application of the incorrect law is a violation of the essential requirements of law while a misapplication or misinterpretation of the correct law is not. *See Manatee County v. City of Bradenton*, 828 So. 2d 1083 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2320a] ("Because Manatee County did not demonstrate that the circuit court applied the wrong law, but rather argued that it misapplied the correct law, the petition for writ of certiorari is denied."). As the Final Order relies on the testimony introduced at the hearings and utilizes the language of the Prior Code, the Final Order is clearly erroneous under the three prong standard of review or under the broader standard of review. The Court compares the instant facts to those of *Hernandez-Canton v. Miami City Com'n*, 971 So. 2d 829, 831 (Fla. 3d DCA 2007) [32 Fla.

L. Weekly D2473b]. In *Hernandez-Canton,* the parties disputed which version of the code should apply. The court held that the city commission had applied the incorrect law by applying the old version of the code and remanded the case for further proceedings. The city commission again applied the incorrect law and the case was again remanded to apply the correct version of the code. *Id*.

Additionally, part of a meaningful opportunity to be heard is the opportunity to present evidence relevant to the violation alleged. *See Department of Highway Safety and Motor Vehicles v. Futch*, 142 So.3d 910 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1403a] (The procedural due process rights afforded a driver when seeking review of a license suspension include the right to present evidence relevant to the issues); *Kupke v. Orange County*, 838 So.2d 598, 599 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a] (holding that in quasi-judicial proceedings by administrative bodies, the parties must be able to present evidence, cross examine witnesses and be informed of all the facts upon which the commission acts). When the lower court applies the incorrect law to the case, courts have reversed the decision and ruled that the Appellant be afforded an opportunity to present new evidence. *Hernandez-Canton,* 971 So.2d at 832. Appellant was unable to present evidence or make argument as to whether the Property met the requirements of the Revised Code. This matter must therefore be remanded for further proceedings to determine whether Appellant violated Section 10.5-23(a) of the Town of Lantana Code of Ordinances as revised.

Accordingly, the Order Finding Violation is **REVERSED** and the matter is **REMANDED** for proceedings in accordance with this opinion. (WEISS, BONAVITA, and COLLINS, JJ., concur.)

[1]It may be argued that there is a district court split and that the Court need not apply the *Central Florida Investments* case. *See Sarasota Cnty. v. Bow Point on Gulf Condo. Devs., LLC*, 974 So. 2d 431 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2551b]. However, the district court's statement that the circuit court should have applied a certiorari standard of review is dictum and does not have precedential value. *See Soto v. State*, 711 So. 2d 1275, 1276 n.2 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1236a]. Second, the *Bow Point* decision noted that the circuit court's actual mistake was reweighing the evidence which, as discussed above, is inappropriate even under the standard presented in *Central Florida Investments*. *See Bow Point*, 974 So. 2d at 432 n.2.

* * *

AUGUSTIN PHILIPPE, Plaintiff, v. CITY OF SUNRISE FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24015394. Division AP. February 25, 2025.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated January 14, 2025. Appellant was directed by this Court to file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 30 days. As of the date of this Order Appellant has failed to comply with this Court's January 14, 2025, Order.

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

* * *

ATLAS INVESTMENTS, LLC, Appellant, v. TOWN OF SOUTHWEST RANCHES, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24-009617. L.T. Case Nos. 2024-089, 2024-090, 2024-091, 2024-092. February 20, 2025. Appeal from Atlas Investments, LLC, Harry Hipler, Special Magistrate. Counsel: Robert C. Volpe, Holtzman, Vogel, Baran, Torchinsky, and Josefiak, PLLC, Tallahassee, for Appellant. Richard J. DeWitt, Government Law Group, PLLC, Fort Lauderdale, for Appellee.

OPINION

[Lower court order at Fla. L. Weekly Supp. 3301TOW1]
[Order on Motion for Rehearing at Fla. L. Weekly Supp. 3301TOW2]

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the Final Order Imposing Municipal Code Enforcement Fine and Lien and Administrative Fine on June 10, 2024, and the Final Order Denying Respondent's Motion for Rehearing, Reconsideration and/or Clarification on July 28, 2024 are hereby **AFFIRMED**. (BOWMAN, ALPERSTEIN and MOON, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Contracts—Construction—Roof installation—Evidence—Spoliation— Sanctions—Homeowner who sought damages from roofing contractor for breach of contract, slander of title, and fraudulent construction lien removed contractor's ability to defend itself when homeowner replaced allegedly deficient roof during pendency of suit without prior notice to contractor—Homeowner's claims and defenses dismissed—Default entered against homeowner as to roofing contractor's breach of contract counterclaim—Homeowner may still defend against construction lien foreclosure

MIA TORRANCE, a/k/a MAI TORRANCE, Plaintiff/Counter-Defendant, v. AMERICAN COMMERCIAL CONSTRUCTION & DEVELOPMENT, INC., Defendant/Counter-Plaintiff. Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 22-003685-CI. December 9, 2024. Thomas Ramsberger, Judge. Counsel: Peter Andrews, Law Office of Peter Andrews, Saint Petersburg, for Plaintiff/Counter-Defendant. Jason Lambert, Hill Ward Henderson, Tampa, for Defendant/Counter-Plaintiff.

ORDER GRANTING IN PART AND DENYING IN PART AMERICAN COMMERCIAL CONSTRUCTION & DEVELOPMENT, INC'S MOTION TO DISMISS MAI TORRANCE'S CLAIMS AND DEFENSES DUE TO SPOLIATION OF EVIDENCE AND FOR ENTRY OF DEFAULT

THIS CAUSE came before the Court on Defendant/Counter-Plaintiff, American Commercial Construction & Development, Inc.'s, ("ACCD") Motion to Dismiss Mai Torrance's Claims and Defenses Due to Spoliation of Evidence and for Entry of Default ("Motion") and the Court, having reviewed the Motion, the evidence in support of the Motion, the Court file, and having heard the argument of counsel and being otherwise advised in the premises, the Court hereby finds as follows:

Background

1. This lawsuit arises from ACCD's installation of a new roof at Ms. Torrance's home, her subsequent claims of deficient workmanship, and ACCD's recording of a construction lien against the home.

2. On August 8, 2022, Ms. Torrance filed her Amended Complaint in this lawsuit, alleging the following: (1) a claim for breach of contract/fraud that sought damages for an allegedly deficiently installed roof, (2) a claim for slander of title that sought damages as a result of the claimed slander, and (3) a claim seeking damages as a result of an allegedly fraudulent lien recorded against her home by ACCD.

3. The underlying basis for Ms. Torrance's claims are that the roof installed by ACCD was somehow deficient, as reflected in both the allegations of her amended complaint, and her deposition testimony, as follows:

a. Alleging that ACCD failed to comply with the building code in constructing the roof. Am. Compl. ¶ 7(B)

b. Negligently supervising the work, including not replacing all existing shingles, replacing plumbing vents, installing roofing to sidewalls, and inspecting and resealing the existing step flashing. Am. Compl. ¶ 7(C)

c. Failing to install a vent system in the roof. Am. Compl. ¶ 7(D)

d. Improperly overlaying underlayment, not properly sealing it, uneven blue lines on the edge of the black underlayment, sloppy and uneven application of asphalt, poorly sealed asphalt, shingles installed over old debris, shingles installed were bumpy, sloppy, uneven, and poorly sealed, holes and gaps in flat roof area holding water, flat roof's membrane does not reach the exterior wall. Am. Compl. ¶ 7(E).

e. The roof installation was a big mess and a big commotion. Torrance Tr. at 19:23-25

f. Underlayment not installed smoothly. Torrance Tr. at 20:1-2.

g. The completed roof was "not right." Torrance Tr. at 21:9.

h. The flat roof membrane does not match up to the exterior wall on the roof. Torrance Tr. at 21:13-14.

i. There was a hole in the completed roof. Torrance Tr. at 27:11-16.

j. The whole roof was a big mess. Torrance Tr. at 28:7-9, 11-20.

4. In response, ACCD filed a counterclaim, alleging (1) breach of contract by Ms. Torrance, (2) alternative counts of unjust enrichment and quantum meruit, and (3) a claim to foreclose its amended construction lien against her home. In support of these claims, ACCD alleged that it had fully and properly installed the roof at Ms. Torrance's property.

5. ACCD also filed an answer and affirmative defenses in response to Ms. Torrance's amended complaint, denying that it had deficiently installed the roof at her home and asserting compliance with the Florida building code under § 553.84, *Florida Statutes*, and failure to comply with Chapter 558, *Florida Statutes*, among others, as defenses to the amended complaint.

6. Ms. Torrance's affirmative defenses to ACCD's counterclaim alleged that ACCD failed to install a functioning roof on her home.

7. In support of the Motion, ACCD filed (1) the deposition transcript of ACCD's owner, Keith Powers, (2) the deposition transcript of Ms. Torrance, (3) an affidavit of Mr. Powers with several exhibits attached, and (4) an affidavit of Thomas Tafelski with several exhibits attached. All four of these documents were accepted into evidence by the Court without objection by Ms. Torrance's counsel.

8. In May 2023, while this lawsuit was still pending, Torrance replaced the roof. Torrance Tr. at 43:11-44:22; 66:18-19; 81:14-16.

9. Neither Torrance nor her counsel gave notice to or otherwise informed ACCD that she was having the roof replaced. Torrance Tr. at 43:16-44:22; Powers Aff. at ¶ 18.

10. ACCD's expert Thomas Tafelski provided an affidavit indicating that it would be impossible for him to provide an opinion as to the correctness or code compliance of ACCD's installation of the roof at Ms. Torrance's home, specifically indicating the following:

a. In order to given an opinion regarding the condition of the work performed by ACCD, code compliance, and the need for any repairs, I must first be able to physically observe the roof at the Property. This includes going onto the roof, examining the materials used, determining whether any maintenance has been performed, and taking measurements and pictures of the condition of the roof and any claimed or apparent deficiencies. If there are claimed deficiencies in the installation of the roof that would only exist or be observable underneath the finished surface of the roof (i.e. underneath the shingles), then destructive testing must be done to temporarily remove the finished surface of the roof.

b. I then take the observed conditions of the roof and compare them to the Florida Building Code requirements to determine if the conditions meet the minimum requirements of the Florida Building Code.

c. I then also take the observed conditions and determine if they comport with industry standard practices in the area where the roof is installed, in this case, Pinellas County, Florida.

d. In this case, my knowledge of the industry standard practices in Pinellas County, Florida is based on my own experience and training as a licensed roofing contractor in Pinellas County, Florida since 1988, my experience and training as a licensed home inspector in Pinellas County, Florida since 2012, and having installed or inspected more than 10,000 roofs in Pinellas County, Florida.

e. Finally, I compare the performed work to the requirements of the contract to see if it conforms to the requirements of the contract.

f. Here, it is impossible to evaluate the roof as installed by ACCD and the claimed deficiencies, because the roof was removed and replaced in its entirety without the ability to inspect prior to its removal.

g. The only way to evaluate these deficiencies and determine (1) if they exist, (2) if any of them are violations of the Florida Building Code, (3) whether they could be repaired, and (4) any other mitigating circumstances is to physically inspect them. Without them, it is impossible to give an opinion that ACCD properly installed the roof in compliance with the Florida Building Code, or that any claimed deficiencies could have been repaired, rather than requiring the whole roof to be replaced.

h. I have been provided with all of the pictures produced by Ms. Torrance in discovery in this lawsuit. Those are attached hereto as Exhibit A. While some of those pictures purport to identify deficiencies in the roof, it is impossible to tell the scope of the deficiency or to determine if it is an issue with ACCD's workmanship or a condition caused by something else.

i. Moreover, none of the conditions listed above . . . are shown in the pictures attached to this affidavit. In fact, some of the pictures purporting to show a deficient condition, actually appear to the show the condition in a state of demolition already. For example, one photograph says "Previous roof install the underlayment didn't go to the wall," but it is apparent from the picture that demolition has already begun. It is impossible to tell if the statement on the picture or the claimed deficiency is accurate.

j. The pictures of the roof also do not show the underlayment or unevenness in the shingles. The very issues that Ms. Torrance claims are deficiencies are not observable in her pictures produced in discovery and are not able to be inspected now because the roof has been removed and destroyed.

k. If I were able to inspect the roof as installed by ACCD, I would be able to testify as to whether any of the conditions listed [above] existed, if so, whether any of them fell outside of compliance with the Florida Building Code, and, whether replacement of the roof was necessary to remedy any of them. Because the roof has been removed, and because the pictures provided are inadequate, I cannot.

Legal Standard

11. "Sanctions may be appropriate when a party has spoliated, lost, or misplaced evidence." *Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053, 1057 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1963a]. "Florida courts may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence." *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015) [40 Fla. L. Weekly S432a]; *Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629, 630 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1566c]. Dismissal of a case is an appropriate sanction where the loss of evidence renders the opposing party completely unable to proceed with its case or defense. *See Fleury v. Biomet, Inc.*, 865 So. 2d 537, 539 (Fla. 2d DCA 2003) [29 Fla. L. Weekly D43b]. Moreover, regardless of intent, once the evidence is gone, if it effectively precludes one party from prosecuting its claims or defenses, sanctions are appropriate. *See DePuy, Inc. v. Eckes*, 427 So. 2d 306, 308 (Fla. 3d DCA 1983).

12. Here, it is undisputed that the roof installed by ACCD existed at the time this lawsuit was filed and that it was within the sole control of Ms. Torrance when she replaced it. She also replaced the roof without any prior notice to ACCD. The removal of the roof without prior notice removed the ability of ACCD to defend itself in this lawsuit.

Accordingly, and for the reasons stated on the record during the hearing, which are hereby incorporated into this order by reference,[1] it is hereby ORDERED and ADJUDGED as follows:

13. ACCD's Motion is hereby GRANTED IN PART as follows: Ms. Torrance's claims and defenses asserted in this case are dismissed and default hereby entered against her as to ACCD's breach of contract claim. ACCD's unjust enrichment and quantum meruit claims are moot as a result.

14. ACCD's Motion is hereby DENIED IN PART as follows: notwithstanding the foregoing, default is not entered against Ms. Torrance as to ACCD's lien foreclosure claim and Ms. Torrance shall be allowed to defend herself against ACCD's claim for lien foreclosure.

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[1]A copy of the transcript of this hearing has been filed with the Court on December 3, 2024.

* * *

Liens—Construction—Torts—Slander of title—Summary judgment entered in favor of roofing contractor on homeowner's claim for slander of title based on contractor's recording of construction lien against home—Homeowner failed to demonstrate that she suffered damages from alleged slander where she made no attempts to sell, refinance, or borrow money against property after lien was recorded—Homeowner may, nonetheless, defend against construction lien foreclosure

MIA TORRANCE, a/k/a MAI TORRANCE, Plaintiff/Counter-Defendant, v. AMERICAN COMMERCIAL CONSTRUCTION & DEVELOPMENT, INC., Defendant/Counter-Plaintiff. Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 22-003685-CI. December 9, 2024. Thomas Ramsberger, Judge. Counsel: Peter Andrews, Law Office of Peter Andrews, Saint Petersburg, for Plaintiff/Counter-Defendant. Jason Lambert, Hill Ward Henderson, Tampa, for Defendant/Counter-Plaintiff.

ORDER GRANTING IN PART AND DENYING IN PART AMERICAN COMMERCIAL CONSTRUCTION & DEVELOPMENT, INC'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant/Counter-Plaintiff, American Commercial Construction & Development, Inc.'s, ("ACCD") Motion for Summary Judgment ("Motion") and the Court, having reviewed the Motion, the evidence in support of the Motion, the Court file, and having heard the argument of counsel and being otherwise advised in the premises, the Court hereby finds as follows:

Background and Summary Judgment Evidence

1. This lawsuit arises from ACCD's installation of a new roof at Ms. Torrance's home, her subsequent claims of deficient workmanship, and ACCD's recording of a construction lien against the home.

2. On August 8, 2022, Ms. Torrance filed her Amended Complaint in this lawsuit, alleging the following: (1) a claim for breach of contract/fraud that sought damages for an allegedly deficiently installed roof, (2) a claim for slander of title that sought damages as a result of the claimed slander, and (3) a claim seeking damages as a result of an allegedly fraudulent lien recorded against her home by ACCD.

3. The claim for breach of contract/fraud listed multiple claimed deficiencies in the roof, including failure to comply with applicable building codes.

4. ACCD moved for summary judgment on all of Ms. Torrance's claims as follows:

a. Slander of title because ACCD's amended claim of lien was not false and Torrance had suffered no damages as a result of it.

b. Fraudulent lien because ACCD's amended claim of lien was not willfully exaggerated.

c. Fraud because it failed to state a cause of action separate from the Ms. Torrance's breach of contract claim.

d. Breach of contract because Torrance waived those claims and failed to comply with conditions precedent.

5. In support of the Motion, ACCD filed (1) the deposition transcript of ACCD's owner, Keith Powers, (2) the deposition transcript of Ms. Torrance, (3) an affidavit of Mr. Powers with several exhibits attached, and (4) an affidavit of Thomas Tafelski with several exhibits attached. All four of these documents were accepted into evidence by the Court without objection by Ms. Torrance's counsel.

6. At the hearing on the Motion, which occurred on the same day as the hearing on ACCD's Motion for to Dismiss Mai Torrance's Claims and Defenses Due to Spoliation of Evidence and for Entry of Default ("Motion to Dismiss"), but after the Court had already ruled on the Motion to Dismiss, ACCD only presented argument to the Court regarding Ms. Torrance's slander of title claim.

7. With regard to that argument, the summary judgment evidence before the Court indicated that Ms. Torrance purchased the property that is the subject of this lawsuit in 2018, had continuously owned it, and had never attempted to sell, refinance, or borrow money against the property following the installation of the roof by ACCD. Torrance Tr. at 8:3-11, 69:6-15.

Summary Judgment Standard

8. Under the federal standard, summary judgment is appropriate if the moving party "show[s] that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(a)). The moving party bears the initial burden of showing the court that there are no genuine disputes of material fact that should be decided at trial. *Id.* at 323.

9. If the movant adequately supports its motion, the burden then shifts to the nonmoving party "to show that *specific facts exist that raise a genuine issue* for trial." *Dietz v. SmithKline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C602a] (emphasis added)

10. "A summary judgment movant under the federal standard need not preemptively tackle all of the nonmovant's affirmative defenses" *G & G In-Between Bridge Club Corp. v. Palm Plaza Associates, Ltd.*, 356 So. 3d 292, 299 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D275a].

11. The Court may grant summary judgment on any claim or defense, or part of a claim or defense, on which summary judgment is sought. Fla. R. Civ. P. 1.510(a). Moreover, the Court, even if it does not grant all relief requested, "may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case. Fla. R. Civ. P. 1.510(g)

Ms. Torrance's Slander of Title Claim

12. Slander of title arises upon the malicious publication of a falsehood concerning title which impairs the vendibility of the property." *Miceli v. Gilmac Developers, Inc.*, 467 So. 2d 404, 406 (Fla. 2d DCA 1985) *citing Old Plantation Corp. v. Maule Indus., Inc.*, 68 So.2d 180, 181 (Fla. 1953)

13. "[R]ecovery in an action for slander of title requires proof that a false and malicious statement was made in disparagement of the plaintiff's title to the property in question and caused him/her/it damage." *Ridgewood Utilities Corp. v. King*, 426 So. 2d 49, 50 (Fla. 2d DCA 1982).

14. Put another way, to prove a claim for slander of title, the plaintiff must prove that "(1) a falsehood (2) has been published, or communicated to a third person (3) when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff and (4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and (5) special damages are proximately caused as a result of the published falsehood. *Trigeorgis v. Trigeorgis*, 240 So. 3d 772, 775 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D663b].

15. Damages, for the purposes of slander of title, typically require evidence of diligent, yet unsuccessful attempts to sell property, lost sales, or higher interest rates as a result of the recorded document. *See e.g. Haisfield v. ACP Fla. Holdings, Inc.*, 629 So.2d 963, 966 (Fla. 4th DCA 1993); *Cont'l Dev. Corp. of Florida v. Duval Title & Abstract Co.*, 356 So. 2d 925, 928 (Fla. 2d DCA 1978); *Atkinson v. Fundaro*, 400 So. 2d 1324, 1326 (Fla. 4th DCA 1981).

16. Here, the Court finds that Plaintiff has not demonstrated any damages related to the claimed slander of title, and therefore ACCD has met its burden to establish that there is no genuine issue of material fact related to Ms. Torrance's slander of title claim.

For the reasons stated on the record during the hearing, which are hereby incorporated into this order by reference,[1] it is hereby ORDERED and ADJUDGED as follows:

17. ACCD's Motion is hereby GRANTED IN PART as follows: summary judgment is hereby entered in favor of ACCD and against Ms. Torrance as to Ms. Torrance's slander of title claim.

18. ACCD's Motion is hereby DENIED IN PART as follows: The Court declines to rule on the other arguments raised in ACCD's Motion because they were not argued during the hearing and some or all of them may be moot based on the Court's ruling on ACCD's Motion to Dismiss.

19. Nothing in this Order shall be construed as modifying Ms. Torrance's ability to defend against ACCD's construction lien foreclosure claim as set forth in the Court's Order on ACCD's Motion to Dismiss.

[1]A copy of the transcript of this hearing has been filed with the Court on December 3, 2024.

* * *

Insurance—Homeowners—Bad faith—Unfair claim settlement practices—Notice of claim—Dismissal is appropriate where amended complaint failed to allege ultimate facts supporting bad faith claim—Civil remedy notice that identifies every person involved in handling claim did not satisfy requirement that notice identify persons most responsible for or knowledgeable of facts giving rise to claim—Further, notice alleged breach of statute relating to personal injury protection policies that is inapplicable to homeowners policy—Dismissal of amended complaint is required where CRN was invalid—Claim for breach of fiduciary duty is subsumed in counts for bad faith—Complaint dismissed with prejudice

SEAN RAULERSON and MARY RAULERSON, Plaintiffs, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022-31345-CICI. Division 31. March 6, 2025. Dennis Craig, Judge. Counsel: Kevin George, Altamonte Springs, for Plaintiffs. Reed W. Grimm, Taylor, Day, Grimm & Boyd, Jacksonville, for Defendant.

ORDER ON DEFENDANT STATE FARM FLORIDA INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT AND ALTERNATIVE MOTION TO STRIKE

This cause came on to be heard on the Defendant State Farm Florida Insurance Company's ("State Farm") motion to dismiss the Plaintiffs, Sean Raulerson and Mary Raulerson's ("Plaintiffs"), Amended Complaint for failure to state a cause of action, or alternatively striking certain irrelevant allegations in Count III pursuant to Fla. R. Civ. P. 1.110 and 1.140(b) and (f). The Court having reviewed the Amended Complaint and the parties' submissions in support of and opposition to the motion, having heard the argument of counsel at the hearing held February 20, 2025, and being otherwise fully advised in the premises, finds as follows:

Facts and Procedural History

The Court deems all factual allegations in the Amended Complaint to be true for purposes of deciding the present motion. This case arises out of a property damage claim submitted under homeowners' insurance policy number 80-S8-5262-8 (the "Policy") issued to Plaintiffs by State Farm (Am. Compl. ¶ 4). The original Complaint was dismissed on State Farm's motion by an Order entered June 10, 2024, and Plaintiffs were permitted to file the Amended Complaint. That order directed the Plaintiffs to file the Amended Complaint within 14 days, or by June 24, 2024.

Plaintiffs had filed Motions for Extension of time, and later the Amended Complaint was filed on November 5, 2024. Like the original Complaint, the Amended Complaint seeks to state a cause of action for "Violation of Section §624.155, Florida Statutes" (Count I), "Violation of Section §626.9541(1)(i), Florida Statutes" (Count II) and Breach of Fiduciary Duty (Count III). However, it differs from the original Complaint as follows:

1. The phrase "failure to timely adjust the loss" has been added to paragraph 8.

2. Paragraph 18 has been added, and states in full "Defendant was provided with a Civil Remedy Notice ("CRN") with the Florida Department of Financial Services and more than 60 (60) days after the CRN was filed Defendant's liability for coverage and the extent of damages was determined."

3. Paragraph 27 has been added, and states in full "In the alternative, if Count I and Count II fails (sic) for any reason, Plaintiff pleads this Count for Breach of Fiduciary Duty."

State Farm asserts that these additions are not ultimate facts, and that the Amended Complaint still fails to allege ultimate facts showing that State Farm committed any violation of §§624.155 or 626.9541, or that the Plaintiffs are entitled to relief on the grounds asserted. State Farm further asserts that the allegations of the Amended Complaint as to the purported acts or omissions that are asserted as the basis for the claims that State Farm acted in violation of §§624.155 and 626.9541 Fla. Stat., remain restatements of statutory provisions, opinions and conclusions of law that are insufficient to state a cause of action under Rule 1.110. Plaintiffs assert that the causes of action are sufficiently alleged with ultimate facts in the Amended Complaint.

State Farm additionally argues that the civil remedy notice ("CRN") attached to the Amended Complaint as its Exhibit B fails to provide the specificity required by § 624.155, Fla. Stat., fails to specifically identify the person or persons representing the insurer who are most responsible for or knowledgeable of the facts giving rise to the allegations in the notice, and cites inapplicable statutory provisions. Plaintiffs argue that the CRN provides adequate notice under Florida law. Finally, State Farm asserts that the claim for breach of fiduciary duty in Count III is subsumed in the claims sought to be alleged in Counts I and II and does not exist separately as a matter of Florida law. The Court further notes that the Plaintiffs seek to bring a claim for a purported violation of §624.155(1)(b), Fla. Stat., but that §624.1551, Fla. Stat. requires an adjudicated breach of contract for a claim for a violation of §624.155(1)(b) to lie.

Conclusions of Law

Florida Rule of Civil Procedure 1.110(b) requires a complaint to set forth "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." "The Complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged." *Barrett v. City of Margate,* 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2398a] (citing *Messana v. Maule Indus.,* 50 So. 2d 874, 876 (Fla. 1951). "Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." *Horowitz v. Laske,* 855 So. 2d 169, 173-74 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2052b]. "It is insufficient to plead opinions, theories, legal conclusions or argument." *Barrett,* 743 So. 2d at 1163. Mere conclusions are insufficient to satisfy the law's requirement that the Complaint set forth ultimate facts supporting each element of the cause of action. *Beckler v. Hoffman,* 550 So. 2d 68 (Fla. 5th DCA 1989).

The Court finds that Counts I, II and III of the Plaintiffs' Amended Complaint do not comply with the requirements of Fla. R. Civ. P. 1.110 as interpreted by the authorities cited above, the additions quoted above do not meet the rule's requirements, and there is an insufficient factual basis alleged for each count. The Amended Complaint does not allege ultimate facts to establish a violation of §624.155, Fla. Stat. or of the provisions of §626.9541, Fla. Stat. incorporated into §624.155. The allegations of the general language of the statutes do not inform State Farm as the defendant of what facts are proposed to be proved to establish Plaintiffs' bad faith claims. Additionally, the Court finds that the Amended Complaint fails to sufficiently recite a factual basis for the damages claimed. Dismissal is therefore appropriate on that basis.

Regarding the CRN, this first party claim in which Plaintiffs assert State Farm acted in bad faith relative to their claim for benefits under their own insurance policy. A first party claim exists only by virtue of §624.155, Fla. Stat. as there is no common law cause of action for first party bad faith. *Macola v. Government Employees Ins. Co.,* 953 So. 2d 451, 457 (Fla. 2006) [31 Fla. L. Weekly S690b]. As a statute in derogation of the common law, §624.155 is strictly construed. *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.,* 753 So. 2d 1278, 1283 (Fla. 2000) [25 Fla. L. Weekly S172a]. Florida law expressly requires a CRN must "state with specificity," among other things, the facts and circumstances giving rise to the violation *see,* §624.155(3)(b), Fla. Stat. An adequate CRN must specifically state 1) the statutory provision that the insurer allegedly violated, the facts and circumstances giving rise to the violation, 3) the name of any individual involved in the violation, and 4) specific policy language that is relevant to the violation.

The approved form of the CRN calls for the party giving notice to identify the person or persons representing the insurer who are most responsible for/knowledgeable of the facts giving rise to the allegations in the notice. In that regard, the Plaintiffs' CRN states as follows:

Clinton M. Bolton, Javon Martin, and all State Farm claims adjusters, employees, representatives, agents, vendors, and/or engineers who handled the claim.

The notice fails to identify those person(s) "most responsible for" or "knowledgeable of" the facts giving rise to the claim. *See, Tappert v. Florida Family Ins. Co.,* Case No. CACE-22-007257, 2022 WL 17851884 (Fla. 17th Cir. Ct. Dec. 14, 2022) [30 Fla. L. Weekly Supp. 618b] ("Identifying every person involved in the claim does not satisfy the specificity requirement of § 624.155(3)(b)."). *See, also, Pierce v. State Farm Fla. Ins. Co.,* No. 22-CA-010376, 2023 WL 5572301, at *2 (Fla. 13th Cir. Ct. Aug. 21, 2023) ("The Court notes that the statement in Plaintiffs' CRN is narrower in that it includes only individuals from State Farm that were involved in the claim; however, it is a similar 'kitchen sink' approach and is not enough to satisfy the specificity requirement of §624.155(3)(b).")

The Plaintiffs' CRN also alleges a breach of §626.9541(1)(i)(3)(i), Fla. Stat, which it describes as "Unfair claim settlement practices." However, §626.9541(1)(i)(3)(i) relates to personal injury protection benefits in automobile insurance policies and provides separate administrative penalties and sanctions for violations as follows:

> Failing to pay personal injury protection insurance claims within the time periods required by s. 627.736(4)(b). The office may order the insurer to pay restitution to a policyholder, medical provider, or other claimant, including interest at a rate consistent with the amount set forth in s. 55.03(1), for the time period within which an insurer fails to pay claims as required by law. Restitution is in addition to any other penalties allowed by law, including, but not limited to, the suspension of the insurer's certificate of authority;

Accordingly, §626.9541(1)(i)(3)(i) is inapplicable to the Plaintiffs' claim under their homeowners insurance policy (Am. Compl. ¶ 4; Exh. A). The CRN was invalid when filed and Counts I and II of the Amended Complaint are required to be dismissed as a result.

In 2022, the Florida Legislature enacted §624.1551, Fla. Stat. That provision expressly precludes claims under §624.155(1)(b), Fla. Stat., *see,* Am. Compl. ¶¶ 17 and 19, against a property insurer unless a breach of the insurance contract has been established. Section 624.1551 as initially enacted provided as follows:

> Notwithstanding any provision of §624.155, a claimant must establish that the property insurer breached the insurance contract to prevail in a claim for extracontractual damages under §624.155(1)(b).

Here the Amended Complaint does not allege that State Farm breached its contract with the Plaintiffs; to the contrary, the claim was resolved through the contractually provided appraisal process. The Court finds that an appraisal award is not an adjudicated breach of contract required to satisfy the statute's requirements.

Count III of the Amended Complaint purports to state a cause of action for an alleged breach of fiduciary duty. However, in a first party action such as this, there is no claim for breach of fiduciary duty against the insurer. Under Florida law, the claim for breach of fiduciary duty in Count III is subsumed in the claims sought to be alleged in Counts I and II and does not exist separately as a matter of law. *See, e.g., Gov't Employees Ins. Co v. Prushansky,* Case No. 12-80556-CIV, 2012 WL 6103220, p.3 (S.D. Fla. Dec. 7, 2012), citing *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.,* 94 So. 3d 541 (Fla. 2012) [37 Fla. L. Weekly S395a]. No fiduciary relationship exists between an insurer who provides a homeowner's policy and the insured. *See Time Insurance Co., Inc. v. Burger,* 712 So. 2d 389, 391 (Fla. 1998) [23 Fla. L. Weekly S309a] ("unlike the fiduciary relationship existed in a third-party claim, the relationship between the [insured and insurer] is that of debtor and creditor"). The claim sought to be asserted in Count III therefore does not exist as a matter of law.

Dismissal With Prejudice

Generally, "leave to amend should not be denied unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile." *Life Gen. Sec. Ins. Co. v. Horal,* 667 So. 2d 967, 969 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D434a]. However, the right to amend a complaint is not infinite. Where amendment would be futile, it is not an abuse of discretion to deny amendment to a pleading. *Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank,* 592 So. 2d 302, 305 (Fla. 1st DCA 1992); *Kalmanson v. Lockett,* 848 So. 2d 374 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1257b]. Here, the allegations of the Amended Complaint are the same as the allegations of the original Complaint with the three additions quoted above, and the deficiencies of the original Complaint were not corrected with the amendment. It is therefore apparent that there are no additional ultimate facts to support the claims in Counts I and II, making further amendment futile. The CRN is inadequate and the amount contractually due has been paid. Additionally, the Amended Complaint was not filed within the time directed by the Court in the order dismissing the original Complaint. As to Count III, the claim asserted does not exist as a matter of law for the reasons outlined above. No further amendment could make a breach of fiduciary duty claim exist as to a first party insurance claim. *See, e.g., P.D.K., Inc. v. Madeline,* 291 So. 3d 134, 136 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D480e] (affirming denial of amendment where existing case law disposed of the legal theory that was the basis for the claim). Accordingly, it is therefore

ORDERED and ADJUDGED

1. Defendant State Farm Florida Insurance Company's motion to dismiss Plaintiffs' Amended Complaint is hereby granted, with prejudice.

2. Plaintiffs Sean Raulerson and Mary Raulerson shall take nothing by this action, and Defendant, State Farm Florida Insurance Company shall go hence without day.

3. The Court reserves jurisdiction for the entry of orders taxing attorneys' fees and costs upon an appropriate motion.

* * *

Insurance—Property—Insurer did not breach policy by paying its own determination of actual cash value of loss where insureds did not submit any competing ACV estimate prior to filing suit, but instead submitted estimate of replacement cash value for unperformed repairs under policy that provided that insurer was only liable for RCV damages once damaged property was actually repaired

AMY SMITH and MATTHEW SMITH, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 8th Judicial Circuit in and for Alachua County. Case No. 2023-CA-3587. Division L. February 6, 2025. George M. Wright, Judge. Counsel: Paul H. Green, Jr. Green Law Group, Jacksonville, for Plaintiffs. Shawn C. Haggerty, Andrew Biernacki Davis, Orlando for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTRY OF FINAL JUDGMENT IN FAVOR OF DFENDANT

THIS CAUSE having come before the Court at hearing on January 21, 2025 on Defendant's Motion for Final Summary Judgment, filed August 27, 2024 (hereinafter referred to as "Defendant's Motion"), and the Court having reviewed Defendant's Motion and Plaintiffs' Response thereto, filed December 23, 2024 (hereinafter referred to as "Plaintiffs' Response"), and all other relevant filings of record, and the Court having heard oral arguments from both parties' counsel and otherwise being fully advised in the premises, it is hereby:

ORDERED and **ADJUDGED** that Defendant's Motion is **GRANTED**.

The Court finds that Defendant has shown the nonexistence of any genuine dispute as to any material fact based on the record evidence and legal authority presented, and that all reasonable inferences to be drawn therefrom uncontrovertibly establish that Defendant is entitled to final judgment as a matter of law, for the following reasons:

1. Under Florida's newly adopted summary judgment standard,[1] the inquiry before the Court in ruling on Defendant's Motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986).

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 371, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). In Florida, the new Rule 1.510 "requires summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

law." *See, In Re: Amendments To Florida Rule Of Civil Procedure 1.510*, No. SC20-1490 (Dec. 31, 2020) [46 Fla. L. Weekly S6a] (per curiam) (internal quotations and citations omitted).

2. Under Florida law, an insurer may be entitled to summary judgment where an insured does not present a competing actual-cash-value ("ACV") estimate in a breach-of-contract action. *See, Goldberg v. Universal Prop. and Cas. Ins. Co.,* 302 So.3d 919 (Fla. 3d DCA 2017) [45 Fla. L. Weekly D2118b] ("While an insurer's unilateral determination of the cash value of a loss does not entitle it to summary judgment in the face of a competing estimate of damages, the insurer should not be deemed to have breached the contract where it accepted coverage and paid the only estimate it received of the actual cash value of the loss."); *Metal Products Co., LLC v. Ohio Sec. Ins. Co.,* 2022 WL 104618 (11th Cir. 2022) (affirming summary judgment for insurer and stating that "Ohio Security did not breach its contract with Metal Products . . . Metal Products [only] submitted an estimate that calculated the replacement cost damages to its buildings . . . The insurance policy states that no payment is made on a claim for replacement cost value '[u]ntil the lost or damaged property is actually repaired or replaced' . . . Because Metal Products made no repairs, Ohio Security was not obligated to pay the replacement cost value of the buildings."); *CMR Constr. & Roofing, LLC v. Empire Indemnity Ins. Co.,* 843 Fed. Appx. 189, 192 (11th Cir. 2021) (affirming summary judgment for insurer and stating "[t]he insurance policy provides that a claim for replacement cost value will not be paid '[u]ntil the lost or damaged property is actually repaired or replaced' . . . [Here,] Empire could not have breached the insurance policy based on the replacement cost value because the 'until and unless' provision has not been satisfied . . . Empire could not have breached by not paying CMR's estimated replacement cost value because CMR had not made any repairs covered by the policy . . . Nor could Empire have breached the insurance policy based on actual cash value because CMR did not and does not seek actual cash value.").

3. Here, Plaintiffs did not submit any "competing" ACV estimates prior to filing suit. Indeed, the record was devoid of any summary judgment evidence submitted by Plaintiffs disputing Defendant's claim valuation on an ACV basis. The only estimate submitted by Plaintiffs calculated damages at a replacement-cost-value ("RCV") basis. Under the plain language of the policy, however, Defendant was only liable for the RCV damages upon Plaintiffs incurring costs to repair the damaged property. There is no record evidence demonstrating such repairs were performed or costs incurred.

4. Therefore, because there is no genuine dispute of material fact as to whether Defendant breached the clear and unambiguous terms of the subject insurance policy contract, Defendant is entitled to final summary judgment.

5. Based on the foregoing, the Court finds that the undisputed material facts and record evidence conclusively establishes the non-existence of any genuine dispute of fact that the Defendant did not breach its insurance policy contract with Plaintiffs prior to the filing of this suit, and therefore, the Court hereby grants final summary judgment in favor of the Defendant and against the Plaintiffs.

WHEREFORE, the Court hereby enters final judgment in favor of the Defendant, AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, and against the Plaintiffs, AMY SMITH and MATTHEW SMITH; the Plaintiffs shall take nothing in this action, and the Defendant may go hence without delay; and the Court reserves jurisdiction on Defendant's entitlement to attorney's fees and costs pursuant to §768.79, §57.105, and/or §57.041, Fla. Stat. and applicable Florida law.

[1]Effective May 1, 2021, Florida's amended Rule 1.510 now adopts the federal summary judgment standard articulated by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (amongst two (2) other United States Supreme Court opinions) (citations omitted). *See specifically*, *In Re: Amendments To Florida Rule Of Civil Procedure 1.510*, No. SC20-1490 (Dec. 31, 2020) [46 Fla. L. Weekly S6a] (per curiam).

* * *

Torts—Negligence—Workers' compensation—Retaliation—Motion for summary judgment in forklift operator's action against employer for injuries suffered when pallet of tile fell from forklift—Summary judgment is not appropriate on negligence claim where plaintiff and employer presented conflicting evidence that created disputed issue of material fact—Summary judgment entered in employer's favor on count alleging retaliation for attempting to claim workers' compensation benefits where undisputed facts show that plaintiff advised manager that he was quitting to pursue other work, and plaintiff's testimony did not establish that he attempted to make workers' compensation claim or that he was fired for engaging in protected activity

ILITCH BROWN, Plaintiff, v. US.K INC., et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-011734-CA-01. Section CA05. March 11, 2025. Vivianne Del Rio, Judge. Counsel: David Markel, Gerson & Schwartz, P.A., Miami, for Plaintiff. Nathan J. Avrunin, Nathan J. Avrunin, P.A., Weston, for Defendants.

ORDER ON DEFENDANT US. K INC. MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER, came before the Court for hearing on January 30, 2025, on Defendants US. K Inc., (hereinafter USK) and US. G Lashes, Inc. (hereinafter LASHES) Motions for Final Summary Judgment. The motions were filed prior to January 1, 2025, when the recent Amendments to the Florida Rules of Civil Procedure took effect. The Court is issuing a separate order as to each Defendant.

The Court having reviewed: the second amended complaint, summary judgment motions, which include the affidavit of USK and LASHES manager Juan Feng, affidavit of USK employee Mingjie Wang, Defendant USK's Support of Factual Positions that includes: Plaintiff's Response to USK First Request for Admissions, and Answers to USK first, second, and third interrogatories by ILITCH BROWN (hereinafter BROWN). In addition, the Court reviewed: Plaintiff BROWN Response in Opposition to Defendants' Motions for Summary Judgment which contains the affidavit of BROWN, and Plaintiff's Notice of Filing in Opposition to Defendants' Motions for Summary Judgment which contains: Wage and W2 Tax Statements for LASHES and USK, Insurance Request Letter of April 21, 2020, and Second Insurance Request Letter of July 14, 2020. The Court having heard argument of counsel for all parties, and being otherwise fully advised in the premises, the Court finds as follows:

BROWN filed this complaint for injuries he alleges were sustained while working as a forklift operator for Defendant USK on January 29, 2020. He makes claims against USK in Count I for Negligence and Count II for Worker's Compensation Insurance Retaliation. USK now moves this court to find that there is no genuine dispute as to any material fact and therefore is entitled to judgment as a matter of law pursuant to Florida Rule of Civil Procedure 1.510(a).

BROWN had been working for USK for several days when he alleges that he was injured. The parties agree that BROWN was an experienced, well-trained, forklift operator when the alleged injury occurred. In Plaintiff's Second Amended Complaint, BROWN claims that: "An improperly secured set of tile pallets fell from forklift in the area where Plaintiff was working." In his filed affidavit, BROWN alleges that USK should have known that the pallet that injured him was not properly bound and secured and that their warehouse management personnel are responsible for inspecting the pallets prior to instructing him to move them. USK maintains that there was nothing that they could have done differently in order to prevent this

accident.

"In *Hall v. Talcott*, 191 So.2d 40 (Fla. 1966), the Florida Supreme Court held that the party moving for a summary judgment has the burden of conclusively showing the nonexistence of a genuine issue of material fact, and the proof must overcome all reasonable inferences which may be drawn in favor of the non-moving party." *Magma Trading Corp. v. Lester Lintz*, 727 So.2d 377 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D616a]. "If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issue, it should be submitted to the jury as a question of fact to be determined by it." *Kitchen v. Ebonite Recreation Centers, Inc.,* 856 So.2d 1083, 1085 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2401a] quoting *Bruckner v. City of Dania Beach*, 823 So.2d 167, 170 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1550a]. The conflicting evidence presented by USK and BROWN create a material issue of fact regarding BROWN's claim of negligence against USK that prevents summary judgment.

The second count of BROWN's amended complaint is worker's compensation retaliation. It is agreed that USK did not have a policy of worker's compensation insurance. USK only had a liability policy and maintains it was not required to carry worker's compensation insurance. BROWN asserts that because Florida Statute §440.205 prohibits employers from discharging an employee for "valid claim for compensation or *attempt to claim* compensation" (emphasis added) under the Workers' Compensation law that a violation can occur even in the absence of insurance. Even if this Court agreed with BROWN that having worker's compensation insurance is not a prerequisite for a retaliation claim, a reasonable jury could not find worker's compensation retaliation in this case. The parties agree that after the incident BROWN and Juan Feng, the manager of USK, spoke on the telephone. Ms. Feng asserts that BROWN called to say he was quitting to pursue other work, and in response Ms. Feng requested that Brown help find his replacement. BROWN claims on this call he said that he "required medical assistance in connection with my injuries" and was then was fired because of it. BROWN alleges by saying he needed medical assistance he had engaged in a protected activity causing him to be fired.

The text messages between Ms. Feng and BROWN for the two weeks after the accident are not disputed and confirm Ms. Feng's account that BROWN had been asked on the phone call if he could find his replacement. The parties cordially arranged for BROWN to receive his pay and later BROWN helped Ms. Feng find a phone number they needed. Ten (10) days after the accident Ms. Feng asks BROWN how everything is going, BROWN responds that everything is alright. With these facts a reasonable jury could not find that BROWN made a worker's compensation claim nor that he had negative employment repercussions because of it. "A party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict." *Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So.2d 1105, 1108 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2373d]. USK demonstrated "that there were no material issues of fact, entitling it to a summary judgment under *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966)." *Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So.2d 1105 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2373d]. The Court finds that BROWN's own testimony does not establish he attempted to make a worker's compensation insurance claim nor is there evidence that he was fired for engaging in a protected activity.

Accordingly, it is hereby ORDERED and ADJUDGED that the Defendant US. K INC., Motion for Final Summary Judgment is DENIED as to Count I Negligence and GRANTED as to Count II Worker's Compensation Retaliation.

* * *

Torts—Negligence—Workers' compensation—Retaliation—Motion for summary judgment in forklift operator's action claiming negligence and workers' compensation retaliation against employer, a tile importer, and against false eyelash import company operating out of same warehouse as employer for injuries suffered when pallet of tiles fell from forklift—Summary judgment entered in favor of lash importer—There is no allegation that lash importer was negligent in any manner in accident that involved pallet of tiles or that plaintiff tried to make workers' compensation claim against lash importer

ILITCH BROWN, Plaintiff, v. US.K INC., et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-011734-CA-01. Section CA05. February 7, 2025. Vivianne Del Rio, Judge. Counsel: David Markel, Gerson & Schwartz, P.A., Miami, for Plaintiff. Nathan J. Avrunin, Nathan J. Avrunin, P.A., Weston, for Defendants.

ORDER GRANTING DEFENDANT US. G LASHES, INC. MOTIONS FOR FINAL SUMMARY JUDGMENT

THIS MATTER, came before the Court for hearing on January 30, 2025, on Defendants US. G Lashes, Inc. (hereinafter LASHES) and US. K Inc. (hereinafter USK) Motions for Final Summary Judgment. The motions were filed prior to January 1, 2025 when the recent Amendments to the Florida Rules of Civil Procedure took effect. The Court is issuing a separate order as to each Defendant.

The Court having reviewed: the second amended complaint, summary judgment motions which include the affidavits of LASHES and USK manager Juan Feng, affidavit of USK employee Mingjie Wang, Defendants' Support of Factual Positions that includes: Plaintiff's Response to USK First Request for Admissions, and Answers to USK first, second, and third interrogatories by ILITCH BROWN (hereinafter BROWN). In addition, the Court reviewed: Plaintiff BROWN Response in Opposition to Defendants' Motions for Summary Judgment which contains: the affidavit of BROWN and Plaintiff's Notice of Filing in Opposition to Defendants' Motion for Summary Judgment which includes: Wage and W2 Tax Statements for LASHES and USK, Insurance Request Letter of April 21, 2020, and Second Insurance Request Letter of July 14, 2020. The Court having heard argument of counsel for all parties, and being otherwise fully advised in the premises, the Court finds as follows:

BROWN filed this complaint for injuries he asserts were suffered while working as a forklift operator moving pallets of tile on January 29, 2020. In this lawsuit, he filed claims for negligence and worker's compensation retaliation against both Defendants.

The parties agree that BROWN was working for US K. Inc. as a forklift operator when BROWN alleges the injury occurred.

USK is a tile import business while LASHES imports false eyelashes. They are both managed by Juan Feng who has submitted an affidavit stating that the two companies have separate owners, tax identification numbers, locations, and products. Feng states the only commonality is she manages both. She states LASHES is operated out of her home with boxes that she can carry. Conversely USK needs a warehouse with a forklift to move heavy pallets of tile. BROWN asserts that at the warehouse he worked for both companies.

The allegations from BROWN for negligence are solely regarding injuries related to a pallet of tile. There is no allegation that US G Lashes was negligent in any manner. The only allegation against LASHES is the disputed allegation that they operate out of the same warehouse. Likewise, BROWN asserts that the worker's compensation claim was related to injuries suffered from tile not lashes. Therefore, the Court finds that LASHES was not negligent. Since BROWN alleges he requested medical care for injuries he claims were from tile, there is no accusation that he tried to make a worker's compensation claim against LASHES.

Accordingly, it is hereby ORDERED and ADJUDGED that the Defendant US. G LASHES, Motion for Final Summary Judgment is GRANTED as to Count III Negligence and Count IV Worker's Compensation Retaliation.

Final Judgment is hereby entered in favor of the Defendant US G. LASHES and against Plaintiff ILITCH BROWN. This matter is dismissed with prejudice, and Defendant shall go hence forth without delay.

* * *

Criminal law—Driving under influence— Misdemeanor—Reclassification to felony DUI—Uncounseled prior misdemeanor DUI convictions cannot be used to reclassify later DUI charge from misdemeanor to felony DUI—Prior conviction based on uncounseled plea entered without *Faretta* inquiry cannot be used to enhance current DUI charge to felony

STATE OF FLORIDA, Plaintiff, v. ERIC V. GREEN, Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2024 CF 001378 NC. February 24, 2025. Donna Padar, Judge. Counsel: Thomas Widen, Assistant State Attorney, for Plaintiff. Robert N. Harrison, for Defendant.

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE having come before the Court on the Defendant's Sworn Motion to Dismiss filed on September 9, 2024 (DIN 41) and the Court having heard argument of counsel and otherwise being fully advised in the premises, finds as follows:

The Defendant was charged by Information with a fourth offense DUI. The Defendant filed a sworn Motion to Dismiss pursuant to Rule 3.190(c)(4). In the Motion, the Defendant asserts that the January 29, 1990 prior conviction alleged in the Information was the result of an uncounseled plea and that "before proceeding with the plea, the judge did not inquire about my age, education, mental condition, and experience and knowledge of criminal proceedings" (no *Faretta* inquiry). The Defendant alleged this uncounseled conviction could not be used to enhance the current charge to a felony, citing to *State v. Kelly*, 999 So.2d 1029 (Fla. 2008) [34 Fla. L. Weekly S15a]. The State did not traverse the motion but submitted additional evidence—a clerk's docket sheet that reflected "oral waiver of counsel." No other record of the plea exists.

A waiver of counsel is not valid without complying with the *Faretta* requirements. *Curtis v. State*, 32 So.3d 759 (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D950a]. The State's evidence failed to overcome the Defendant's sworn affidavit.

ORDERED AND ADJUDGED that said Motion is hereby Granted to the extent to the Information charges a felony. The misdemeanor charge for third offense DUI remains and the State is directed to file an amended Information.

* * *

Torts—Negligence—Discovery—Plaintiff is required to disclose whether claimant was referred for treatment under letter of protection and, if so, the identity of the referring person—If referral was made by claimant's attorney, information about financial relationship between law firm and medical provider is discoverable

EUGENE VALENTINO, Plaintiff, v. JOHN BARIC, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE24005828. Division 03. February 17, 2025. Daniel A. Casey, Judge.

ORDER OVERRULING PLAINTIFF'S OBJECTIONS TO DEFENDANT'S SECOND SET OF INTERROGATORIES

THIS CAUSE having come before the Court upon Plaintiff's objections to Defendant's Second Set of Interrogatories, and the Court, having heard argument from both parties via hearing on February 4, 2025, and being otherwise fully informed in the premises, it is hereby:

ORDERED and ADJUDGED:

1. The Plaintiff's Objections to Defendant's Second Set of Interrogatories are overruled. Defendant's Second Set of Interrogatories is permissible pursuant Fla. Stat. § 768.0427(3)(e), which requires the Plaintiff to disclose whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral. If the referral is made by the claimant's attorney, disclosure of the referral is permitted, and evidence of such referral is admissible notwithstanding s. 90.502. Moreover, in such situation, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of bias of a testifying medical provider.

2. The Plaintiff shall have twenty (20) days from the date of this order to provide better responses to the Defendant's Second Set of Interrogatories.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Arrest—Probable cause—Motion to suppress granted where officer arrested defendant who was stopped for speeding and had moderate odor of alcohol on his breath for "suspicion of DUI," and officer testified that he did not believe that there was probability that defendant was impaired

STATE OF FLORIDA, v. WALTER KEITH WRIGLEY, JR., Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2023CT15220. Division K. January 24, 2025. Kimberly Sadler, Judge. Counsel: Tucker David Watters, Assistant State Attorney, State Attorney's Office, Jacksonville, for State. Janet E. Johnson, Janet E. Johnson, P.A., Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

This cause having come before the Court on the Defendant's Motion to Suppress any and all evidence seized, including all statements and physical observations, as well as any refusals of breath test and field sobriety exercises, the Motion to Suppress is hereby **GRANTED** as to Issue Number Four: No Probable Cause to Arrest.

ANALYSIS

Defendant was stopped for an alleged speed violation. Upon the stop, Officer Dickens of the Atlantic Beach Police Department approached the vehicle, in which Defendant and two passengers were located. He observed an odor of alcohol in the vehicle, requested documents from Defendant, and began an inquiry into his out-of-state registration. Officer Dickens asked Defendant to exit the vehicle, observed no difficulty with his exit or his walk, and noticed a moderate odor of alcoholic beverage, as well as bloodshot, watery eyes. He asked Defendant to submit to Field Sobriety Exercises, which he declined, and promptly arrested Defendant, handcuffing him and placing him in his patrol car. At the Hearing, conducted on January 24, 2025, Ofc. Dickens testified on both direct and cross-examination, that he arrested Defendant for "suspicion of D.U.I." Ofc. Dickens did not indicate that the arrest was made pursuant to the legal standard of probable cause.

In Florida, probable cause is necessary for an arrest for Driving Under the Influence, which means something more than just a Defendant having consumed an alcoholic beverage. *State v. Kliphouse,* 771 So.2d 16 (Fla. App. 4th Dist. 2000) [25 Fla. L. Weekly D2309f] "Probable cause for a DUI arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." Ofc. Dickens admitted twice in his testimony that he did not believe there was a probability that Defendant was impaired by alcohol or had an unlawful amount of alcohol in his system; he merely stated he had a "suspicion" that he was. This does not meet the legal standard necessary under the Fourth Amendment of the United States and Florida Constitutions.

ADJUDGED: the Motion to Suppress evidence seized pursuant to Defendant's arrest without probable cause including observations, statements, and any refusals to submit to breath or field sobriety tests, are hereby suppressed and the Motion to Suppress is hereby granted.

* * *

Criminal law—Boating under influence—Search and seizure—Detention—Officer who stopped defendant driving personal water craft to make sure he was paying attention to other traffic in area and for vessel safety inspection did not have reasonable suspicion to detain defendant further for BUI investigation where defendant was not speeding or driving poorly and did not have odor of alcohol, glassy/bloodshot eyes, garbled/slurred speech, or poor balance—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. PAUL FRANCIS REIS ROSA, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2024 113143 MMDL. February 25, 2025. Joseph LeDonne, Judge. Counsel: Lucas Lee, for Plaintiff. Madison Howeller, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court on the Defendant's Motion to Suppress filed on December 20th, 2024. The Court conducted an evidentiary hearing on the Motion on February 13th, 2025, considered the evidence presented, and legal authorities submitted by the parties.

FACTUAL FINDINGS

Testimony of Officer Quick

On July 20th, 2024, at approximately 6:43 p.m., Florida Fish and Wildlife Conservation Commission (FWC) Officer Justin Quick observed the Defendant operating a Personal Water Craft (PWC) on the St. Johns River in Volusia County, Florida. Officer Quick noted that the Defendant was operating the PWC in a slow manner, standing with both feet on one side of the PWC. He also noted that the Defendant was fluctuating speed on the PWC, looking to the side talking to his friends rather than looking forward in the direction he was traveling, as he entered a slow speed zone. Officer Quick noted that at that point he made the decision to stop the Defendant.

Officer Quick testified that he used the lights on his boat as well as verbal commands and his hand to indicate to the Defendant that he was being stopped. The Defendant's PWC was then tied off to Officer Quick's boat and Officer Quick conducted a boater safety inspection. Officer Quick identified himself, notified the Defendant that the reason for the stop was for the improper display of his registration numbers. Officer Quick also asked for the Defendant's license and registration, which the Defendant was able to provide. Officer Quick testified that the Defendant was unsure if the registration paperwork was the correct paperwork. He also testified that the Defendant was confused about why the registration numbers displayed on the PWC were incorrect, so Officer Quick explained to him why they were incorrect. Officer Quick also requested the Defendant show him the fire extinguisher pursuant to the boater safety inspection. As the Defendant opened the front hatch of the PWC, he had to rummage through at least half a dozen empty beer cans, stating that "those were from before." When Officer Quick asked the Defendant what he meant by "before", the Defendant did not give a timeframe. Officer Quick asked if it was earlier that day and Defendant never gave him a clear answer, though Officer Quick testified that the Defendant later changed his answer to "those are my friend's."

Officer Quick further testified that the primary reason for stopping the Defendant was for vessel safety and to make sure the Defendant was paying attention to the traffic in the area.

Officer Quick testified that the Defendant's physical appearance was a little lethargic, answering questions that Officer Quick was no longer asking him, not answering other questions, his speech was "garbled", and he was "hung up" on the display of his registration numbers despite Officer Quick previously explaining it to him and the Defendant indicating he understood.

Officer Quick testified that based on the Defendant's speech, the way he was operating the PWC, the presence of a number of empty beer cans in the vessel, Officer Quick thought there was a "high likelihood" that he had "probable cause that the operator had consumed enough alcohol to reasonably be impaired."

When asked if the Defendant had any issue keeping his balance, Officer Quick testified that it appeared the Defendant had an issue keeping his balance as the Defendant held onto Officer Quick's boat a few times even though the boats were tied together.

Based on all of his observations, Officer Quick asked the Defendant if he would be willing to consent to Field Sobriety Exercises on Officer Quick's vessel, to which the Defendant agreed.

During cross-examination, when asked if the Defendant was speeding, Officer Quick testified that you could see a "little bit of wake" coming from the PWC. However, Officer Quick believed that it would be "a little bit of a stretch" for him to indicate speeding because it did not meet his personal discretion for above slow speed minimum wake. Officer Quick further testified that the main reason he stopped the Defendant was not for the wake, but rather the fact that the Defendant was passing other vessels.

When asked if he smelled the odor of alcohol on the Defendant, Office Quick testified not that he could recall.

When asked about his testimony that the Defendant had difficulty finding his registration, Officer Quick testified that he had a little bit of difficulty, but clarified that it was because the Defendant had two vessels. Officer Quick also testified that the Defendant stopped as soon as he saw Officer Quick.

When asked about the weather conditions, Officer Quick testified the weather was clear, sunny, and not windy.

On re-direct examination, Officer Quick testified that some reasons he might not notice an odor of alcohol is the distance between himself and the operator of the vessel as well as being in an open-air environment. Lastly, Officer Quick testified that defendant can mask the smell of alcohol by drinking any non-alcoholic fluid after drinking alcohol or by smoking a cigarette. Officer Quick pointed out the Defendant was smoking a cigarette when he was first stopped.

Body Worn Camera of Officer Quick

Both sides stipulated to the admission of the Body Worn Camera (BWC) video of Officer Quick. The Court reviewed the BWC video during the hearing as it was played during Officer Quick's testimony. Deputy Quick's BWC captures some of the Defendant's driving pattern, though it should be noted that the Defendant can only be seen from a far distance and it is for a short amount of time. In that timeframe, it does appear that the Defendant is in a standing position, facing another PWC, and going slightly faster than the PWC that he is adjacent to. It should be noted that the weather appears clear with little to no wind.

Once Officer Quick signals for the Defendant to stop his PWC, the Defendant stops and makes contact with Officer Quick as requested. The Defendant is initially smoking a cigarette, though it is extinguished approximately 40 seconds later. The Defendant provides Officer Quick with his driver's license as requested, as well as his registration, though he notifies Officer Quick that he's not sure if it is the correct registration as he owns two PWCs and is unable to see the registration number on the front of the PWC he is currently riding. The Defendant complies with the other requests made by Officer Quick, to include assisting in securing the PWC to the side of Officer Quick's boat and retrieving the fire extinguisher from the front compartment of the PWC.

When asked about the empty beer cans in the front of the PWC, the Defendant states, "That's old." When Officer Quick asks if the beer is a couple hours old, the Defendant states: "Way more than that. And I have my friend, so. . ." He further admits that he had three beers "way earlier today" and that his friends threw their empty beer cans in the front compartment of his PWC.

Throughout the approximately five-minute initial contact, the Defendant is able to balance himself on his stomach to retrieve his fire extinguisher at the request of Officer Quick, his speech appears clear and responsive to Officer Quick's questions, and he only grabs onto Officer Quick's boat to stabilize himself when another boat's wake approaches. At no point during the interaction does the Defendant's speech appear to be either slurred or garbled.

CONCLUSIONS OF LAW

The only issue raised by the Defendant is whether Officer Quick had reasonable suspicion to detain the Defendant for a DUI investigation.

Section 901.151, Florida Statutes, states, in pertinent part:

> (2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.
>
> (3) No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purposes of that subsection. Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof
>
> (4) If at any time after the onset of the temporary detention authorized by subsection (2), probable cause for arrest of person shall appear, the person shall be arrested. If, after an inquiry into the circumstances which prompted the temporary detention, no probable cause for the arrest of the person shall appear, the person shall be released.

The Court finds the following cases binding and directly on point with the facts in the instant case. In *State v. Ameqrane,* 39 So.3d 339 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b], the Court held that speeding, an odor of alcohol, and glassy/bloodshot eyes were sufficient to support a DUI investigation. In *Origi v. State,* 912 So.2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a], the Court held that speeding, an odor of alcohol, and bloodshot eyes "gave rise to reasonable suspicion sufficient to justify detaining [a motorist] for a DUI investigation." In *State v. Kliphouse,* 771 So.2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f], the Court found that "the sole evidence of an odor of alcohol on an appellee's breath was insufficient probable cause for the officer to believe that the appellee was 'under the influence' of alcoholic beverages. . ."

In the instant case, Officer Quick stopped the Defendant to make sure he was paying attention to other traffic in the area as well as for a vessel safety inspection. While Officer Quick testified that he decided to evaluate the Defendant for DUI based on his speech pattern, his operation of the vessel, and the presence of empty beer cans in the Defendant's PWC, these factors alone do not give rise to reasonable suspicion that the Defendant was DUI. The Defendant was not speeding, he did not exhibit a poor boating pattern. he did not have an odor of alcohol, there was no testimony that he had glassy/bloodshot eyes, and his speech did not appear either slurred or garbled based on the interaction observed on Officer Quick's BWC. Additionally, the interactions on Officer Quick's BWC show the Defendant was able to balance himself on the PWC, his speech was clear and responsive, he is able to hand over his required documents immediately, and he is able to ambulate from his PWC to Officer Quick's boat with no difficulty. Following *Ameqrane, Origi,* and *Kliphouse,* and based on the foregoing, this Court finds that there was not reasonable suspicion to justify further detention and investigation of DUI.

WHEREFORE it is **ORDERED and ADJUDGED** as follows:

The Defendant's Motion to Suppress is **GRANTED**.

* * *

Criminal law—Driving under influence—Search and seizure—Arrest—Warrantless misdemeanor DUI arrest—Motion to suppress warrantless arrest granted—Deputy responding to disabled vehicle did not observe defendant driving or in physical control of vehicle or so close to vehicle as to be capable of taking authority of vehicle, deputy did not conduct traffic crash investigation, and no other deputy responding to scene observed defendant driving or in physical control of vehicle so as to allow arresting deputy to develop probable cause to arrest under fellow officer rule—Statements of lay witnesses on scene, offered through testimony of deputy, are inadmissible hearsay and do not fall under fellow officer rule exception to hearsay

STATE OF FLORIDA, v. JESSICA ELVIRA DIXON, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2024-CT-005265. March 12, 2025. Stefania C. Jancewicz, Judge. Counsel: Laura Chiu, Assistant State Attorney, Office of State Attorney, for State. Ira D. Karmelin, The Ticket Clinic, Kissimmee, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came on to be heard before the undersigned on 03/11/2025 for hearing upon the Defendant's Motion to Suppress and the Court heard and considered the testimony, video evidence and argument presented by State and Defense. Based upon same, the Court finds as follows:

1. The State conceded there is no warrant for arrest of the Defendant for this charge of DUI and the Court takes Judicial Notice of the absence of a warrant. The State and Defense stipulated to the admissibility of State's #1 and State's # 2 (body camera videos) into evidence and the Court heard testimony from one witness, Deputy Covas.

2. Deputy Covas initially testified he responded to a "traffic crash" on 11/3/24 but he said he later determined it was not a traffic crash, but simply a disabled vehicle. He said that is why he did not conduct a "traffic crash investigation" or complete a "traffic crash report." Deputy Covas was adamant that he was not investigating a crash or an accident, and that he was responding to investigate a disabled car and conduct a "property damage investigation." Despite the State's efforts to elicit evidence of a crash, Deputy Covas was unwavering that he did not conduct an accident or crash investigation involving the Defendant.

3. There are three scenarios when an officer may execute a warrantless misdemeanor arrest for DUI: (a) the officer witnesses each element of a prima facie case, (b) the officer is investigating an accident and develops probable cause to charge DUI, or (c) one officer calls upon another for assistance and the combined observations of the two or more officers are united to establish the probable cause to the arrest. As applied to the case at bar, the Court finds:

a. Section 901.15(1) of Florida Statutes provides: "an officer has probable cause to make a warrantless arrest for a misdemeanor when the offense is committed in the officer's presence." The evidence did NOT prove the Defendant committed all the acts required to establish probable cause for a DUI arrest in the presence of law enforcement. When Deputy Covas arrived on scene, the Defendant was no closer than 5 feet from the disabled vehicle and could have been as far as 15 feet away from the vehicle. The car was not running at the time and it was "up on" a hedge of juniper bushes. At no time did Deputy Covas say he saw the Defendant driving, behind the wheel, in actual, physical control of the car or that she was so close to it as to potentially be capable of taking authority of the car.

b. Section 316.645 of Florida Statutes provides: a warrantless arrest is authorized when "A police officer who makes an investigation at the scene of a traffic crash when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provision of this chapter, chapter 320, or chapter 322 in connection with a crash." If Deputy Covas did not conduct a traffic crash investigation (and again, he was unequivocal that he did not), then this exception to a warrantless arrest for DUI is not applicable either.

c. If Deputy Covas did not see the Defendant driving or in actual physical control of the vehicle, then clearly none of the Deputies who arrived after him saw her driving or in actual physical control of the vehicle either (and there was no evidence that anyone did). If there was no evidence presented that all of the elements required to establish probable cause for a lawful DUI arrest (again, in this case specifically the element of driving or being in actual physical control of the vehicle) occurred in the presence of any other law enforcement officer, the "Fellow Officer Rule" is inapplicable in this case. Additionally, the Court finds the statements by the lay witness on scene are hearsay because they are being offered through Deputy Covas to prove the truth of the matter asserted—that the Defendant was the driver of the vehicle. Despite the State's efforts to argue otherwise, the lay witness's statements are clearly being offered as "wheel witness" evidence. Defendant's objection as to hearsay related to the lay witness statements offered through Deputy Covas is Sustained. And, finally, because those statements are from a lay witness they do not fall under the "Fellow Officer Rule" exception to hearsay and thus they do not qualify to establish the third exception for a warrantless arrest.

As such, the Court therefore, ORDERS AND ADJUDGES that the Defendant's Motion to Suppress is hereby GRANTED.

* * *

Garnishment—Dissolution of writ—Because plaintiff failed to file timely objection to defendant's claim of exemption, writ must be dissolved and defendant's property released or returned

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. ANA DIAZ, Defendant, and BANK OF AMERICA, N.A., Garnishee. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2020 SC 001918 SP. March 3, 2025. Juna M. Pulayya, Judge. Counsel: Luis Dionicio Elera, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Altamonte Springs, for Defendant.

ORDER GRANTING DEFENDANT'S CLAIM OF EXEMPTION AND DISSOLVING WRIT OF GARNISHMENT

THIS CAUSE came before the Court for a hearing on February 5, 2025, on the *Defendant's Verified Claim of Exemption from Garnishment*,[1] and the Court having reviewed the court file, heard argument from counsel, and being otherwise fully advised in the premises, finds as follows:

On December 10, 2024, the Defendant filed her Verified Claim of Exemption from Garnishment. Plaintiff's objection to Defendant's claim was due 14 business days from the claim filing date. Plaintiff did not file a timely objection to Defendant's claim. Florida Statute § 77.041(1) states: "If the plaintiff or the plaintiff's attorney fails to file an objection [within 14 business days], no hearing is required, the writ of garnishment will be dissolved and [Defendant's] wages, money or property will be released." Because the Plaintiff did not file a timely objection to Defendant's claim, the *Continuing Writ of Garnishment*[2] must be dissolved and Defendant's property released and/or returned.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's *Verified Claim of Exemption* is granted.

2. The *Continuing Writ of Garnishment* is hereby dissolved *instanter*.

3. The Garnishee, Bank of America, N.A., shall immediately cease any further garnishment of Defendant's wages and/or property.

4. All wages, money and/or other property that have been withheld, taken and/or sent to the Plaintiff shall be immediately returned to the Defendant. Plaintiff's counsel shall communicate with Defendant's counsel to facilitate the return of Defendant' property and shall file a certificate of compliance with this order within ten (10) calendar days of the date of this order.

[1]DIN #38.
[2]DIN #34.

* * *

Landlord-tenant—Eviction—Jury trial—Waiver of right to jury trial was not knowing, intelligent, and voluntary where, although waiver provision in lease was in conspicuous typeface, waiver was written in English and was not explained to Spanish-speaking tenant in Spanish before she signed lease, tenant has low level of sophistication and experience and was not represented by counsel, and opportunity to negotiate lease terms was quite limited, as tenant was rushed to sign 40-page lease—Motion to strike jury trial demand is denied

608 INVESTMENTS LLC, Plaintiff, v. MARIA ROMAN, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-221542-CC-20. Section CL02. February 11, 2025. Kevin Hellmann, Judge. Counsel: Albert Cardet, Cardet Law, P.A., Miami, for Plaintiff. Yesenia Arocha, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER DENYING MOTION TO STRIKE JURY TRIAL DEMAND

THIS CAUSE having been brought before the Court on Defendant's Motion to Strike Jury Trial Demand (Index 41), which was filed on February 5, 2025, and the Court having heard witness testimony and argument from both parties on February 10, 2025, and having reviewed the entire case file and the facts and law relevant to the case, it is hereby

ORDERED AND ADJUDGED:

that the Defendant's Motion to Strike Jury Trial Demand DENIED based on the following:

1. Defendant signed a lease written in English without legal counsel for rental of the premises located at 315 NW 32nd Street, Rear Structure, Building 2, Miami, Florida 33127.

2. Within the text of that lease, paragraph 93 included a waiver of trial by jury for any disputes that should arise from the lease contract between Plaintiff and Defendant. This paragraph is written in capital letters and entitled Waiver of Jury Trial.

3. Plaintiff subsequently filed a complaint for eviction against Defendant on November 14, 2024, based on termination of that lease.

4. Defendant's counsel filed an Answer and Affirmative Defenses on December 2, 2024, which included a demand for trial by jury.

5. Plaintiff filed a Motion to Strike Jury Trial Demand on February 5, 2025, citing the language contained in paragraph 93 of the lease agreement.

6. On February 10, 2025, the Court heard testimony of Defendant Maria Roman translated from Spanish to English and argument from both parties' attorneys about Plaintiff's Motion to Strike Jury Trial Demand.

7. The right to trial by jury is a waivable right so long as the waiver is knowing, intelligent and voluntary. *See Amquip Crane Rental, LLC v. Vercon Const. Management, Inc.*, 60 So.3d 536 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D932a] *citing Leslie v. Carnival Corp.*, 22 So.3d 567, 581 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2448a]

8. The appellate court's dissent in *Leslie v. Carnival Corp.*, applied five factors in determining whether a waiver of jury trial is knowing, intelligent and voluntary. Those factors are: (1) conspicuousness of the [waiver] provision in the contract; (2) level of sophistication and experience of the parties entering the contract; (3) opportunity to negotiate terms of the contract; (4) relative bargaining power of each party; and (5) whether the waiving party was represented by counsel.

9. These factors, although listed in the dissenting opinion, provide a helpful framework to assist the Court in determining whether a waiver of the right to trial by jury was done knowingly, intelligently and voluntarily.

10. In assessing the testimony of Maria Roman, this Court found her answers credible and any inconsistencies in her answers reflected her lack of sophistication and limited understanding of some questions. Her tone in answering questions under oath demonstrated her candor to this Court.

11. Pursuant to the testimony provided regarding the waiver of jury trial, this Court found that although the waiver was conspicuous in its typeface, it was still written in English, which is not the Defendant's language. Based on the testimony provided, Paragraph 93 was not explained to Ms. Roman in Spanish before she signed the lease. Ms. Roman's level of sophistication and experience is very low. Her opportunity to negotiate the terms of the contract was quite limited because she was rushed to sign the lease agreement. Her only request of the lease's terms was to extend it to June, which was summarily refused. No other terms of the lease were discussed before the lease was signed. Ms. Roman had no bargaining power over the terms of the lease and she was unaware of the waiver of a jury trial included in the lease, which consisted of over 40 pages. And Ms. Roman was not represented by counsel before or during her signing of the lease that included the jury trial waiver.

Therefore, in applying the factors from *Leslie vs. Carnival Corp.* to the facts of the case at bar, including the written lease agreement itself as provided by Plaintiff as well as Defendant's testimony, this Court finds that the waiver by this Defendant was not knowing, intelligent and voluntary and requires the denial of the Motion to Strike Jury Trial Demand.

* * *

Insurance—Personal injury protection—Coverage—Reimbursement rate—Modality not listed on applicable Calendar Year Physician Fee Schedule of Medicare Part B—Unattended electrical stimulation by provider that is not an ambulatory surgical center or a clinical laboratory—Section 627.736(5)(a)(1) authorizes insurer to limit reimbursement for modality that is not listed on applicable Calendar Year Physician Fee Schedule of Medicare Part B to 80 % of maximum allowance under workers' compensation fee schedule

LAKE WORTH PHYSICAL MEDICINE, INC., a/a/o Gerardo Isaias, Plaintiff v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-003506-SP-26. Section SD04. February 24, 2025. Lawrence D. King, Judge. Counsel: Thayer A. Musa, TAM Law, LLC, Miami, for Plaintiff. Anthony Lewin, Mimi L. Smith & Associates, Orlando, for Defendant.

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

THIS MATTER came before this Court on February 10, 2025, on Defendant's Motion for Final Summary Judgment and Plaintiff's Motion for Summary Judgment as to Improper payment of CPT code 97014. Having reviewed and considered the respective Motions for Summary Judgment, the Responses in Opposition, the summary judgment evidence, argument of counsel, relevant case law, and being otherwise fully advised, the Court finds as follows:

ORDERED AND ADJUDGED that:

FACTUAL BACKGROUND

Plaintiff, Lake Work Physical Medicine, Inc. filed the instant action to recover personal injury protection ("PIP") benefits allegedly owed to it as an assignee of Gerardo Isaias against Defendant, State Farm Mutual Automobile Insurance Company arising out of an

alleged accident that occurred on November 3, 2015.

The subject policy governing PIP benefits is Florida Policy form 9810A (the "9810A Policy"), which specifically incorporates the statutory payment methodologies delineated in Fla. Stat. 627.736(5)(a)(1)-(3). There is no dispute that that the provisions of State Farm's 9810A policy form "clearly and unambiguously authorize the use of the statutory schedule of maximum charges in accord with the requirements of the PIP statute." *MRI Assocs. of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.,* 334 So. 3d 577 (Fla. 2021) [46 Fla. L. Weekly S379a].

The dispute between the parties lies in the reimbursement level of CPT code 97014. Plaintiff argues State Farm failed to properly reimburse Plaintiff for CPT Code 97014 (unattended electrical stimulation). Specifically, Plaintiff asserts State Farm must use the Relative Value Unit (RVU) formula to reimburse CPT Code 97014. State Farm contends Plaintiff's bills, including the charge for CPT Code 97014, were all reimbursed properly pursuant to its policy and statutory language.

LEGAL STANDARD

The Florida Supreme Court 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).

FINDINGS OF LAW

This Court finds State Farm's payment of CPT Code 97014 is proper under the subject policy. The Third District Court of Appeal's recent opinion in *Allstate Indem. Co. v. Gady Abramson, D.C., P.A.,* 49 Fla. L. Weekly D2437a (Fla. 3rd DCA 2024) is instructive on this issue.

In *Abramson*, the issue before the Third District Court of Appeal was whether Allstate was authorized under Florida's No-Fault Law to limit reimbursement for a modality that is not listed on the applicable Calendar Year (CY) Physician Fee Schedule of Medicare Part B to eighty percent of the maximum allowance under the workers' compensation schedule. The Court concluded Allstate's reimbursement method was proper under section 627.736(5)(a)(1), Florida Statutes (2019).

The Third DCA stated the following:

> "A basic tenet of statutory interpretation is that a statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *Fortune v. Gulf Coast Tree Care Inc*., 148 So. 3d 827, 828 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2152a] (quoting *Jones v. ETS of New Orleans, Inc.,* 793 So. 2d 912, 914-15 (Fla. 2001) [26 Fla. L. Weekly S549a]) (internal quotations omitted). "No part of a statute, not even a single word, should be ignored, read out of the text, or rendered meaningless, in construing the provision." *Scherer v. Volusia Cnty. Dep't of Corr.*, 171 So. 3d 135, 139 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1564c].

Allstate Indem. Co. v. Gady Abramson, D.C., P.A., 49 Fla. L. Weekly D2437a (Fla. 3rd DCA 2024)

The No-Fault Law provides, in pertinent part:

> (5) Charges for treatment of injured persons
>
> (a) A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered . . . .
>
> 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, except as provided in subsub-subparagraphs (II) and (III).
>
> (II) Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.
>
> (III) The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.
>
> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.
>
> Fla. Stat., §627.736(5)(a)(1)

In this case, none of the services were rendered by an ambulatory surgical center or clinical laboratory. Hence, reimbursement falls under subsection (5)(a)(1)(f)(I). This particular provision authorizes the insurer to limit payment to 80% of 200% of the amount allowed under "the participating physicians fee schedule of Medicare Part B." This is markedly different than the provision for ambulatory surgical services or clinical laboratories, which more broadly allows for payment consistent with "Medicare Part B."

Consistent with this construction, "as provided in this sub-subparagraph" is immediately preceded by the Medicare reimbursement provision. Whether a modality is reimbursable under Medicare Part B depends upon the nature of the services. Ambulatory surgical services and clinical laboratory services are generally reimbursable under Medicare Part B, while all other services are more specifically reimbursable under the participating physicians fee schedule of Medicare Part B. Hence, the insurer is entitled to resort to reimbursement under workers' compensation if the services are non-ambulatory and non-clinical and do not appear on the schedule. *Allstate Indem. Co. v. Gady Abramson, D.C., P.A.,* 49 Fla. L. Weekly D2437a (Fla. 3rd DCA 2024).

Plaintiff, Lake Work Physical Medicine, Inc. is not an ambulatory surgical center or clinical laboratory. The CPT Code at issue is CPT Code 97014 which Medicare assigned with a Status Indicator "I". Status Indicator "I" is defined as, "[n]ot valid for Medicare purposes. *See Fed Register / Vol. 72, No. 133 at 38233 & 38357.*

Pursuant to Medicare, CPT Code 97014 is simply not reimbursable under the participating physicians fee schedule. The argument State Farm must reimburse CPT Code 97014 based on the RVU calculations is diametrically opposed to Medicare's own guidelines.

F.S. §627.736(5)(a)(1) and (5)(a)(3) must be read in conjunction. This makes clear that certain services which are not reimbursable under Medicare will be reimbursed under the workers compensation fee schedule when Medicare does not pay for the service. Addition-

ally, F.S. §627.736(5)(a)(3) only requires the insurer reimburse the provider for the service, **but it does not control the amount of the reimbursement level** and does not specify that reimbursement must be under Medicare. Therefore, reimbursement under workers compensation fee schedule satisfies this provision where the underlying service is not compensable under Medicare.

As further explained by the Court in *Allstate*, [T]he applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation reflected in the annual Medicare Part B fee schedule." § 627.736(5)(a)(2), Fla. Stat. This choice of language reinforces the fact that the Legislature afforded the fee schedule great significance. To read the statute otherwise would net the unintended effect of requiring an insurer to reimburse the provider for any modality, so long as the service was billed under a generic code and arguably analogous to another listed service. Such a construction would render the two alternative statutory provisions about the workers' compensation schedule and non-reimbursable services meaningless because virtually any service could be considered compensable under Medicare. *Allstate Indem. Co. v. Gady Abramson, D.C., P.A.*, 49 Fla. L. Weekly D2437a (Fla. 3rd DCA 2024).

This Court therefore finds that Defendant properly reimbursed Plaintiff's charges, including CPT code 97014, in accordance with F.S. § 627.736 and the insured's policy of insurance.

Based on the foregoing, it is hereby **ORDERED and ADJUDGED**:

1. Defendant's Motion for Final Summary Judgment is **GRANTED.**

2. Plaintiff's Motion for Summary Judgment is **DENIED.**

3. Plaintiff shall take nothing from this action and Defendant shall go henceforth without day.

4. The Court reserves jurisdiction to award attorney's fees and costs, if any.

* * *

Landlord-tenant—Eviction—Default—Failure to deposit rent into court registry—Motion for rehearing of order striking tenants' answer and entering default final judgment awarding landlord possession and money judgment is granted in part—Tenants' failure to deposit rent into court registry waived defenses to claim for possession, but not defenses to money judgment count

UNITED GLOBAL SYNERGIES, LLC, Plaintiff, v. WILLIAM LEON, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-230486-CC-26. Section SD06. March 10, 2025. Christopher Green, Judge. Counsel: Jose Gomez, Barket Lawyers, Miami, for Plaintiff. James Glover, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR REHEARING OF DEFAULT FINAL JUDGMENT, MOTION TO VACATE FINAL JUDGMENT, AND MOTION FOR RECONSIDERATION OF THE DECEMBER 16, 2024 ORDER

THIS CAUSE having come before the Court for hearing on February 28, 2025 on the Defendant's Motion For Rehearing Of Default Final Judgment, Motion To Vacate Final Judgment, And Motion For Reconsideration Of The December 16, 2024 Order [D.E. 37], and the Court having heard the argument of counsel, and having reviewed the file and being otherwise fully advised in the premises, it is ORDERED and ADJUDGED as follows:

1. In the instant case, on November 21, 2024, Plaintiff filed a two-count complaint seeking (1) a residential eviction under Florida Statute 83.59 and (2) a money judgment for unpaid rent under Florida Statute 83.625.

2. Service on Defendants was effectuated on December 4, 2024.

3. Defendant William Leon filed his Answer, Affirmative Defenses, Motion to Determine Rent, Motion to Dismiss, and Demand for Jury Trial on December 9, 2024. Defendant Jennifer Leon filed her pro se Answer to the complaint on December 11, 204.

4. On December 16, 2024, this Court entered an order pursuant to Florida Statutes 83.60, requiring Defendants to deposit the sum of $4,945.00 into the court registry by 4:00 p.m. on December 17, 2024. . Defendants did not timely post the money in the Court registry.

5. On December 17, 2024, Plaintiff filed a motion to strike Defendant's answer [D.E. 33] for Defendant's failure to post the funds into the court registry. Plaintiff also sought entry of a default money judgment against Defendants for $4,945.00 pursuant to Florida Statutes 83.625.

6. On December 18, 2024, this Court granted the Plaintiff's motion to strike without hearing and entered a Default Final Judgment against Defendants [D.E. 31], which awarded Plaintiff possession as well as a money judgment of $4,945.00.

7. Defendant timely moved this Court for rehearing of the Default Final Judgment, moved to vacate the Default Final Judgment, and moved for reconsideration of the December 16, 2024 court order [D.E. 37].

6. Florida Statutes 83.60(2) states in relevant part:

"... Failure of the tenant to pay the rent into the registry of the court or to file a motion to determine the amount of rent to be paid into the registry within 5 days, excluding Saturdays, Sundays, and legal holidays, after the date of service of process constitutes an absolute waiver of the tenant's defenses other than payment, ***and the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon.***..."
[Emphasis added]

7. Florida Statutes 83.625 states:

83.625Power to award possession and enter money judgment.—In an action by the landlord for possession of a dwelling unit based upon nonpayment of rent, if the court finds the rent is due, owing, and unpaid and by reason thereof the landlord is entitled to possession of the premises, the court, in addition to awarding possession of the premises to the landlord, shall direct, in an amount which is within its jurisdictional limitations, the entry of a money judgment with costs in favor of the landlord and against the tenant for the amount of money found due, owing, and unpaid by the tenant to the landlord. However, no money judgment shall be entered unless service of process has been effected by personal service or, where authorized by law, by certified or registered mail, return receipt, or in any other manner prescribed by law or the rules of the court; ***and no money judgment may be entered except in compliance with the Florida Rules of Civil Procedure***. The prevailing party in the action may also be awarded attorney's fees and costs.
[Emphasis added]

8. Though Defendant waived his defenses to the eviction claim for possession by failing to deposit rent, a noncompliance with Florida Statute 83.60 does not operate as a waiver of defenses to the separate money judgment count.

9. As Defendant's answer was improperly struck with respect to Count II, Plaintiff's money judgment was not entered in compliance with the Florida Rules of Civil Procedure, as required by Florida Statutes 83.625. The Default Final Judgment should have only been entered against Defendants with respect to Plaintiff claim in Count I for Possession. Although only Defendant William Leon filed a motion for rehearing, the Court finds his arguments apply to Defendant Jennifer Leon as well because she filed an Answer and generally denied the allegations in the complaint.

IT IS THEREFORE ORDERED AND ADJUDGED

that Defendant's Motion For Rehearing Of Default Final Judgment, Motion To Vacate Final Judgment, And Motion For Reconsideration Of The December 16, 2024 Order [D.E. 37] is **GRANTED IN PART.** The Default Final Judgment [D.E. 31] is VACATED to the extent it entered a final judgment against Defendants for damages on Count II. The Plaintiff is directed to submit a proposed, amended final judgment on Plaintiff's claim for possession only.

Defendant William Leon has demanded a jury trial and this matter shall be set for trial on damages in the normal course. Defendant concedes that the Summary Procedure rules do not apply to Plaintiff's claim for damages, and therefore this case does not require an expedited trial date.

The Court defers ruling on Defendant's Motion for Reconsideration of the December 16, 2024 Order.

* * *

Landlord-tenant—Public housing—Prohibited practices—Interruption of utilities—Statutory damages—Where landlord terminated public housing tenant's water service for over one month, statutory damages of "3 months' rent" are properly calculated as three times total amount of rent for leased unit, not merely three times portion of rent paid by tenant—Tenant is entitled to entirety of statutory damages despite fact that she paid smaller portion of rent

JOHN OKEKE, Plaintiff, v. SABRINA CLIMPSON, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-024779-CC-05. Section CC02. March 6, 2025. Miesha S. Darrough, Judge. Counsel: John Okeke, Hialeah, for Plaintiff. Zhoujiang Xie, Legal Services of Greater Miami, Inc., Coral Gables, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE came before the Court on Defendant's Motion for Rehearing regarding the Final Judgment for Damages entered on November 24, 2024. The Court, having reviewed the motion, the applicable law, and otherwise being fully advised in the premises, finds as follows:

1. Defendant Sabrina Climpson brought a counterclaim against Plaintiff for violating Fla. Stat. § 83.67 by terminating her water service for over one month.

2. The Court entered default against the landlord and the issue of damages remained [D.E. 64].

3. Ms. Climpson is a Section 8 tenant, and she is responsible for paying $467.00 of the rent each month. Both the tenant and the landlord signed a rental agreement which states the total contract rent was $1,805.00. The Section 8 voucher program pays the landlord the difference between the total contract rent and the tenant's portion of the rent.

4. Florida Statute § 83.67(6) states that a landlord who violates the statute "shall be liable to the tenant for actual and consequential damages or 3 months' rent, whichever is greater[.]"

5. The Court previously entered a final default judgment awarding statutory damages of $1,401.00, based on three times the tenant's portion ($467.00), rather than three times the full contractual rent of $1,805.00. [D.E. 75].

6. Ms. Climpson filed a motion for rehearing, arguing that the damages should be $5,415.00—equal to three times the rent set in the rental agreement.

7. Upon reconsideration, the Court finds that, pursuant to Fla. Stat. § 83.67(6), statutory damages are calculated as "3 months' rent" even when actual and consequential damages are less than that amount.

8. Fla. Stat. § 83.43(12) defines "rent" as "the periodic payments due the landlord from the tenant for occupancy under a rental agreement and any other payments due the landlord from the tenant as may be designated as rent in a written rental agreement."

9. The lease in this case establishes that the total rent for the unit was $1,805.00 per month. Therefore, the proper statutory damages amount is $5,415.00 (three times $1,805.00).

10. The court next turns to the issue of whether Ms. Climpson should receive $5,415.00 even though she paid a smaller portion, or whether Section 8 must receive some of the damages.

11. Ms. Climpson, as the tenant, is the only party who has standing to bring a claim under this statute, and she is the only party who suffered harm. Specifically, the harm she suffered is that she was without water service for more than a month. Therefore, the only party who can receive the damages authorized by the statute is Ms. Climpson.

12. The Court further notes that the statutory damages under Fla. Stat. § 83.67(6) serve as a form of liquidated damages when actual damages are less than three times the monthly rent. The Legislature created a damages scheme which sets a "floor" for damages where the court only needs to determine the rent to calculate damages. *Towers Associates Real Estate v. Richardson*, 39 Fla. Supp. 2d 79 (Fla. 15th Cir. Ct. 1990) (reasoning that "the statute provides for liquidated damages in an area of law where actual damages would be difficult if not impossible to ascertain."). This avoids imposing unnecessary proof requirements on a tenant; tenants are only required to prove actual and consequential damages when those damages are more than three times the monthly rent.

13. Additionally, the statute is designed to deter unlawful self-help evictions. *Badaraco v. Suncoast Towers V Associates*, 676 So.2d 502, 503 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1546g]; *Bond v. Soar Merging Markets, LLC and Paulo*, 31 Fla. L. Weekly Supp. 139a (Fla. Duval Cnty. Ct. 2022) ("[Fla. Stat. § 83.76] is a punitive one, intended to prevent landlords from resorting to self-help evictions by taking the law into their own hands, whether or not a debt is actually owed."). Otherwise, landlords could choose to violate the law because the damages are nominal.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Rehearing is **GRANTED**.

2. The court will enter a separate Amended Final Judgment consistent with this opinion.

* * *

Insurance—Personal injury protection—Discovery—Failure to comply—Sanctions—Striking of insurer's pleadings and entry of default is warranted where insurer failed to respond to multiple discovery requests and comply with numerous orders compelling discovery, insurer has been sanctioned numerous times in other matters for similar conduct, insurer was personally involved in acts of disobedience, failure to comply with discovery has prejudiced medical provider, and no reasonable justification for noncompliance has been offered

GR REHAB CENTER, INC., Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-105894-CC-21. Section CC02. February 24, 2025. Miesha S. Darrough, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Star Law, Miami, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR ENTRY OF DEFAULT AND/OR FOR SANCTIONS

THIS MATTER, having come before the Court on February 20, 2025, pursuant to Plaintiff's Motion to Strike Defendant's Pleadings, or in the alternative, Motion for Entry of Default and/or for Sanctions, and the Court having reviewed the respective docket, heard argument from counsel of each party, and having been sufficiently advised in the premises, finds as follows:

The subject action, filed on August 25, 2023, is a Personal Injury Protection (PIP) case in which the Plaintiff alleges that the Defendant has failed to fully comply with the terms and conditions of the policy, as well as Fla. Stat. 627.736. During the pendency of this action, as reflected per the docket, the Plaintiff served the Defendant with several discovery requests, including, not limited to the following: Initial Request for Production; Initial Interrogatories; Request for Production regarding Relatedness and Medical Necessity; Interrogatories regarding Relatedness and Medical Necessity; Requests for Production regarding Prior Injuries; and Interrogatories regarding Prior Injuries.

Based on the Defendant's failure to respond to the aforementioned discovery, and the failure to timely seek an extension of time to respond to same, the Plaintiff filed several Motions to Compel Defendant's Responses to Discovery and for Attorney's Fees and Costs pursuant to Rule 1.380(a)(4). In compliance with Administrative Order No. 06-09, after providing the Defendant with written notice of the overdue discovery responses, the Plaintiff submitted Ex Parte Orders to the Court for review and execution. As reflected per the docket, the Plaintiff obtained six (6) Ex Parte Orders in which this Court ordered the Defendant to respond to Plaintiff's discovery within a designated time. Based on Defendant's repeated failure to respond to the subject discovery, Plaintiff filed its Motion to Strike Defendant's Pleadings, or in the alternative, Motion for Entry of Default and/or for Sanctions and set same for hearing.

As an initial matter, this Court notes that "It is axiomatic that trial courts enjoy broad discretion and flexibility in fashioning sanctions to enforce court orders." *Alvarez v. Citizens Property Ins. Corp.,* No. 3D20-0178 (Fla. 3d DCA July 21, 2021) [46 Fla. L. Weekly D1670a].

In consideration of the subject motion, the Court considered the factors set forth in *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1993). In *Kozel,* the Florida Supreme Court explained the analysis trial judges should employ in determining whether to strike pleadings as a sanction. The *Kozel* Court set forth principles for addressing the matter, and some guidelines for determining whether such a sanction is appropriate. These principles include whether the purpose of the Florida Rules of Civil Procedure is being upheld, i.e., "to encourage the orderly movement of litigation." *Kozel,* 629 So.2d at 818.

The Kozel factors are as follows: 1. Whether the attorney's conduct was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2. Whether the attorney has been previously sanctioned; 3. Whether the client was personally involved in the act of disobedience; 4. Whether the delay prejudiced the opposing party through undo expense, loss of evidence or some other fashion; 5. Whether the attorney offered reasonable justification for noncompliance; and 6. Whether the delay created significant problems of judicial administration.

The Court analyzed the aforementioned factors and hereby finds as follows:

There is no doubt that the Defendant violated numerous Court Orders which graciously extended the time for Defendant to comply with the ordered discovery. The Third District has held that where numerous Court Orders were violated, that trial courts are "entitled to interpret [such] repeated failures to comply with discovery Orders as willful and intentional, justifying the severe sanction of default." *Morales v. Perez,* 445 So.2d 393 (Fla. 3d DCA 1984). The Court finds the Defendant's conduct to be contumacious and egregious rather than an act of neglect or inexperience. Defendant and its counsel were well aware of the outstanding discovery and this Court's multiple Orders, such that Defendant's failure to comply demonstrates its complete disregard for the Court's authority, the Rules of Civil Procedure and the justice system.

As it pertains to the second factor, the Plaintiff made reference to several Orders showing that the Defendant has been sanctioned numerous times in other matters for similar conduct. See *Lighthouse Medical Group of Florida, Inc. v. Star Casualty Ins. Co.,* 2021-000254-CC-24 [31 Fla. L. Weekly Supp. 268a]; *Gonzalez Rehab Professionals, LLC v. Star Casualty Ins. Co.,* 2021-012436-CC-25; *Manuel V. Feijoo, M.D., et al., v. Star Casualty Ins. Co.,* 2016-004946-SP-25-02 [28 Fla. L. Weekly Supp. 419a]; *Manuel V. Feijoo, M.D., et al., v. Star Casualty Ins. Co.,* 2018-1748-SP-25-01, *SOS Medical Ctr. v. Star Casualty Ins. Co.,* COINX23063564; *Clearcare v. Star Casualty Ins. Co.,* COINX23040660; *Dragon Clinic, Inc v. Star Casualty Ins. Co.,* 2023-129102-CC-21.

Regarding the third factor, the Plaintiff relied upon *Xtreme Chiropractic & Rehab, Inc. (a/a/o Oscar Hincapie) v. Geico Ind. Co.,* 23 Fla. L. Weekly Supp. 964b (Broward Cty. Ct. 2016)(Lee, J.), wherein the Court was presented with a similar fact pattern as the instant case and Judge Lee held:

> that the misconduct at issue lies at the feet of the Defendant itself, i.e., the client. The attorneys in this case are "in house" counsel for the Defendant. Defendant's attorneys work directly for the Defendant and have no clients other than Defendant. See *A-1 Mobile MRI, Inc. v. United Auto. Ins. Co.,* 12 Fla. L. Weekly Supp. 387d (Broward Cty. Ct. 2005). This particular Defendant apparently believes the Court's Orders are not "orders," but rather "suggestions" to which it may comply at its leisure.

Regarding the Fourth Kozel factor, the Court finds that Defendant's failure to abide by this Court's numerous Orders and the Rules of Civil Procedure, has prejudiced the Plaintiff in its attempt to obtain discoverable evidence and to prosecute this matter in an effort to bring it to a conclusion. A review of the docket will clearly indicate that the Plaintiff was prejudiced as the Plaintiff has incurred a substantial amount of time and expense in simply trying to obtain information, which it has a right to obtain, by way of discovery. Defendant's failure to engage in discovery has resulted in Plaintiff's inability to comply with the deadlines established by the Court's Uniform Case Management Order.

Regarding the fifth factor, at the hearing, counsel for Defendant indicated that this case was recently taken over from prior counsel, however, a review of the docket will show that Defendant's prior counsel was discharged as of June 10, 2024, as all files were transferred to in house counsel. Five of the six orders were issued after the file was transferred to Defendant's in-house counsel. Defendant has a duty and obligation to review any files it takes over to ensure there no overdue Orders. Regardless, it is difficult for this Court to imagine any circumstances that would sufficiently justify a party's continued violation of Court Orders.

As to the final factor, this Court finds that the Court's administration of justice has been hampered as this case involves a claim for unpaid PIP benefits, with a recommended resolution standard of eighteen months. Fla. Jud. R. Admin. 2.250(a)(1)(b). The subject action has been pending since August 25, 2023, and despite numerous Orders compelling discovery, the Defendant's unilateral lack of diligence has unduly delayed the progression of this action. Our court system must function efficiently, and a party ignoring Court Orders only causes delays and clogged dockets. This Court expects all parties, Plaintiff and Defendant, to follow the Rules of Procedure and Orders of this Court. The Court cannot function as efficiently if orders are repeatedly ignored.

Therefore, it is **ORDERED and ADJUDGED** that as a matter of law, Plaintiff's Motion to Strike Defendant's Pleadings is GRANTED, as a result a Default is hereby entered against the Defendant.

* * *

Landlord-tenant—Eviction—Jury trial—Prior order striking jury trial demand is vacated based on trial court determination, on reconsideration, that waiver of jury trial right was not knowing, intelligent, and voluntary

BROWNSVILLE VILLAGE IV, LTD., Plaintiff, v. JANIECE SANTAMARIA, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-220889-CC-20. Section CL02. February 4, 2025. Kevin Hellmann, Judge. Kenneth J. Lowenhaupt, Law Offices of Lowenhaupt Sawyers & Spinale, Miami, for Plaintiff. Yesenia Arocha, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION AND ALLOWING JURY TRIAL

THIS CAUSE having been brought before the Court on Defendant's Motion for Reconsideration of the Order to Strike Plaintiff's Jury Trial Demand (Index 24) and the Court having heard argument from both parties on January 30, 2025, and having reviewed the entire case file and the facts and law relevant to the case, it is hereby

ORDERED AND ADJUDGED:

that the Defendant's Motion for Reconsideration is GRANTED and the previously entered Order Striking Plaintiff's Jury Trial Demand is VACATED based on the following:

1. Defendant signed a lease without legal counsel on April 20, 2024.

2. Within the text of that lease, paragraph 40 included a waiver of trial by jury for any disputes that should arise from the lease contract between Plaintiff and Defendant.

3. Plaintiff subsequently filed a complaint for eviction against Defendant on November 13, 2024, based on allegations that Defendant failed to pay rent.

4. Defendant filed an Answer and Affirmative Defenses on December 3, 2024, which included a demand for trial by jury.

5. Plaintiff filed a Motion to Strike Jury Trial on January 7, 2025, citing the language contained in paragraph 40 of the lease agreement.

6. The Court entered an Order Striking Jury Trial upon review of the language included in paragraph 40 of the lease agreement.

7. On January 30, 2025, the Court heard argument on Defendant's Motion for Reconsideration.

8. The right to trial by jury is a waivable right so long as the waiver is knowing, intelligent and voluntary. *See Amquip Crane Rental, LLC v. Vercon Const. Management, Inc.*, 60 So.3d 536 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D932] *citing Leslie v. Carnival Corp*., 22 So.3d 567, 581 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2448a]

9. The appellate court's dissent in *Leslie v. Carnival Corp*., applied five factors in determining whether a waiver of jury trial is knowing, intelligent and voluntary. Those factors are: (1) conspicuousness of the [waiver] provision in the contract; (2) level of sophistication and experience of the parties entering the contract; (3) opportunity to negotiate terms of the contract; (4) relative bargaining power of each party; and (5) whether the waiving party was represented by counsel.

10. These factors, although listed in the dissenting opinion, provide a helpful framework to assist the Court in determining whether a waiver of the right to trial by jury was done knowingly, intelligently and voluntarily.

11. In applying these factors to the facts of the case at bar, including the written lease agreement itself as provided by Plaintiff, this Court finds that the waiver by this Defendant was not knowing, intelligent and voluntary.

* * *

Landlord-tenant—Eviction—Standing—Where plaintiff sold property three months prior to bringing eviction action, and new owner failed to file motion for substitution of parties within 90 days of transfer of ownership of property, plaintiff lacks standing and new owner cannot legally acquire standing—Motion to dismiss is granted

SP LINCOLN FIELDS GP, INC., Plaintiff, v. LANETTE EARLY, et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-004050-CC-20. Section CL02. March 3, 2025. Kevin Hellmann, Judge. Counsel: Whitney Daly, MGFD Law Firm P.A., Clearwater, for Plaintiff. Michael Angelo Tata, Legal Services of Greater Miami, Miami, for Defendant.

ORDER OF DISMISSAL

THIS CAUSE, having come before the Court on the Defendant's Motion to Dismiss, and the court having held a hearing on February 27, 2025, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff filed a nonpayment eviction against Defendant on April 12, 2023.

2. Her Rent Determination hearing was held on May 5, 2023, culminating in an Order that she pay into the Court Registry on May 9, 2023.

3. Tenant never made this payment by the deadline, and the Court entered a Default Judgment against her on June 1, 2023.

4. Tenant—hitherto *pro se*—then obtained counsel. Her attorney filed a Motion for Reconsideration on June 2, 2023.

5. From June 2023 through March 2024, Tenant's undersigned counsel worked to resolve the issue with Plaintiff's Counsel.

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

7. Defendant's counsel then filed a Motion to Dismiss on January 17, 2025.

8. The Court heard Defendant's Motion for Consideration on January 29, 2025, granting the motion and vacating the default.

9. The Court heard Defendant's Motion to Dismiss on February 27, 2025.

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

11. As a result, the Court finds that Plaintiff currently lacks standing to pursue its eviction against Defendant pursuant to Florida Rules of Civil Procedure 1.260(c) because its Successor failed to substitute itself as Plaintiff within the allotted timeframe.

Since Plaintiff lacks standing and its Successor can no longer legally acquire it, Defendant's Motion to Dismiss is granted and the present action is dismissed.

* * *

Civil procedure—Dismissal—Motion to dismiss is granted where plaintiff failed to file witness or exhibit lists, plaintiff failed to appear at trial, and statement of claim is deficient for not being in English

MARIA LEGUISAMO, Plaintiff, v. GUDIZZI HOME CORP., et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-075237-SP-05. Section CC08. February 20, 2025. Maria D. Ortiz, Judge. Counsel: Maria Leguisamo, Pro se, Plaintiff. Robert Wayne and Shawn Wayne, for Defendants.

ORDER GRANTING DEFENDANTS MOTION FOR DISMISSAL AT TRIAL

THIS MATTER coming before the Court for a non-jury trial on February 13, 2025, and the Court having reviewed the record, the filings and hearing argument from Defendants' counsel, it is hereby:

ORDERED AND ADJUDGED as follows:

1. A non-jury trial was scheduled in this cause for February 13, 2025, at 2:30pm.

2. All Defendants appeared through counsel.

3. Plaintiff failed to appear.

4. The Court waited additional time for the Plaintiff to appear.

5. The Court's review of the trial docket reflects that Plaintiff received notice of the trial order.

6. In addition, Plaintiff failed to file a witness list or exhibit list in accordance with the trial order.

7. Defendants' *ore tenus* motion for dismissal is hereby **GRANTED**. *Smith v. St. Vil*, 714 So. 2d 603 (Fla. 4th DCA 1998) [25 Fla. L. Weekly D372b] (". . . a dismissal of an action or claim for failure to comply with the rules or any order of court is an adjudication on the merits.")

8. Lastly, the Court in reviewing the statement of claim finds that it fails to state a cause of action for which relief can be granted. *See Rodriguez v. State*, 45 So. 3d 938, 939 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2276a] (concluding that a defendant's post conviction motion was deficient and improper because he "submitted his motion partially written in Spanish, without an English translation"); 40 Fla. Jur. 2d Pleadings § 13 (2012) (stating that "pleadings are required to be in the English language")

9. The Court reserves jurisdiction to award costs and monetary 57.105 fees to the Defendant(s).

10. Plaintiff shall take nothing from this action and all Defendants shall go hence without day.

* * *

Insurance—Discovery—Insurer is ordered to provide better responses to request to produce, with specific objections and privilege log to support any claimed privilege

OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC, d/b/a WINDSOR IMAGING BOCA-DELRAY, a/a/o Tammy Atkinson, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2022-SC-014591-XXXX-MB (RE). May 5, 2023. Sarah L. Shullman, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck and Baxter, P.A., West Palm Beach, for Plaintiff. Manshi Shak, for Defendant.

ORDER ON MOTION TO COMPEL BETTER RESPONSES TO REQUEST TO PRODUCE AND REQUEST FOR ADMISSIONS AND MOTION FOR SANCTIONS AND PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO COMPLY WITH THE TIMEFRAME IN THE ORDER IMPLEMENTING DIFFERENTIATED CASE MANAGEMENT PLAN, DESIGNATING CASE TO THE STREAMLINED TRACK, ORDER SETTING JURY TRIAL AND PRE- TRIAL CONFERENCE, AND DIRECTING PRETRIAL AND MEDIATION PROCEDURES

THIS CAUSE having come before the Court and the Court having heard argument of counsel of the parties on Plaintiff's Motion to Compel Better Responses to Request to Produce and Request for Admissions and Motion for Sanctions and Plaintiff's Motion for Extension of Time to Comply with the Timeframe in the Order Implementing Differentiated Case Management Plan, Designating Case to the Streamlined Track, Order Setting Jury Trial and Pre-Trial Conference and Directing Pretrial and Mediation Procedures; the Court having reviewed the documents and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

1. Plaintiff's Motion to Compel Better Responses to Request to Produce is hereby ***GRANTED.***

2. Defendant is required to file Amended Responses to Plaintiff's Request to Produce, as to all of the requests set forth in Plaintiff's Request to Produce, within thirty (30) days of the date of this order. Defendant is required to either assert an objection or provide the documents sought in accordance with the request, or indicate exactly which portion is objected to and which portion is being produced. For any response where Defendant is alleging privilege, Defendant is required to serve Plaintiff with a Privilege Log specifying the documents being withheld by Defendant based upon its privilege objection.

3. Plaintiff's Motion to Compel Better Responses to Request for Admissions is hereby ***DENIED AS MOOT WITHOUT PREJUDICE*** based upon Defendant's filing of Amended Responses to Admissions dated May 2, 2023. Plaintiff has the right to refile its Motion to Compel Better Responses based upon the Amended Responses to Admissions filed by Defendant on May 2, 2023.

4. Plaintiff's Motion for Extension of Time to Comply with the Timeframe in the Order Implementing Differentiated Case Management Plan, Designating Case to the Streamlined Track, Order Setting Jury Trial and Pre-Trial Conference and Directing Pretrial and Mediation Procedures is hereby ***GRANTED.***

5. Calendar Call scheduled for May 10, 2023, has been cancelled.

6. Defendant's Motion for Summary Judgment hearing scheduled for May 9, 2023, has been cancelled.

7. It is improper for the Court to move forward with summary judgment with pending discovery. The parties may schedule any Motions for Summary Judgment to be heard closer to the date of Calendar Call to allow for the Parties to complete written and oral discovery.

8. The Court will reset this case on its August docket with a one (1) week Jury Trial rescheduled for the week of August 28, 2023, and Calendar Call rescheduled for August 21, 2023.

9. The Court will issue a new trial order which will set forth new deadlines for the parties to comply.

* * *

Insurance—Discovery—Failure to comply—Sanctions—Because insurer's amended responses to request to produce failed to comply with order to provide more specific objections and privilege log, all prior objections asserted by insurer, other than those based on attorney-client or work-product privileges, are waived

OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC, d/b/a WINDSOR IMAGING BOCA-DELRAY, a/a/o Tammy Atkinson, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2022-SC-014591-XXXX-MB (RE). August 29, 2023. Sarah L. Shullman, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck and Baxter, P.A., West Palm Beach, for Plaintiff. Manshi Shak, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL BETTER RESPONSES TO DEFENDANT'S AMENDED RESPONSES TO REQUEST TO PRODUCE AND MOTION FOR SANCTIONS AND ORDER ON PLAINTIFF'S MOTION TO COMPEL BETTER RESPONSES TO INTERROGATORIES AND FOR SANCTIONS

THIS CAUSE having come before the Court for hearing on Plaintiff's Motion to Compel Better Responses to Defendant's Amended Responses to Request to Produce and Motion for Sanctions and Order on Plaintiff's Motion to Compel Better Responses to Interrogatories and for Sanctions. The Court having reviewed the documents and being fully advised in the premises, makes the following findings/rulings:

BACKGROUND

1. On May 2, 2023, the Court found that Plaintiff's Requests to Produce were sufficiently specific and that Plaintiff is entitled to such discovery. Additionally, the Court found that Defendant's generic objections and its failure to file and serve a privilege log were improper.

2. The Court entered an Order granting Plaintiff's Motion to Compel Better Responses, thereby requiring Defendant to file better responses within thirty (30) days. Additionally, the Order specifically stated that Defendant was required to either assert an objection or provide the documents sought in accordance with the request, or

indicate exactly which portion was objected to and which portion was being produced. For any response where Defendant was alleging privilege, Defendant was required to serve Plaintiff with a privilege log specifying the documents being withheld by Defendant based upon its privilege objection.

3. The Order also granted Plaintiff's Motion for Extension of Time to Comply with the Order Setting Jury Trial, thereby cancelling Calendar Call set for May 10, 2023 and the hearing on Defendant's Motion for Summary Judgment scheduled for May 9, 2023, based upon its finding that it was improper to move forward with discovery pending.

4. On June 5, 2023, Defendant filed and served its Amended Responses to Plaintiff's Request to Produce, asserting therein virtually identical objections as asserted previously by Defendant. Defendant also filed and served a privilege log that consisted of a one-paragraph list of general assertions of privilege, without specifying to which request or which documents they pertained.

5. Thereafter, Plaintiff filed its Motion to Compel Better Responses to Defendant's Amended Responses to Request to Produce and for Sanctions, which is the subject of this Order, and which was heard before this Court on August 11, 2023.

6. After not receiving any better responses to its Interrogatories, in response to its good faith letter, on May 1, 2023, Plaintiff filed its Motion to Compel Better Responses to Interrogatories and for Sanctions.

FINDINGS

7. This Court finds that the prior Order entered on May 5, 2023, was clear and provided specific instructions to Defendant to amend its Responses and provide a privilege log.

8. The Court finds that Defendant failed to comply with said Order. Defendant's Amended Responses assert the same improper objections and Defendant failed to produce a specific Privilege Log.

9. Accordingly, this Court hereby finds that all prior objections asserted by Defendant, other than objections based upon attorney-client privilege or work product, are hereby waived.

10. Defendant is hereby required to file and serve Second Amended Better Responses to Plaintiff's Request to Produce, and shall produce and provide to Plaintiff every document in Defendant's possession, custody, or control, as well as all recorded statements, phone calls, and communications, whether oral, written, or transcribed, relating to its insured Tammy Atkinson, including but not limited to any documents pertaining to Plaintiff or any non-suit provider.

11. For any document or communication being withheld from production based upon an objection as to attorney client privilege or work product, Defendant is hereby required to file and serve Plaintiff with a specific and detailed privilege log as required by Florida law.

12. This Court also hereby finds that Defendant is required to file and serve better verified Answers to Plaintiff's Interrogatories numbers 2, 3, 4, 5, 6, and 7 as stated on the record.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

13. Plaintiff's Motion to Compel Better Responses to Defendant's Amended Responses to Request to Produce is hereby **GRANTED**. Defendant's objections to Plaintiff's Request to Produce, with the exception of attorney client privilege and work product privilege, are **OVERRULED**. Defendant is required to file and serve better responses to Plaintiff's Request to Produce, along with all documents required to be produced as set forth herein, within ten (10) days of August 11, 2023.

14. For any document, communication, or other information being withheld by Defendant based upon an objection asserting attorney client privilege and work product privilege, Defendant shall file and serve a Privilege Log, in compliance with this Order, which shall be filed within ten (10) days of August 11, 2023.

15. Plaintiff's Motion to Compel Better Responses to Defendant's Responses to Plaintiff's Interrogatories is hereby **GRANTED** for Interrogatories #'s 2, 3, 4, 5, 6, and 7. Defendant is required to file and serve better Verified Answers to Plaintiff's Interrogatories within ten (10) days of August 11, 2023.

16. Upon receipt of Defendant's better responses to Plaintiff's Request to Produce, better Verified Answers to Interrogatories, and Privilege Log, the Plaintiff shall have five (5) days to file any additional motions related to the discovery being produced and/or objected to by Defendant as being privileged, and is required to schedule any motions for hearing to occur within thirty (30) days of August 11, 2023.

17. The Court hereby RESERVES RULING on Plaintiff's Motion for Sanctions and will allow Plaintiff to reset its Motion to occur for an in-person evidentiary hearing for a future date and time.

* * *

Insurance—Discovery—Objections—Objections to production are overruled—Ruling on objections based on asserted privileges is deferred until in camera inspection of documents—Any items reflecting communication between insured and insurer or its agents are relevant

OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC, d/b/a WINDSOR IMAGING BOCA-DELRAY, a/a/o Tammy Atkinson, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2022-SC-014591-XXXX-MB (RE). September 28, 2023. Sarah L. Shullman, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck and Baxter P.A., West Palm Beach, for Plaintiff. Manshi Shah, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL BETTER RESPONSES TO DEFENDANT'S 2nd AMENDED RESPONSES TO PLAINTIFF'S REQUEST TO PRODUCE & OVERRULE DEFENDANT'S OBJECTIONS TO PLAINTIFF'S REQUEST TO PRODUCE AND MOTION FOR SANCTIONS

THIS CAUSE having come before the Court upon Plaintiff's Motion to Compel Better Responses to Defendant's 2nd Amended Responses to Plaintiff's Request to Produce & Overrule Defendant's Objections to Plaintiff's Request to Produce and Motion for Sanctions in this matter. The Court having reviewed the documents and being fully advised in premises,

It is **HEREBY ORDERED AND ADJUDGED AS FOLLOWS:**

1. Defendant's objections to Request to Produce numbers 31 are **OVERRULED.** Defendant is required to produce all documents responsive to request #31, which are in its custody, control, or possession, or within the custody, control, or possession of any of its agents, regardless of whether the documents are being maintained in more than one claim file, or being maintained by a separate department of the insurance company or being maintained by any of its agents, as it relates to the Georgia Policy or the Florida Policy, not limited to the date of loss of 3/29/22. Defendant's objections to Request to Produce numbers 33, 34, and 35 are **SUSTAINED**.

2. Defendant has asserted either work product or attorney client privilege objections in response to Request to Produce numbers 1(a), 12, 13, 21, 32, and 40. This Court is unable to determine by review of the Privilege Log whether Defendant's Privilege Log sufficiently described the documents withheld as privileged or whether those documents are in fact privileged. Therefore, this Court **DEFERS RULING** as to whether the Defendant met the requirements of sufficiently describing all documents being withheld by Defendant as privileged and whether the documents set forth on the Privilege Log

are in fact privileged, pending an in-camera inspection. Other than what has been specifically set forth on the Privilege Log, this Court hereby finds that Plaintiff's Motion to Compel Better Responses to these requests is hereby **GRANTED**. Defendant is hereby required to produce all other documents responsive to these requests which are in its custody, control, or possession, as well as documents responsive to these requests which are within the custody, control, or possession of any of its agents, regardless of whether the documents are being maintained in more than one claim file, or being maintained by a separate department of the insurance company or being maintained by any of its agents, as it relates to the Georgia Policies with policy #815961476 or the Florida Policy with policy #988798046, and not limited to the date of loss of 3/29/22.

3. For Request to Produce numbers: 1(a), 1(b), 1(e), 9, 11, 12, 17, 18, 19, 24, and 29, the Court cannot determine at this juncture whether Defendant has improperly withheld responsive documentation based on its interpretation of what is relevant. Therefore, as it relates to these requests, Plaintiff's motion is hereby **GRANTED**. Defendant is hereby required to produce all documents responsive to these requests which are in its custody, control, or possession, and all documents responsive to these requests which are within the custody, control, or possession of any of its agents, regardless of whether the documents are being maintained in more than one claim file, or being maintained by a separate department of the insurance company or being maintained by any of its agents, as it relates to the Georgia Policies #815961476 or the Florida Policy #988798046, and not limited to the date of loss of 3/29/22.

4. The Court finds that any documents, correspondence, notes, recordings, messages and/or communications of any kind, which are maintained by Defendant, or any of Defendant's agents, reflecting any communications between Tammy Atkinson and Defendant or between Ms. Atkinson and any of Defendant's agents, related to her Georgia Insurance Policies #815961476 and/or related to her Florida Insurance Policy #988798046 including but not limited to communications regarding insurance coverages, premiums, payments, bills, address changes, mailing changes, residency changes, inquiries or conversations as to any possible or necessary insurance requirements, and/or changes to coverages or insurance, personal information obtained by Defendant and utilized for any purpose related to any of Ms. Atkinson's insurance policies, are relevant to the issues in this case. .

5. This Court also finds that any Notice to Defendant and discovery surrounding this issue is relevant to the claims and defenses currently at issue in this case.

6. Defendant shall submit all of the pages for all of the documents set forth on Defendant's Privilege Log to the Court, bates stamped, for an in-camera review, within (5) five days of the date of this Order, after which the Court will rule on the Defendant's privilege objections.

7. Defendant shall file its amended responses as well as provide all other responsive documents required to be produced, in accordance with this Order, within ten (10) days of the date of this Order.

8. The Court hereby RESERVES RULING on Plaintiff's Motion for Sanctions and will allow Plaintiff to reset its Motion for an in person evidentiary hearing for a future date and time.

* * *

Insurance—Discovery—Order requiring coordination of deposition dates and specifying sequence of events to resolve ongoing discovery disputes

OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC, d/b/a WINDSOR IMAGING BOCA-DELRAY, a/a/o Tammy Atkinson, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2022-SC-014591-XXXX-MB (RE). November 8, 2023. Sarah L. Shullman, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck and Baxter P.A., West Palm Beach, for Plaintiff. Manshi Shah, Coconut Creek, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION REQUESTING A CASE MANAGEMENT CONFERENCE AND MOTION TO COMPEL SEQUENCE OF HEARINGS AND DEPOSITIONS

THIS CAUSE having come before the Court upon Plaintiff's Motion Requesting a Case Management Conference and Motion to Compel Sequence of Hearings and Depositions in this matter, and the Court having heard argument of counsel, having reviewed the court record and case file, and otherwise being fully advised in the premises,

It is**, HEREBY ORDERED AND ADJUDGED**, as follows:

1. Plaintiff's Ore Tenus Motion Requesting to Continue Calendar Call, Jury Trial and Summary Judgment Deadlines is hereby **GRANTED**. The Calendar Call scheduled for January 9, 2024, and the Jury Trial scheduled for January 22, 2024, are hereby **CANCELLED**. Pursuant to this Order, Jury Trial and Calendar are hereby continued. **This action is reset for a jury trial on the one—week docket beginning March 11, 2023, with Calendar Call reset for March 5, 2024, at 9:30 am.** Any prior Summary Judgment deadlines are hereby extended to allow the Parties to complete all written and oral discovery.

2. The Parties shall coordinate a date and time for the Plaintiff to take the following depositions: (a) the deposition of the insurance agent, Kory Rykman (hereinafter "The Georgia Agent") and (b) the deposition of the insurance agent Kelly Davis (hereinafter "The Florida Agent") to occur on a date and time in January 2024. The deposition of The Georgia Agent and the deposition of the Florida Agent can be taken one time to be utilized by the Parties in both this case and the companion case, *Dr. Peter J. Vapnek DC PA (a/a/o Tammy Atkinson) v. Allstate Insurance Company,* case no. 502022SC018706XXXXMB.

3. The Plaintiff shall file its Notice of Taking Deposition and issue the Subpoenas for the depositions of The Georgia Agent and The Florida Agent, by the end of the week of November 3, 2023. Defendant is required to file any objections it is alleging to either of the two Notices of Taking Depositions and/or Subpoenas within five (5) days of the date of Plaintiff's filing of its Notices of Taking Depositions. Plaintiff may file any subsequent motions and/or responses directed to any objections and/or motions filed by Defendant related to the taking of either of these depositions.

4. The Court hereby schedules an ***in person hearing*** and reserves a **one (1) hour timeslot on December 6, 2023 at 2:30 pm** for the following hearings: (1) Defendant's Motion for Protective Order/ Objection to the deposition of the Florida Agent, (2) Plaintiff's Motion to Compel Deposition of the Florida Agent/Response to Defendant's Motion for Protective Order, (3) Defendant's Objections to Plaintiff's Subpoena Duces Tecum for the Deposition of The Georgia Agent, (4) Defendant's Objections to Plaintiff's Subpoena Duces Tecum for the Deposition of The Florida Agent, and any motion and/or response filed by Plaintiff directed to Defendant's objections.

5. The Court hereby schedules and reserves a **30 - minute hearing on November 9, 2023, at 3:00 pm** for the hearing on Plaintiff's Motion to Compel Exhibits from Defendant from Plaintiff's Deposition of David Blankenship on September 19, 2023, Motion to Compel Documents Requested in the Duces Tecum, and Motion for Sanctions.

6. The Defendant shall comply with the Order Granting Plaintiff's Motion to Compel Better Responses to Defendant's 2nd Amended Responses to Plaintiff's Request to Produce & Overrule Defendant's Objections to Plaintiff's Request to Produce and Motion for Sanctions

(hereinafter "Order Granting Plaintiff's MTC Better Responses to Defendant's 2nd Amended Responses") filed on 9/28/2023, within ten (10) days of the date of the Order Denying Defendant's Motion for Clarification filed on 11/1/2023.

7. Upon the receipt and review of Defendant's 3rd Amended Responses to Plaintiff's Request for Production, including all responsive documents required to be produced by Defendant, in accordance with the Order Granting Plaintiff's MTC Motion to Compel Better Responses to Defendant's 2nd Amended Responses, the Plaintiff shall advise the Court as to whether the Plaintiff is still contesting the Defendant's responses and/or production of documents produced by Defendant in response to Plaintiff's Request to Produce and prior Court Orders. If Plaintiff advises that there is nothing more being contested by the Plaintiff as to the discovery responses produced by Defendant, then this Court will move forward with conducting the in-camera inspection and evidentiary hearing as to the documents set forth on Defendant's Privilege Log filed on 8/21/23 based upon a review of the documents provided to the Court by Defendant on 10/2/23. If Plaintiff advises that it is still contesting Defendant's responses and/or responsive documents produced by Defendant, the pending discovery issues being contested, including the in-camera inspection, will be turned over to a Special Master/Magistrate to be assigned by the Court.

* * *

Real property—Foreclosure—Judicial sale—Surplus funds—Entitlement—Presumption that original owners were entitled to surplus funds was sufficiently rebutted where third-party purchaser directed court and clerk to disburse surplus funds to city to pay fine for original owners' code violations involving short-term rental of property, and city filed affidavit of debt and motion to intervene and claim surplus funds prior to funds becoming unclaimed—City is found to be assignee/grantee of surplus funds by virtue of involuntary equitable transfer or constructive assignment of right to collect surplus to prevent unjust enrichment of original owners

RIVIERA AT BONAVENTURE HOMEOWNERS ASSOCIATION, INC., Plaintiff, v. MOSMARTNEY INVEST, LLC, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO 21-003220 (62). February 11, 2025. Woody R. Clermont, Judge. Counsel: Michael Villarosa and Carolina Sznajderman Sheir, Eisinger Law, for Plaintiff. Alberto H. Orizondo, Law Offices of Alexis Gonzalez, P.A., for Third Party Purchaser, ATK Associates, LLC. Joseph R. Natiello, Weiss Serota Helfman Cole & Bierman, for Intervenor, City of Weston. Michael W. Burke and Scott Andron, Broward County Attorney's Office, for Intervenor, Broward County.

ORDER GRANTING CITY OF WESTON'S SECOND AMENDED MOTION TO INTERVENE AND CLAIM TO SURPLUS FUNDS FROM FORECLOSURE

THIS CAUSE having come before the Court on February 10, 2025, via Zoom, on the City of Weston's ("City") *Second Amended Motion to Intervene and Claim to Surplus Funds from Foreclosure,* and the Court being duly advised in the premises, having conducted an evidentiary hearing, and having heard no objection from any other party upon proper notice, it is hereby ORDERED AND ADJUDGED that the City's Motion is GRANTED IN ITS ENTIRETY, as provided below:

1. On July 23, 2020, the City of Weston issued a Notice of Violation to the owners of 163 RIVIERA CIRCLE # 57-9 WESTON, 33326 for violating the City's codes prohibiting the use of a Townhouse as a vacation rental ("Violation").

2. On April 12, 2021, Riviera At Bonaventure Homeowners Association, Inc. filed a Complaint in Foreclosure and Lis Pendens on the below-described property ("Property"):

163 RIVIERA CIRCLE # 57-9 WESTON, 33326; or BONAVENTURE 82-43 B POR TR 58 DESC AS COMM MOST NLY COR TR 15 OF SAID PLAT,N118.54 SW 17 TO POB,SW 15,NW 41, NE 15,SE 41 TO POB AKA: LOT 57 RIVIERA AT BONAVENTURE, AS RECORDED IN OFFICIAL RECORDS BOOK 23576 AT PAGE 1898 OF THE PUBLIC RECORDS OF BROWARD COUNTY, FLORIDA.

3. The Lis Pendens was recorded as Instrument No.: 117190838 in the Official Records of Broward County, Florida on April 13, 2021. A lis pendens serves two main purposes: (1) to give notice to and thereby protect any future purchasers or encumbrancers of the property; and (2) to protect the plaintiff from intervening liens. *See Fischer v. Fischer*, 873 So. 2d 534, 536 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1222a].

4. Under Section 48.23(1)(d), Florida Statutes, the recording of such lis pendens constitutes a bar to the enforcement against the property described in the notice of all interests and liens. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens. *See also Jallali v. Knightsbridge Vill. Homeowners Ass'n, Inc.,* 211 So. 3d 216, 219 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D115a]

5. On June 22, 2022, the City of Weston certified a lien for the Violation. This lien was recorded on June 23, 2022 as Instrument No.: 118229318.

6. Under Florida law, the City was not entitled to intervene in the foreclosure litigation as its lien was recorded after the recording of the lis pendens. Thus any late filed lien to be enforced was to be extinguished by virtue of the sale. *See, e.g. Baron v. Aiello*, 319 So. 2d 198, 200 (Fla. 3d DCA 1975).

7. All named, known defendants of the foreclosure action failed to file responsive pleadings. The Court subsequently found all defendants in default and entered a Final Judgment of Foreclosure on July 21, 2022.

8. On September 16, 2022, foreclosure of the Property was prosecuted to a judicial sale via public auction, and sold to ATK Associates LLC. ("ATK") for $252,100.00.

9. The sale resulted in a disbursement of $15,682.57 to the Plaintiff. A surplus of $236,389.43 ("Surplus") is being held by the Clerk of Court. This is as of a Certificate of Disbursement dated October 3, 2022.

10. On January 24, 2023, ATK filed a Motion for an order directing the Clerk to disburse surplus funds to pay Broward County property taxes and City fines related to the underlying Weston code violation. Thus, the Third-Party Purchaser ATK directly requested that this court disburse the monies to pay the City of Weston's fines in addition to Broward County's taxes, by virtue of its motion filed February 3, 2023.

11. The City subsequently filed an Affidavit of Debt owed on March 13, 2023. This as in response to the Third-Party Purchaser's desire to see these surplus funds to go to both County and City to pay off any outstanding obligations, regardless of the effect of any time deadlines or time periods which might have been missed. *But compare Bank of New York Mellon v. Glenville,* 252 So. 3d 1120 (Fla. 2018) [43 Fla. L. Weekly S333a] (regarding interpretation of an older version of section 45.032, Florida Statutes prior to revisions in 2018). Moreover, no one has currently competing claims to the surplus funds, which factually distinguishes this case from *Refaie v. Bayview Loan Servicing, LLC,* 331 So. 3d 749, 750 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1125a].

12. On April 10, 2023, a hearing was held before the Honorable Terri Ann Miller, who entered an Order cancelling Broward County's tax deed sale on the property, and reserving ruling on ATK's Motion

to Disburse. Ordinarily under section 45.032(3)(c), Florida Statutes, the surplus would be reported and remitted to the department after 1 year from the sale, but this is only if there is not a pending court proceeding regarding entitlement to the surplus. September 16, 2023 would have marked one (1) year from the sale, and this action was still pending, so the funds are not yet considered unclaimed and being required to be turned over to the department. *See, e.g., Atwater v. City of Cape Coral*, 120 So. 3d 595, 599 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1504a].

13. The City filed a Motion to Intervene and Claim to Surplus Funds ("Motion 1") on April 26, 2023.

14. The Broward County tax lien on the Property was satisfied via payment by ATK on May 12, 2023.

15. The City filed a Notice of Filing on June 6, 2023, providing an Affidavit of Publication of the City's Motion 1 in a newspaper of general circulation, and a copy of the Court's current docket demonstrating no parties submitted any filings subsequent to that notice by publication.

16. The City filed a Second Amended Motion to Intervene and Claim to Surplus Funds ("Motion 2"), and an Amended Affidavit of Debt ("Affidavit"), on October 30, 2024. The Affidavit asserts the City is owed $211,280.06 for accrued fines and fees under the Violation.

17. A hearing on Motion 2 was held on February 10, 2025. The City was the only attendee/participant in the hearing.

18. No parties have come forward to make a claim to the Surplus, as of the February 10th hearing.

19. Under Section 45.032(3)(b), Florida Statutes, the City is entitled to claim an interest in the proceeds from a foreclosure prior to the date the clerk reports the surplus as unclaimed. This court interprets the totality of the circumstances here based on the evidence: that ATK filed a motion directing the court and clerk to disburse surplus funds to the City of Weston on January 24, 2023, that City of Weston filed an Affidavit of Debt on March 13, 2023, and the City of Weston's Motion to Intervene and Claim to Surplus Funds from Foreclosure, filed April 26, 2023, as being sufficient action to constitute a proper claim of interest, that was made prior to the funds becoming unclaimed, and are even instigated at the insistence of the Third-Party Purchaser ATK.

20. Unjust enrichment occurs when (1) the first party has conferred a benefit on the second party; (2) the second party accepts the retains the benefit; and the (3) circumstances are inequitable that the second party retain the benefit without paying value to the first party. *Circle Fin. Co. v. Peacock*, 399 So. 2d 81, 84 (Fla. 1st DCA 1981) ("Unjust enrichment is characterized as the effect of a failure to make restitution for property received by one under such circumstances as to give rise to a legal or equitable obligation, thereby requiring such person to account for his retention of the property."); *Moore Handley, Inc. v. Major Realty Corp.*, 340 So. 2d 1238, 1239 (Fla. 4th DCA 1976) (finding that a count seeking a judgment for monies wrongfully received states a cause of action for " 'restitution' to prevent 'unjust enrichment' ").

21. Under Section 45.033, Florida Statutes, there is a rebuttable presumption that the owners of record of real property on the date of the filing of a lis pendens ("Owners") are the persons entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim.

22. In accordance with Section 45.033(2)(b), Florida Statutes, the City of Weston has rebutted this presumption.

23. This court finds the following facts which point to the City's entitlement to restitution as to the surplus funds resulting from the wrongful conduct of the original Owners:

a. The Owners were the beneficiaries of unjust enrichment in the form of the collection of short term rental fees in disregard of the City's code, compelling the City to initiate proceedings, and accrues costs and fees in the pursuit of compliance and collections of monies due.

b. Furthermore, the Owners demonstrated a disregard of the homeowners association ("HOA") rules by not paying their share of fees and/or assessments, causing the HOA to commence foreclosure proceedings in pursuit of monies owed. Consistent with their lack of participation in the Weston code enforcement processes, the Owners effectively abandoned the Property and all interests in it, ultimately leading to a default judgment against them in the foreclosure litigation.

Thus the facts show that the Owners benefitted from their collection of rents which were premised on the privilege to operate as a landlord or renter within the City of Weston in compliance of Weston's code. The Owners accepted these benefits, and then proceeded to illegally collect rents in a windfall violation of the City's rules,[1] making it inequitable that they might profit by avoiding paying what was owed based on their repeated failures to follow the City's ordinances and regulations.[2] All other landlords and renters were required to follow these ordinances.[3] The adversarial processes commenced as a result of the Owners' disregard of ordinances and HOA agreements have resulted in multiple parties incurring costs and expenses to obtain judgements against them, with prescribed damages. Such judgments and resulting damages, ordered under adversarial legal proceedings, are found to be constructive transfers of the Owners' right to collect the Surplus, to the City to remedy the violations.

24. Where the assertion of a contract, lien, or debt, fails because of a fatal issue which affects the legality of collection, then equity serves as a means to enforce a quasi-contract or collect some kind of restitution prevent an unjust enrichment. *See Com. P'ship 8098 Ltd. P'ship v. Equity Contracting Co.,* 695 So. 2d 383, 388 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D764a], as modified on clarification (June 4, 1997) [22 Fla. L. Weekly D1379b] ("At least three Florida cases have allowed subcontractors who failed to perfect their liens to nonetheless maintain a [quasi-contract] action against an owner.").

25. The City is found to be an assignee/grantee of the Surplus by virtue of an involuntary equitable transfer or constructive assignment of the right to collect the Surplus.

26. The City has thereby satisfied its burden of demonstrating its right to request disbursement of the Surplus funds and has justified receipt of such disbursement with its filings, exhibits, and presentation at the hearing on the issue.

27. ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that the Clerk of the Court shall report and remit $211,280.06 of the unclaimed Surplus to the City of Weston, pursuant to Sections 45.031-45.033, Florida Statutes.

28. IT IS FURTHER ORDERED AND ADJUDGED that the remainder of the Surplus, if any, shall be reported and remitted as unclaimed property to the Florida Department of Financial Services, pursuant to Section 717.117, Florida Statutes, as is required by the statute upon the termination of court proceedings regarding surplus fund entitlements.

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[1]*See* Chapter 81 as well as Chapter 124, Weston, Florida Code of Ordinances.

[2]Violation of Section 124.15, Weston Code, which prohibits the use of Vacation rentals in Multiple Family Districts.

[3]"It is unlawful for any Person to allow another Person to occupy any Residential Property as a Vacation Rental within the City, or offer such rental services within the City, unless the Person has registered the Vacation Rental property with the City and the Vacation Rental property has been issued a Certificate of Use in accordance with the provisions of this Chapter." § 81.01, Weston, Florida Code of Ordinances.

* * *

Insurance—Default—Vacation—Evidence—Motion to vacate default and default judgment is denied where insurer has not filed verified answer, sworn motion, affidavit, or other competent evidence in support of motion

ALLIANCE HEALTH & INJURY CENTERS, INC., a/a/o James Johnny, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX24073929. Division 70. March 19, 2025. Kim Theresa Mollica, Judge. Counsel: Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale, for Plaintiff. Daniel Cardwell, Geico In House Counsel, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE DEFAULT AND DEFAULT JUDGMENT

THIS CAUSE, having come before the Court regarding Defendant's Motion to Vacate Default and Default Judgment, and the Court having heard argument of counsel, having reviewed the case law, having considered all Affidavits filed and any additional memorandum of law submitted by the parties, and having been otherwise fully advised in the premises, finds as follows:

FACTS

This case was filed on December 3, 2024. A summons was issued on December, 4, 2024. The Defendant, GEICO GENERAL INSURANCE COMPANY, was served on December 12, 2024. Therefore, a response to the Complaint was due on or before January 2, 2025. The Defendant did not file a response to the Complaint by that deadline. On January 8, 2025, the Plaintiff filed its motion for judgment by default. This motion was set for hearing on January 22, 2025. Defendant was provided notice of the motion for default and notice of hearing on January 8, 2025. No one appeared on the Defendant's behalf at the hearing and an order of default was entered on January 22, 2025. The Order gave the Plaintiff until February 6, 2025 to submit a default final judgment package. On January 27, 2025, the Plaintiff filed the necessary affidavits in support of the default final judgment. On January 27, 2025, the Court entered Default Final Judgment against the Defendant in the amount of $3,354.94 in medical benefits and pre-judgment interest and $6,576.40 in attorney's fees and costs.

On February 4, 2025, the Defendant filed its motion to vacate default and default judgment. This motion was not supported by any sworn statements or affidavits. On February 24, 2025, the Plaintiff responded to the Defendant's motion and provided numerous exhibits reflecting the faxing and direct mailing of the pleadings to the Defendant's mailing address.

LEGAL ANALYSIS

Florida has a long-standing policy of liberality in granting motions to set aside defaults. *North Shore Hospital, Inc. v. Barber*, 143 So.2d 849 (Fla. 1962). In order to prevail on a motion to vacate a default, a party must establish that there was (1) excusable neglect in failing to timely file a response; (2) a meritorious defense, and (3) due diligence in requesting relief after discovery of the default. *Bequer v. National City Bank*, 46 So.3d 1199 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2485a]; *Santiago v. Mauna Loa Invs., LLC*, 189 So.3d 752, 758 (Fla. 2016) [41 Fla. L. Weekly S91a]. While it is within the Court's discretion whether or not to grant the motion to vacate, failure of the moving party to prove any of the three elements must result in a denial of the motion to vacate. *Id*.

Excusable neglect is found "where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any of the other foibles to which human nature is heir." *Somero v. Hendry Gen. Hosp.*, 467 So.2d 1103, 1106 (Fla. 4th DCA 1985). Excusable neglect must be provided by sworn statements or affidavits. *Geer vs. Jacobsen*, 880 So.2d 717, 720 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1102a]. Courts have held that an affidavit that failed to explain "what happened to the complaint or suit papers other than admitting that the complaint was received and then was lost or misfiled" did not show excusable neglect. *Hurley v. Government Employees Insurance Co.*, 619 So.2d 477 (Fla. 2d DCA 1993). The 3rd DCA has also reversed a trial court order setting aside a default where the Defendant's affidavit failed to offer any explanation as to what happened that resulted in the failure to respond to the complaint, but only outlined the defendant's policies and procedures regarding responding to lawsuits. *Bequer v. National City Bank*, 46 So.3d at 1199.

In regards to due diligence, it has long been the law of this state, well understood by practitioners, that "swift action must be taken upon first receiving knowledge of any default." *Westinghouse Credit Corp v. Steven Lake Masonry, Inc.*, 356 So.2d 1329, 1330 (Fla. 4th DCA 1978). "Timely action is required to avoid 'defaulting' upon the opportunity to set aside a previously entered default. *Lazcar Int'l Inc. v. Caraballo*, 957 So.2d 1191, 1192 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D769a]. Any allegation of due diligence must be supported by affidavit or sworn statements. *Church of Christ Written in Heaven of Georgia, Inc. v. Church of Christ Written in Heaven of Miami, Inc.*, 947 So.2d 557, 559 (Fla. 3d DCA 2006) [32 Fla. L. Weekly D106b]. Delays between defaults and motions to vacate with lengths of six weeks (*Lazcar*, 1191 So.2d 1191), more than a month (*Trinka v. Struna*, 913 So.2d 626, (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1282a]), five weeks (*Fischer v. Barnett Bank of S. Fla., N.A*, 511 So.2d 1087 (Fla. 3d DCA 1987), one month (*Bayview Tower Condo. Ass'n v. Schweizer*, 475 So.2d 982, 983 (Fla. 3d DCA 1985) and seven weeks (*Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So.2d 300 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2717c] have all been found to be unreasonable and without due diligence. There must be some competent, substantial evidence of some exceptional circumstances explaining the delay. *Lazcar* at 1193.

FINDINGS

The Court rules as a matter of law that the Defendant has not met its burden to show that it acted with excusable neglect or due diligence or that it has a meritorious defense. "If a defendant is relying on a factual defense to obtain relief from a default judgment, the ultimate facts establishing the defense must be set forth in a verified answer, sworn motion, or affidavit or by other competent evidence." *Geer v. Jacobsen*, 880 So.2d 717, 721 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1102a]. The Court finds that the Defendant has not filed a verified answer, sworn motion, affidavit or other competent evidence to support its motion for default. The attorney's argument is not testimony. As such, their motion to vacate default and default judgment must be **DENIED**. The Court's January 27, 2025 Default Final Judgment remains in effect.

The clerk shall show this case as reclosed forthwith.

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to breath test—Incident to arrest—Motion for reconsideration of series of rulings denying motions to suppress defendant's refusal to submit to breath test contending that refusal was invalid because implied consent warning was read and request for test was made prior to arrest—Reliance on circuit court decision in *Begera v. DHSMV*, which defendant argues clarified that request for test must follow arrest for implied consent to be triggered, is misplaced—Implied consent statute is intended to address issue of driver's license suspension, as in *Begera*, not admissibility of evidence at trial

STATE OF FLORIDA, Plaintiff, v. STEVEN GRAHAM GALISZEWSKI, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052022CT017438AXXXXX. March 17, 2025. 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 FOR RECONSIDERATION

[Original report at 32 Fla. L. Weekly Supp. 398a]

This cause came on to be heard on February 5, 2025 on the Defendant's Motion for Reconsideration dated January 6, 2025. The motion requested this Court to reconsider a series of rulings that had declined to exclude the Defendant's refusal to submit to a breath test.

The motion was based entirely on the newly issued decision of *Begera v. Department of Highway Safety and Motor Vehicles,* Case No. 05-2024-AP-043232-XXAP-BC (Fla. 18th Cir. Nov. 21, 2024). The motion argued that *Begera* "clarifies the law concerning the timing of breath test requests and implied consent warnings," and "holds that the request for the breath test itself must follow the arrest for implied consent to be triggered." The motion also argued that *Begera* constitutes binding precedent on this Court because the decision was issued by the Circuit Court of the Eighteenth Judicial Circuit Court, sitting in its appellate capacity.

The issue before the Court is whether the ruling in *Begera* is binding on this Court in the instant criminal case. At the hearing, the Defendant argued that *Begera is* binding on this Court because it squarely addressed the same issue presented in this case: whether a refusal to submit to a breath test is legally valid if the request for the test occurs before a lawful arrest. Defendant further argued that the validity of a refusal to submit to a breath test in a criminal prosecution is wholly contingent upon whether the refusal was lawful under the implied consent statute.

The State argued that *Begera* is not "on point," and therefore it is not binding on this Court. Specifically, the State argued that *Begera* dealt with the implied consent statute only in the context of an administrative license suspension issue and did not deal with the admissibility of a refusal to submit to a breath test in a criminal case. The State relied on *Grzelka v. State,* 881 So.2d 633 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a], in which the Fifth District Court of Appeal ruled that the implied consent statute "does not provide the sole basis for admission of evidence related to breath testing;" therefore, the Court looked to the "general rules of evidence" in addressing the admissibility of the defendant's refusal to submit to the breath test in that DUI case.[1]

The Defendant responded that *Grzelka* itself is not "on point" because it dealt with different facts than the facts of the instant case; specifically, *Grzelka* dealt with an incomplete implied consent warning and not with a refusal to submit to a breath test that preceded a lawful arrest. The State replied that *Grzelka is* on point because it held that there is an alternative method for determining the admissibility of a refusal to submit to a breath test beyond showing compliance with the implied consent statute; as such, the State argued that *Begera* is *not* on point because it did not address the alternative method (i.e., "the general rules of evidence") of determining the admissibility of a refusal to submit to a breath test.

This Court has reviewed the *Begera* opinion multiple times. Contrary to Defendant's argument, this Court cannot find that the Circuit Court in *Begera* made any decision whatsoever on when implied consent is triggered. The Court finds that the implied consent statute is intended to address the issue of the driver's license, as occurred in *Begera,* and not necessarily the issue of evidence at trial. Thus, this Court finds that *Begera* is not "on point" and therefore is not binding on this Court. As to the *Grzelka* case, the Court agrees with the Defendant that the *facts* of *Grzelka* are different than the facts here because *Grzelka* involved an incomplete implied consent warning. However, the Court also agrees with the State that the *ruling* in *Grzelka* applies in this case because *Grzelka* held that the implied consent statute is not the sole basis for determining the admissibility of a refusal to submit to a breath test in a DUI case.

Accordingly, it is hereby ORDERED and ADJUDGED that the Defendant's Motion for Reconsideration is hereby DENIED.

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[1]The Court ultimately concluded that because the defendant was advised of at least one adverse consequence that would result from her refusal, her decision to refuse was relevant and therefore admissible. The State's position is that this conclusion applies to the instant case as well.

* * *

Criminal law—Driving under influence—Evidence—Field sobriety exercises—Jury instructions—Defendant is entitled to instruction that officer's observations of field sobriety exercises should be treated no differently than testimony of lay witness

STATE OF FLORIDA, Plaintiff, v. LENA MARLENE SIBILA-WRIGHT, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 592023CT003917A. March 3, 2025. Carsandra Buie, Judge. Counsel: Michael Zemlock, for Defendant.

AGREED ORDER ON FIELD SOBRIETY EXERCISE JURY INSTRUCTION

THIS MATTER having been brought before the Court on the DEFENDANT'S MOTION FOR A FIELD SOBRIETY EXERCISE JURY INSTRUCTION by Stipulation of counsel for the State and the Defense, and the Court being advised in the premise

FINDS AS FOLLOW:

1. The State intends to introduce the walk-and-turn and the one leg stand field sobriety exercises.

2. The Field sobriety exercises are not subject to expert opinion pursuant to *State v. Meador*, 674 So.2d 826 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a].

3. The following instruction is a correct statement of the law:

Evidence of the police officer's observations of the results of defendant's performance of the walk-and-turn, and the one-legged stand, should be treated no differently than testimony of a lay witness concerning their observations about the driver's conduct and appearance.

4. The instruction in paragraph 3 meets the three prong-test in *Evans v. State*, 13 So.3d 100 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1005c].[1]

IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

The Defendant is entitled to the following jury instruction:

Evidence of the police officer's observations of the results of defendant's performance of the walk-and-turn, and the one-legged stand, should be treated no differently than testimony of a lay witness concerning their observations about the driver's conduct and appearance.

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[1]In *Evans v. State*, 13 So.3d 100 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1005c] the Court held: The failure to give the requested instruction does constitute reversible error when it is established that: "(1) [t]he requested instruction accurately states the applicable law, (2) the facts in the case support giving the instruction, and (3) the instruction was necessary to allow the jury to properly resolve all issues in the case."

* * *

Volume 33, Number 1
May 30, 2025
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MISCELLANEOUS REPORTS

Municipal corporations—Zoning—Code enforcement—Conducting social events on agricultural property—Special magistrate finds no merit to argument that alleged violations should be dismissed because investigation was instigated based on anonymous complaint—Code officer who saw violations in plain view had discretion to investigate matter—Competent, substantial evidence supported town's conclusion that weddings and commercial events that were being held on agricultural property were not related to agriculture or agritourism and town's decision to file notice of violations—Where previous special magistrate's order finding violations was reversed by circuit court solely on issue of procedural due process, respondent is precluded from raising in current action all other issues that were litigated or could have been litigated before previous magistrate

THE TOWN OF SOUTHWEST RANCHES, Broward County, Florida, a Florida Municipal Corporation, Petitioner, v. ATLAS INVESTMENTS LLC, Respondent. Town of Southwest Ranches Code Enforcement Special Magistrate. Case Nos. 2024-089, 2024-090, 2024-091, 2024-092. June 10, 2024. Harry Hipler, Special Magistrate. Counsel: Richard J. DeWitt, Government Law Group, PLLC, Ft. Lauderdale, for Petitioner. Robert C. Volpe, Holtzman, Vogel, Baran, Torchinsky, and Josefiak, Tallahassee, for Respondent.

FINAL ORDER IMPOSING MUNICIPAL CODE ENFORCEMENT FINE AND LIEN AND ADMINISTRATIVE FINE

[Affirmed at Fla. L. Weekly Supp. 3301ATLA]
[Order on Motion for Rehearing at Fla. L. Weekly Supp. 3301TOW2]

THIS CAUSE came before the Special Magistrate on June 5, 2024 beginning at 9:00 am. All cases relate to violations involving TSWR-ULDC Sections 045-080(D), 045-050, and 045-060 of the Town Code. The subject real property is located at 4680 SW 148 Avenue, Southwest Ranches, Florida 33330, and whose Folio/ID Number is 5040 27 01 0242, and whose legal description is as follows: FLA FRUIT LANDS CO SUB NO 1 2-17 D 27-50-40 TR 42 N1/2.

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

FINDINGS OF FACT

1. ATLAS INVESTMENTS, LLC., d/b/a CIELO FARMS NURSERY (hereinafter called ATLAS or CIELO FARMS NURSERY) was purchased by its current owner in November, 2020 and constitutes total acreage of 4.95 acres. Its makeup for purposes of this hearing was 1.47 acres (plants for nursery for growth and sales that includes a barn like building) and 0.16 acres (sheep) in 2022. It appears that any agricultural classification was either revoked or ended sometime thereafter. The remainder of the acreage is 3.32 acres that does not constitute a nursery and has never been deemed agricultural.

2. ATLAS was charged with code violations involving TSWR-ULDC Sec(s)s 045-080(D), 045-050, and 045-060 that allegedly occurred on November 10, 2022. That code enforcement order was appealed to the Circuit Court sitting in its appellate capacity, and the appellate court reversed the prior Special Magistrate on the grounds that there was no violation proved on the date ATLAS was charged by the Town, and further by adding a total of six violations in the Final Order when only one was charged, procedural due process was violated when the Special Magistrate found violations at the rate of $1,000.00 per violation for six different violations and where ATLAS only received a Notice of Violation for the November 10, 2022 violations for Section 035-080(D). The appellate court considered a litany of issues that was raised by ATLAS in the-appeal that included fair notice (which was the cause of the reversal), were the events held on the subject property agricultural related absent a detached single-family residence, was ATLAS conducting weddings and other ceremonial events for profit agricultural related activities and did the property as used for commercial events involve a nursery as a proper usage of the subject property as to "agritourism activity" pursuant to the Town Code, the prior Special Magistrate misinterpreted the Town's Code and applied it arbitrarily, the prior Special Magistrate failed to hold the Town accountable for failing to issue Notices of Violation for each of the events that were raised and fined at the January 3, 2023 hearing, the prior Special Magistrate mischaracterized the nature of the violations for which ATLAS was cited without guidance as to how to comply with the January 3, 2022 order, and that the prior Special Magistrate denied ATLAS Motion for Rehearing without considering the arguments raised therein.

3. After the Circuit Court's reversal, the Town noticed and filed violations pursuant to TSWR-ULDC Sec(s)s 045-080(D), 045-050, and 045-060 of the Town Code pursuant to its Notices of Violation. These code provisions provide that 045-050 allows uses in rural and agricultural districts plots that may be used for one or more of the uses specified and as permitted or conditionally permitted where there is one single-family detached dwelling on a lot of record, and if not stated in the aforementioned code provision, then such uses are not permitted; there was no residence or single-family dwelling on the property that would allow ATLAS to conduct commercial weddings and events; the property was being utilized primarily as a commercial wedding venue, therefore, the primary use was commercial weddings and wedding related assemblies that were not an accessory use of an occupied single-family detached residence which is prohibited; the use of the property was not for a commercial agricultural purpose, nor were the assemblies related to any agricultural activity; and where the subject property is not being used primarily as agricultural property, here the barn (building structure or facility in which assemblies are taking place) is not an integral part of the agricultural operation as per Chapter 470, more particularly Sections 570.86 and 570.87, *Florida Statutes.* Therefore, any nursery and agricultural land is not immune from the Town's code.

4. The Special Magistrate proceeded to hear these cases in light of the fact that the Circuit Court denied ATLAS Motion to Stay upon reversal of the prior Special Magistrate and pursuant to that Order Denying Stay it has allowed the Town to proceed with its claims of violations by Order entered on April 19, 2024.

5. Town argues that TSWR CODE SEC. 045-080(D), 045-050, and 045-060 provides that assembly shall be deemed an accessory use of an occupied single family detached residence, but that the existing ATLAS business does not have a single family residence on the premises, which is required in order to allow ATLAS's specified uses of commercial wedding parties and events which the Town has argued are prohibited; and further in accordance with the Town's code that a permissible assembly is deemed an accessory use of an occupied single-family residence only if the assembly is limited to family, friends, acquaintances of the property owner and their guests, but in no event if the assembly is held for profit (with an admission fee or payment) and that is open to the general public, then such event(s) shall be disqualified from issuance of a permit or other such permissible use and would constitute an impermissible use of the subject property and therefore such violations are subject to code enforcement proceedings.[1]

6. In November, 2021, the Town granted a Certificate of Use CU-21-015 for ATLAS INVESTMENTS, INC., d/b/a CIELO FARMS LLC solely for a retail/wholesale Plant Nursery and nothing else based upon the evidence and exhibit introduced. There was a dispute at the hearing as to whether the subject property has or has had agricultural status, but in 2021 and thereafter and pursuant to the CU, it would appear that for purposes of this hearing, the uses allowed by the Town and agreed to by ATLAS are specifically stated in the CU. Further, it appears that in 2022 and during these violations, the subject property including the barn where the wedding events including parties, entertainment, TVs, are located and occurred and the nursery acreage was designated as agricultural by virtue of an email dated on or about August 25, 2022 and November 15, 2022 that states that the property containing 1.63 acres had an agricultural classification. Regardless of this, for purposes of this hearing and the Final Order and the evidence presented, the Special Magistrate has relied on the CU and the evidence presented in a fact intensive analysis that has been made by virtue of the admissions and exhibits and evidence presented at the hearings, ATLAS Website and advertising that lists the events and prices for use of the property that includes cost, prices, types of events, as well as individuals commenting on their wedding parties that occurred at subject property over time that was admitted into evidence among other testimony and evidence presented.

7. Section 570.86, Florida Statutes (2023) defines "agritourism activity" as agricultural related activity consistent with a bona find farm, livestock operation, or ranch or in a working forest which allows members of the general public to view or enjoy activities that involve agriculture and such related activities.[2] ATLAS argues that the Town's code is pre-empted by virtue of Chapter 570, *Florida Statutes,* and that pursuant to Chapter 162.08, the Town may not proceed with an alleged violation without a specific complaint and in no event with an anonymous complaint and requests that the cases be dismissed.

CHAPTER 162.08 CLAIM AS ALLEGED BY ATLAS

8. At the hearing, the evidence showed that in 2021 and 2022, there was at least one complaint made by a local resident about the commercial weddings and parties and traffic going onto and out of the subject property along with customers attending those weddings and events during the evening and when dark as the evidence showed that vehicles were being driven onto the subject property along with people walking into the property along with at least ten or more vehicles for commercial weddings and celebrations and parties and events for commercial events after sundown that went on for several hours on all four occasions.[3] Photos were introduced into evidence showing vehicles driving onto the property when dark to attend each of the events that occurred on November 27, 2022, December 1, 2022, December 2, 2022, and December 15, 2024. The code officer, Julio Medina, also testified that a law enforcement officer was contacted about one or more of these violations and went onto the subject property in order to determine what was going on at the subject property after daylight hours. Mr. Medina of the Town also testified that when the Town was contacted by a complainant who apparently complained about the traffic and commercial events after hours, he drove to those events which were photographed as per his testimony that he took the photographs and that he saw and heard party like activity coming from the subject property during the evening times. Mr. Medina also stated that he resided near the subject property and on occasion without complaints he observed such events and in fact the photographs taken were taken from outside of the subject property in as much as he could not go onto the subject property, so the photographs were taken from a distance. Mr. Medina believed that it was his obligation to investigate the events under these circumstances as he saw them in plain view, he heard the noise and witnessed the vehicles being driven on and off the property as there was noise and vehicles entering the property, and as stated above in one instance a law enforcement officer was called to investigate the after hour events.

9. Section 162.06 provides the basis to initiate enforcement proceedings when there is an alleged violation.[4] Here, there appears to have been a complaint made by an individual about the use of the property after hours that allowed law enforcement to go onto the property. Further, Mr. Medina stated that upon driving by the area, he noticed traffic going into the subject property during the evening and when dark and based upon his observations, he believed that violations may be occurring.

10. A code officer who sees an alleged violation in plain view or observation or by noise is required to investigate the matter and if the facts warrant a violation, he should contact the alleged violator according to Section 162.06 (2), *Florida Statues,* and bring the matter before the Special Magistrate or Code Enforcement Board.[5] The Special Magistrate finds that if an alleged violation occurs and a code officer sees and observes in plain view as to what purports to be a violation, he or she would be remiss if he or she did not investigate the alleged violation, and that is precisely what the code officer did pursuant to complaint(s) and his plain view observation. When this occurs, the investigation does not end here, but rather a code enforcement officer can bring the matter before a Special Magistrate or Code Enforcement Board for consideration, which is always subject to full and fair consideration before those bodies in a quasi-judicial proceeding upon the issuance of Notices of Violation in any determination of whether a code violation has occurred. Whether one bases this on plain smell or plain view of a violation or merely seeing an alleged violation or a complaint that may or may not turn out to be true and correct, a code enforcement officer has the duty and obligation to do his or her due diligence by further investigation. Respectfully, 162.06 Enforcement procedure—provides:

> "(1)(a) It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes; however, no member of a board shall have the power to initiate such enforcement proceedings." This same statute also says in subsection (b) that: "A code inspector may not initiate enforcement proceedings for a potential violation of a duly enacted code or ordinance by way of an anonymous complaint. A person who reports a potential violation of a code or an ordinance must provide his or her name and address to the respective local government before an enforcement proceeding may occur. This paragraph does not apply if the code inspector has reason to believe that the violation presents an imminent threat to public health, safety, or welfare or imminent destruction of habitat or sensitive resources."

11. For purposes of statutory construction, courts have always differentiated between the words, "may", which is discretionary as distinguished from "shall", which is mandatory." The Special Magistrate acknowledges this provision of the statutes and the legislature's concern for harassment and nuisance claims; however, for purposes of statutory construction, courts have always differentiated between the words, "may", which is discretionary as distinguished from "shall", which is mandatory. See *Sloban v. Florida Board of Pharmacy,* 982 So. 2d 26, 33 (Fla. 1st DCA Dist. 2008) [33 Fla. L. Weekly D927a]**;** *State v. Meagher,* 323 So. 2d 26 (Fla. 4th DCA 1975); and others. This is especially so upon a reasonable reading of this statute when it uses "may" and provides guidance to local governments to attempt to obtain individuals who go on the record about a violation as well as those whose names are either lost or misplaced or who do not go on the record in determining if a violation is found to exist as well as those violations, as here, that are noticed in plain view and observation thereby eliminating any requirement to obtain the complainant that should not come into play as a possible violation of the statute**.** Further, the Special Magistrate acknowledges that the purpose of the statute is in favor of persons

going on the record rather than anonymous complainants, who may do so for nuisance and harassment purposes, which did not occur here. However, it would still appear to be discretionary for the code officer who sees violations in plain view to be able to investigate the matter rather than turn his or her head away. Further, a further reasonable reading of this statute must also consider whether laches, estoppel, and waiver may be applied should a code enforcement officer see an alleged violation and turn his or head away. Therefore, the Special Magistrate rejects ATLAS argument that the cases should be dismissed on account of a claim of an anonymous complainant.[6]

ATLAS VIOLATIONS AND TOWN'S RESPONSE AND VIOLATIONS CLAIMS

12. TSWR-ULDC Sec(s)s 045-080(D), 045-050, and 045-060 of the Town Code provides that 045-050 allows uses in rural and agricultural districts plots that may be used for one or more of the uses specified and as permitted or conditionally permitted uses where there is one single-family detached dwelling on a lot of record, and if not stated in the aforementioned code provision, then such uses are not permitted, there was no residence or single-family dwelling on the property, the property was being utilized primarily as a commercial wedding venue, therefore, the primary, the commercial weddings and wedding related assemblies were not an accessory use of an occupied single-family detached residence which is prohibited, the use of the property was not for a commercial agricultural purpose, nor were the assemblies related to any agricultural activity.

13. Town argues that TSWR CODE SEC. 045-080(D), 045-050, and 045-060 provides that assembly shall be deemed an accessory use of an occupied single family detached residence, but that the existing ATLAS business does not have a single family residence on the premises, which is required in order to allow ATLAS's specified uses of commercial wedding parties and events which the Town has argued are prohibited; and further in accordance with the Town's code that a permissible assembly is deemed an accessory use of an occupied single-family residence only if the assembly is limited to family, friends, acquaintances of the property owner and their guests, but in no event if the assembly is held for profit (with an admission fee or issuance of a permit or other such permissible use and would constitute an impermissible use of the subject property and therefore such violations are subject to code enforcement proceedings. It also appear that after 2022 that ATLAS agricultural classification was revoked and it was no longer qualified as possible "agritourism" activity in addition to the above, which suggests that the commercial activity of weddings for profit in a structure and building calling itself a barn was inconsistent in an agricultural area.

14. Local government as part of their search to promote the health, safety, and welfare of the community may consider evidence suggesting that activity conducted in an allegedly agricultural area is or is not covered by "agritourism" in accordance with Chapter 570, *Florida Statutes,* and based upon the evidence provided in these cases, the allegations made and discussed above, and the hearing that occurred, the Town concluded that the weddings and commercial events were violations of the Town's code as they were not related to agriculture or "agritourism," and therefore, the Town's decision to file Notices of Violations and the evidence provided is hereby sustained in favor of the Town. Therefore, based upon the evidence presented, the Special Magistrate sustains the Town's claims and finds that there was substantial competent evidence to support its positions and reject ATLAS as made claims and those that could have been made.

IMPACT OF CIRCUIT COURT'S REVERSAL OF THE PRIOR SPECIAL MAGISTRATE

15. In light of the appellate court reversal and its remand based on procedural due process, after considering arguments presented in the Appellant and Appellee's Briefs and the Circuit Court opinion, the Special Magistrate suggests that all remaining issues raised or that could have been raised by ATLAS, except for those reversed, cannot be re-litigated and other than procedural due process, no others can be re-litigated. Under the doctrine of res judicata, law of the case, or collateral estoppel, ATLAS should be precluded from further raising any issues it seeks to raise in these proceedings as they are the same issues involving the same parties and the same subject matter. See *Zikofsky v. Marketing 10, Inc.,* 904 So. 2d 520 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1343a]. The principle of res judicata stands for the proposition that a judgment on the merits rendered in a former suit between the same parties upon the same cause of action is conclusive not only as to every matter that was offered and received to sustain or defeat the claim, but also as to every other matter that might have been litigated and determined in that action. ATLAS' claims presented now once again should be precluded by collateral estoppel, law of the case, or res judicata, which bars re-litigation of the same issues between the same parties which has already been determined by a valid judgment. See also *Bomwell v. Bomwell,* 720 So. 2d 1140, 1141 Fla. 4DCA 1998) [23 Fla. L. Weekly D2499b].

In its decision, the Circuit Court reversed and remanded solely on procedural due process, not on any other issue that was raised and argued or that could have been raised and argued. As such, res judicata, collateral estoppel, and law of the case should preclude review in these matters, except as stated in the Circuit Court opinion.

CONCLUSIONS OF LAW

16. Based upon the evidence presented by Petitioner that is discussed above and that was heard at the hearing, Petitioner met its burden of proving by substantial competent evidence that the violations as alleged in the Notices of Violations did in fact occur on the subject real property, that violations of TSWR-ULDC Sections 045-080(D), 045-050, and 045-060 of the Town Code were properly and duly alleged, and proven by the Town by substantial competent evidence, and therefore, the Special Magistrate sustains the Town's Notices of Violations as alleged.

ORDER

A. THEREFORE, BASED UPON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE SPECIAL MAGISTRATE FINDS THAT THE TOWN MET ITS BURDEN OF PROOF BY SUBSTANTIAL COMPETENT EVIDENCE THAT THE VIOLATIONS OCURRED AS ALLEGED AND HEREBY FINDS RESPONDENT GUILTY OF VIOLATING THE TOWN CODE SECTIONS. RESPONDENT IS ASSESSED $1,000.00 FOR EACH OF THOSE VIOLATIONS AND THAT TOTALS $4,000.00 WHICH CONSTITUTE IRREPARABLE AND IRREVERSIBLE VIOLATIONS. IF THE AMOUNT OF $4,000.00 IS NOT PAID IN FULL, THE FINES SHALL CONSTITUTE A LIEN AS PER THIS FINAL ORDER ON THE SUBJECT REAL PROPERTY. IF NECESSARY, THIS MATTER SHALL BE REFERRED BACK TO THE SPECIAL MAGISTRATE FOR ANY FUTURE ORDER IMPOSING FINES AND LIEN AND THE SPECIAL MAGISTRATE IS HEREBY AUTHORIZED TO ENTER A FINAL ORDER CERTIFYING THE CODE ENFORCEMENT FINE AND LIEN THAT SHALL BE RECORDED IN THE PUBLIC RECORDS OF THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR BROWARD COUNTY, FLORIDA AND SAID FINAL ORDER IMPOSING FINE AND LIEN SHALL CONSTITUTE A LIEN.

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

C. A FINE AND LIEN IMPOSED BY THE A SPECIAL MAGISTRATE SHALL CONTINUE TO ACCRUE WITH INTEREST

UNTIL THE RESPONDENT AND VIOLATOR COMES INTO COMPLIANCE WITH THE FINAL ORDER. THE SPECIAL MAGISTRATE RESERVES JURISDICTION TO ENTER SUCH FURTHER ORDERS AS ARE NECESSARY AND PROPER INCLUDING ANY FURTHER ADMINISTRATIVE FINES AND FEES AND COSTS IF NECESSARY.

D. If THE SPECIAL MAGISTRATE FINDS ANY FUTURE VIOLATION TO BE IRREPARABLE OR IRREVERSIBLE IN NATURE, SECTION 162.09 (2)(a) MAY IMPOSE A FINE NOT TO EXCEED $5,000.00 PER VIOLATION.

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[1]Respondent also requested the use for pay of the Town's police department for traffic control of these events that occurred in 2021 and 2022, the latter year of which ATLAS has been charged by these violations by the Town and as alleged and proven according to the evidence as violations of the Town Code provisions cited, but for purposes of this opinion and the facts herein, the evidence indicated that the attempt to hire local law enforcement private hiring for parking and security reasons was also denied and did not occur. Instead, in all events where Respondent held wedding parties and other events on the subject property, it appears that the owner of Respondent, Miguel Rodriguez and his representatives attempted to control traffic entering and exiting the subject premises for the commercial wedding parties and other events based on the evidence as no law enforcement officers were used.

[2]Section 570.86 (1) provides as follows: "Agritourism activity" means any agricultural related activity consistent with a bona fide farm, livestock operation, or ranch or in a working forest which allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy activities, including farming, ranching, historical, cultural, civic, ceremonial, training and exhibition, or harvest-your-own activities and attractions. An "agritourism" activity does not include the construction of new or additional structures or facilities intended primarily to house, shelter, transport, or otherwise accommodate members of the general public. An activity is an "agritourism" activity regardless of whether the participant paid to participate in the activity."

[3]The violations based on the Town's testimony and evidence and photographs occurred on November 27, 2022, December 1, 2022, December 2, 2022, and December 15, 2024. This commercial activity was shown by virtue of photographs and testimony and exhibits of the Town's code officer, Mr. Medina.

[4]162.06 Enforcement procedure.—

"(1)(a) It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes; however, no member of a board shall have the power to initiate such enforcement proceedings.

(b) A code inspector may not initiate enforcement proceedings for a potential violation of a duly enacted code or ordinance by way of an anonymous complaint. A person who reports a potential violation of a code or an ordinance must provide his or her name and address to the respective local government before an enforcement proceeding may occur. This paragraph does not apply if the code inspector has reason to believe that the violation presents an imminent threat to public health, safety, or welfare or imminent destruction of habitat or sensitive resources." For purposes of statutory construction, courts have always differentiated between the words, "may", which is discretionary as distinguished from "shall", which is mandatory. See *Sloban v. Florida Board of Pharmacy,* 982 So. 2d 26, 33 (Fla. 1st DCA Dist. 2008) [33 Fla. L. Weekly D927a]; *State v. Meagher,* 323 So. 2d 26 (Fla. 4th DCA 1975). This is especially so when a reasonable reading of this statute in using "may" provides a suggestion of a procedure or guidance to local governments to attempt to obtain individuals who go on the record about a violation as well as those whose names are either lost or misplaced or do not go on the record in determining if a violation is found to exist, as well as those violations, as here, that were noticed in plain view and observation that do not even come into play as a possible violation of the statute as argued by ATLAS.

The Special Magistrate acknowledges that the purpose of the statute is to preclude nuisance and harassment claims and to promote bona fide claims to support complainants to go on the record rather than anonymous complainants, who may make unfounded claims for nuisance and harassment reasons. Based on the evidence provided here, there is nothing to support any evidence here that there was any claimant, who made unfounded claims for nuisance and harassment purposes. However, it would still appear to be discretionary for the code officer who sees and observes violations in plain view to be able to investigate on-goings especially when ten or more vehicles and party like noise and people are milling around in the instant area that is doing business in the evening time and is open during the evening time rather be closed.

(2) Except as provided in subsections (3) and (4), if a violation of the codes is found, the code inspector shall notify the violator and give him or her a reasonable time to correct the violation. Should the violation continue beyond the time specified for correction, the code inspector shall notify an enforcement board and request a hearing.

[5]See *Brinkley v. County of Flagler,* 769 So.2d 468 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D2446b] is being cited to suggest that even where there is an anonymous complaint, it is permissible to go onto property to make investigation. This case, of course, was decided before Section 162.06 as amended was decided, but it clearly suggests that a code officer or such other official may investigate an alleged charge and when seen in plain view or smell or noise, it is permissible to file a claim thereby providing due process to the alleged violator at a future hearing before any adjudication occurs.

[6]See Harry M. Hipler, *Do Code Violations and Liens Run with the Land? Carving out a Changing Landscape to Section 162.09(3), Florida Statutes, with Enactment of Section 723.024, Florida Statutes, Mobile Home Park Lot Tenancies,* 22 Barry L. Rev. (2017), pg. 185-6 and cases cited in fn 219-224 of the article. While courts are hesitant to judicially create exceptions to code violations, equitable claims have been made and successfully shown, and , there is legal authority that suggests that equitable defenses that include laches, estoppell, and waiver may come into play if years go by without local government intervention.

* * *

Municipal corporations—Zoning—Code enforcement—Conducting social events on agricultural property—Motion for rehearing of special magistrate's order sustaining town's finding of violations for conducting social events on agricultural property is denied—Jurisdiction—No merit to argument that town lacked jurisdiction to prosecute code violations while motion for rehearing of circuit court's opinion reversing previous special magistrate's order was pending where circuit court specifically denied motion to stay town's code enforcement powers, and cases adjudicated by current magistrate are new violations—Argument regarding authority of code officer to investigate violations originating from anonymous complaint is again rejected based on code officer having observed violations in plain view—Argument that current magistrate's decision was based on false evidence is rejected—Finding that weddings, parties and other commercial events were not agritourism events is supported by competent substantial evidence—No merit to argument that current magistrate was without authority to hear matter—Respondent requested an alternate magistrate after case decided by previous magistrate was reversed and remanded by circuit court, current magistrate with no ties to town was selected by town to hear case, and respondent did not object to selection of current magistrate prior to or at hearing

TOWN OF SOUTHWEST RANCHES, Broward County, Florida, a Florida Municipal Corporation, Petitioner, v. ATLAS INVESTMENTS LLC, Respondent. Town of Southwest Ranches Code Enforcement Special Magistrate. Case Nos. 2024-089, 2024-090, 2024-091, 2024-092. June 28, 2024. Harry Hipler, Special Magistrate. Counsel: Richard J. DeWitt, Government Law Group, PLLC, Ft. Lauderdale, for Petitioner. Robert C. Volpe, Holtzman, Vogel, Baran, Torchinsky, and Josefiak, Tallahassee, for Respondent.

FINAL ORDER DENYING RESPONDENT'S MOTION FOR REHEARING, RECONSIDERATION AND/OR CLARIFICATION

[Affirmed at Fla. L. Weekly Supp. 3301ATLA]
[Prior report at Fla. L. Weekly Supp. 3301TOW2]

THIS CAUSE came before the Special Magistrate pursuant to Respondent's Motion for Rehearing, Reconsideration and/or Clarification. After considering the arguments of counsel, the Respondent's Motion, the Special Magistrate's Final Order, Response by the Town, the exhibits identified at the hearing, the Special Magistrate makes the following findings of fact and conclusions of law:

1. Section 2-158 (a) provides the basis for rehearing and grants the Special Magistrate discretion to consider a written Motion for Rehearing. Respondent's Motion re-argues matters brought up during the evidence. As such, the Special Magistrate will go through Respondent's arguments and respond.

2. Respondent argues that due to a Motion for Rehearing, Reconsideration, and Clarification that was pending before the appellate court, the Town did not have jurisdiction to prosecute charges against Respondent. The appellate court specifically ruled that the City had authority to move forward when it stated: "Appellant has failed to provide legal authority or an otherwise compelling basis by which to

grant a stay of the Appellee's municipal code enforcement powers," and denied the stay in the Order dated April 19, 2024. Based upon that appellate court order which allows the Special Magistrate to proceed, the Town filed four new charges in light of the four violations and Notices of Hearings, and therefore, this case was heard.[1]

3. On June 5, 2024, the Special Magistrate considered the Town's and Respondent's positions during a 3 ½ hearing where both parties presented exhibits, testimony, examined and cross-examined any witnesses who testified, and they argued the merits of the case at length as well as communicated with counsel and had every opportunity to present their positions, and therefore they proceeded before the Special Magistrate, which considered claims and defenses made by the Town and Respondent before the Special Magistrate made a ruling. This is so as the circuit court in its appellate capacity reversed the prior Special Magistrate on a due process and notice issue as to one violation where insufficient evidence was presented, yet the appellate court in its court order dated April 19, 2024 specifically ruled that the City was not precluded from proceeding with code enforcement matters. As such, the Special Magistrate most respectfully rejects Respondent's claims as the 3 ½ hearing considered a voluminous amount of evidence and exhibits and arguments of counsel as these matters were "new" cases as conceded by Respondent. As per the appellate court's ruling, the Notice of Violation dated November 15, 2022 was based on an alleged event that occurred on November 10, 2022, which did not occur thereby allowing a ruling by the appellate court that Respondent's procedural due process was violated. This appellate court also stated that the issuance of other violations and even adjudicating those events without notice violated its procedural due process. See *Atlas Investments LLC v, Town of Southwest Ranches,* Appeal No. CACE 23-001548 (February 21, 2024) [32 Fla. L. Weekly Supp. 161a]. As such, the instant four new violations were hereby noticed as violations, and both sides presented evidence in favor of and against these violations upon due notice. Respectfully, the Special Magistrate rejects Respondent's argument.

4. Respondent suggests that there was no competent, substantial evidence to support the Town's positions in many different forms one of which is due to Section 162.06 (1)(a)(b), and argues that dismissal of the above styled action is required, because an anonymous complaint was made thereby precluding the Town from investigating and ultimately filing code enforcement violations. Respectfully, as stated in the Special Magistrate's Order, this statute sets forth a procedure so that no anonymous complaints are made and stating that a person must provide his or her name and address to the local government before one may be entertained. Here, the evidence provided that the code officer saw these alleged violations in plain view and plain observation as he drove to the area on many different occasions, which are listed on the photographs and as stated in the Final Order of this Special Magistrate. The code officer, Mr. Medina, took photos from the street, heard noise from vehicles parking and parties being dropped off at the property, and then filed the code proceedings based upon his observations and experience as a code officer. This code officer was lawfully in a position from which he could view an object and alleged violation, and since it was visibly noticed as a violation of the locally adopted code provision, he was entitled to investigate and ultimately issue notices of violation regarding the violations, which he did. There is nothing improper about what the code officer did in his performance of his due diligence here in as much as he also lived near the property, he drove by and took photos of non-agricultural activity and events that appeared to be violations in the evening time after hours; he never trespassed on Respondent's property, but viewed these events off of Respondent's property.

The plain view doctrine allows code officers to make investigation if an alleged violation exists in their presence, which occurred here, and assuming *arguendo* that the Fourth Amendment strictly applies here (these are not criminal proceedings), the plain view doctrine is an exception to any Fourth Amendment claim that may be made thereby eliminating any requirement for the name and address of the complainant who apparently was unknown when it was made.[2] Other ways code enforcement operates and legally determines if a violation has occurred or is occurring is when a code officer conducts daily visits throughout a local government by driving or walking in a neighborhood. Officers as part of their duties do so during the weekends, after hours, and at any time, and they make notes of any violations they may see to ensure a continuous presence for the health, safety, and welfare of the community. Further, the Broward County Property Appraiser's Office has photos from the air in their data base on line of dwellings and real property some of which may or may not have been subject to permitting violations, and if a local government uses this form of investigation, the plain view doctrine provides the code officer with the authority to further investigate to determine if an attachment of a room or add on exists and check out its history to determine if a permit was ever applied for and closed out. Again, no person need be a complainant about these plain view violations, but if one is it is not improper to check out whether a violation exists on the subject real property without permits when these illegal events are in plain view. Finally, when sales or rental of real property units are advertised on the Internet there is usually advertising or a listing on line showing photographs of a for sale dwelling or vacation rental on line that show photos of the rooms and the status of those rooms, permitted and not permitted, yet when that occurs, there is no reasonable expectation of privacy that may be argued when these sales or vacation rentals or rentals go on line and the Town staff determine that violations exist.

As such, there was no violation by the Town in its conduct here when these violations were seen in plain view and observation, nor was there any reasonable expectation of privacy. See generally *Davis v. State,* 763 So.2d 519 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1752a] (search where object could be seen by person standing on front porch was not unreasonable); *State v. Kennedy,* 953 So.2d 655 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D850e](search following the detection of ammonia and either vapors when police entered unfence yard and approached front yard was not unlawful).

5. A similar argument has been made here where Respondent argues that there was no competent substantial evidence to support the Special Magistrate's decision due to allegedly false evidence. These arguments and counterarguments were presented by both sides with the presentation of considerable testimony and exhibits at length that included exhibits, videos, testimony, and argument of counsel. The bottom line is that there was substantial competent evidence to support the Town's position that there was no "agritourism" qualifying events here with weddings, parties, and such other commercial events having nothing to do with agriculture. Whether there was or was not an agricultural classification existing after 2022, Respondent argued at the hearing that any post 2022 violations were irrelevant whether an agriculture classification existed after 2022 in that the new charges made here by the Town concerned those that existed in 2022, not afterwards. However, as the evidence suggested, the barn and dwelling were used primarily for generating gross revenue rather than for agricultural purposes as is evidenced by the weddings and group events and after hour parking where the events were advertised and offered to the general public and stating that the subject real property could be rented for non-agricultural purposes. While both parties presented evidence in support of their respective positions as to whether the property was classified as agricultural after 2022, based upon the facts presented, there was no "agritourism" qualifying events

to support Respondent's positions as per the evidence. Further, even if a piece of property is designated as agriculture which has been disputed here, it has been held that if a building is an integral part of an agricultural operation when the land constitutes agricultural purposes, the building is not exempt from local government code provisions. See the following cases, where the circuit court, acting in its appellate capacity, determined that even if a building is deemed an integral part of a farming operation when the land under it is not used for bona fide agricultural purposes, the construction of the building is not exempt from regulation. See *Lawrance Properties, LLC, v. Hillsborough County*, 28 Fla. L. Weekly Supp. 470a (Fla. 13th Jud. Cir. [Appellate] August 12, 2020), petition denied 321 So. 3d 734 (Fla. 2d DCA 2021); *Lawrance Properties, LLC, v. Hillsborough County*, 28 Fla. L. Weekly Supp. 470a (Fla. 13th Jud. Cir. [Appellate] August 12, 2020), petition denied 321 So. 3d 734 (Fla. 2d DCA 2021). These may be found at fn 2, 3 of *Lawrence Properties, LLC*, affirmed on October 16, 2020. See also *Op. Att'y Gen. Fla. 19760*, pg. 1(2022)[3] as to a local government's right to information gather in a fact intensive hearing and make independent evaluations and findings in such matters.

The same goes to where alleged agricultural property is being used for commercial purposes and not for "agritourism" purposes, which was discussed at length in the Special Magistrate's findings of facts and conclusions of law that was submitted in paragraphs 3, 5, 6, 7, and elsewhere in the Final Order entered by the Special Magistrate on June 10, 2024, which specifically provides the multi-faceted basis and reasoning of his ruling,[4] and as such those findings are hereby incorporated herein to support findings of substantial, competent evidence to support the Town's position. As such, the Special Magistrate most respectfully rejects Respondent's claims.

6. Respondent argues that the alternate Special Magistrate was without jurisdiction to hear these matters.[5] Respectfully, before the hearing occurred, Respondent was hired by the Town's counsel to serve as an alternative Special Magistrate due to Respondent's complaint that the current Special Magistrate had a conflict.[6] At no time was there ever an objection made to the undersigned to serve as a Special Magistrate. Respondent's counsel argued that the Special Magistrate was recently appointed and needed time to prepare and review the file and requested a case management conference. He also stated that he wanted to know the process of that appointment. The attachments via counsel's own emails indicate that in fact Respondent moved forward by asking for a continuance and requested a case management conference on grounds that have nothing to do with its claim that is now heard for the first time in Respondent's Motion for Rehearing, Reconsideration, and Clarification, as the undersigned Special Magistrate did not feel that it was necessary to continue the cause due to prior continuances and decided that there was no need for a case management conference. Respondent counsel's emails dated of the same date requested another Special Magistrate other than Mr. Garcia, which was granted as an accommodation, and therefore the undersigned served as a Special Magistrate for these proceedings. See Respondent's counsel's as per own emails 1/12 to 12/12 along with 1/14 to 14/14, which are attached along with communications. These documents along with many others were produced via the public records request on June 20, 2024 and produced on June 24, 2024 (Exhibit A). As such, the undersigned was selected to hear this case.

7. Code enforcement Special Magistrates proceedings are reviewed to determine whether the aggrieved party was afforded due process, whether the decision comports with the essential requirements of law, and whether competent, substantial evidence supports the decision. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). Further, the entire purpose of Chapter 162 is to provide expedited proceedings to insure the health, safety, and welfare of the local government.[7] None of these fundamental matters are being contested by Respondent in these proceedings. Instead, it is now merely the hiring of an alternate Special Magistrate, which Respondent requested, and who has no ties to the Town and who will serve for two cases that is being contested by Respondent as to the above case.

8. It is the local government and its counsel who decides on a Special Magistrate. The undersigned was hired by the Town, and the best evidence of this is the Special Magistrate Minutes which specifically provides that the Town has two Special Magistrates one of which is the undersigned (Exhibit B). It ought to be clear that that the Town approved that hire as its own minutes says that the undersigned served as a Special Magistrate for the Town in this case as well as one other that he will serve (Exhibit B).

9. The selection of a quasi-judicial officer lies with the local government and Town's counsel. Service as an alternate Special Magistrate has nothing to do with a stipulation by the parties where parties decide to hire an arbitrator or Special Magistrate or Special Master to consider the merits of a case. Respondent requested an alternate and stated that there were a number of attorneys who could serve as an alternate. Therefore, the undersigned does not believe that there is any basis for recusal here. An after the fact argument without any basis for recusal is no basis for a claim of recusal or objection in as much as the undersigned Special Magistrate was contacted by the Town's attorney in late May, 2024 about serving as an alternate Special Magistrate and he was hired due to an alleged conflict with its existing Special Magistrate, Mr. Garcia. The emails attached also show that there was no discussion about the merits of the case, nor was there ex parte communications about the merits of the case between counsel and the undersigned.[8] The undersigned does not have a financial interest in anything or anyone in the Town of Southwest Ranches. Nor has his neutrality been questioned by anyone. The attached emails speak for themselves. As such, the undersigned agreed to serve as an alternative Special Magistrate in two cases as he has in the past for local governments in a number of South Florida local governments. The undersigned has never served as a Special Magistrate in the Town of Southwest Ranches, nor has he ever served on any of its boards, nor does the Special Magistrate have any knowledge of Respondent. He has no ties to the Town of Southwest Ranches. For the Respondent to suggest that there was an objection to undersigned's service as an alternate Special Magistrate, except for what has been made for the first time in Respondent's Motion for Rehearing, Reconsideration, and Clarification, is contrary to the facts as there was none before, during, or after the hearing, until Respondent filed a Motion for Rehearing, Reconsideration, and Clarification. During the hearing, counsel for Respondent stated on the record that the undersigned was "patient" and in fact after the hearing it was presumably counsel for Respondent who walked up to the Special Magistrate and called him "patient" and shook the undersigned's hand with praise. As such, the undersigned relied on the fact that he was hired and was serving as an alternative Special Magistrate and attended the hearings while serving as an alternative Special Magistrate that is evidenced by the Town's Minutes and the hearing as is evidenced by the Town's Minutes.[9]

ORDER

THEREFORE, BASED UPON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE SPECIAL MAGISTRATE DENIES RESPONDENT'S MOTION FOR REHEARING, RECONSIDERATION, AND CLARIFICATION.

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[1]Found on page 2 of Respondent's Motion for Rehearing and Clarification, paragraph 3, 4, Respondent concedes that the violations that are the subject of these hearings were "new" as it states that "…The Town issued four new Notices of Hearing" as to the four new violations (December 1, 2022, December 2, 2022, November 27, 2022, and December 15, 2022), and therefore Town decided to set the hearings initially for April 3, 2024 and finally on June 5, 2024 after continuance(s). The case that was

reversed concerned an alleged violation on November 10, 2022, which has not been charged here.

[2]During a routine inspection or drive by, code officers customarily notice unlawful activity such as junk vehicles, working without permits, evidence of improper events, after hour work without permits, which are standard violations that do not need a complainant even if one is made. This code officer in the instant case did not trespass, he was in a place he had a right to be, and to further investigate any alleged code provisions as always.

[3]Opinions of the Attorney General are not binding, but they can be persuasive as all parties at the hearing agreed and in accordance with Florida case law.

[4]See Section 570.86, Florida Statutes (2023) and Chaper 570, Florida Statutes, which does not preempt a municipality from exercising its police powers to enforce its health, safety, and welfare. *See generally D'Agastino v. City of Miami*, 220 So. 3d 410, 423 (Fla. 2017) [42 Fla. L. Weekly S682a] *(citing City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006) [31 Fla. L. Weekly S461a](*see also D'Agastino, supra, citing Phantom of Clearwater, Inc. v. Pinellas Cty.,* 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D205a]. The Town's code provision was and has been properly applied making Respondent in violation of the charges as stated and proved.

[5]This position goes against at least one appellate court decision that is logically similar to the facts here. See *Florida Power & Light Co. v. Canal Authority,* 423 So.2d 421 (Fla. 5th DCA 1982), where there was attention drawn to a condemnation which failed to attach a jurisdictional requirement of authorizing resolutions of the condemning authority. A claim was made as to subject matter jurisdiction, but the appellate court rejected that claim.

[6]Respectfully, it is unknown what conflict may have existed, yet the Town accommodated Respondent and provided an alternate Special Magistrate.

[7]See 162.02 "Intent.—It is the intent of this part to promote, protect, and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities, where a pending or repeated violation continues to exist."

[8]Claims made by Respondent's counsel of ex parte communications is inaccurate. There have been no discussions about the merits of this case by either Respondent's counsel or undersigned Special Magistrate or the Town's counsel. There have been emails requesting background information that was necessarily sent by the Town and read and reviewed upon receipt by the Special Magistrate. Further, when the Final Order was entered, it was served to the City as is customarily done with Final Orders in local governments, which then serves them to the parties and counsel. Further, Respondent's email where it requested public records from the undersigned Special Magistrate was received on June 20, 2024 for the first time requesting emails and public records; any public records held by the Special Magistrate were not requested earlier and the undersigned advised Respondent's counsel that documents were in the process of being gathered and produced upon completion of that process which was copied and provided by email on June 24, 2024, which was a mere four days.

[9]*See Setai Resort & Residences Condominium Association v. BHI Miami Limited Corp*., Appellate Case No. 2022- 36-AP-01 decided July 10, 2023 [31 Fla. L. Weekly Supp. 240a], where the court ruled that neither the Special Magistrate nor the city is part of the judiciary, and accordingly neither can govern the conduct of their administrative decision-making. See pages 9-10 of Setai. *See also Canney v. Bd. Of Pub. Instruction of Alachua Cnty.*, 278 So.2d 260 (Fla. 1973). Respectfully, the local government decides those procedures.

* * *

Municipal corporations—Code enforcement—Short-term vacation rentals—Maximum occupancy—On special magistrate's request for rehearing of oral order finding respondent to be in violation of short-term rental maximum occupancy limit of ten persons, magistrate finds that there is no competent substantial evidence that twelve girls observed at property's pool were actually all staying overnight on premises—Oral order is rescinded

CITY OF DANIA BEACH, a Florida Municipal Corporation, Petitioner, v. VITALY STESIK, Respondent. Code Compliance Special Magistrate, City of Dania Beach. Case No. 2024-1631. February 24, 2025. Harry M. Hipler, Special Magistrate. Counsel: Eve A. Boutsis, City Attorney, Dania Beach, for Petitioner. Vitaly Stesik, Pro se, Respondent. Howard P. Clark, III, Pompano Beach, for Shawn DeRosa (Third Party neighbor).

FINAL ORDER OF THE DANIA BEACH CODE COMPLIANCE SPECIAL MAGISTRATE AFTER REHEARING

This proceeding came on for Formal Hearing, after notice, for rehearing, upon the request of the Special Magistrate. Based upon the evidence presented, the Code Compliance Special Magistrate makes the following findings of fact and conclusions of law:

a. The initial hearing for the underlying violation was held on January 9, 2025.

b. A rehearing of the matter was requested by Special Magistrate Hipler, which rehearing was heard on February 24, 2025. The rehearing request was supported by Florida Attorney General Opinion 85-27 (Special Magistrate has the discretion to rehear an item).

c. No final written order was entered from the January 9th, 2025, hearing as the Special Magistrate rethought his ruling and requested rehearing the same day.

d. The Special Magistrate has jurisdiction of the Respondent and the subject matter of this action;

e. On January 9, 2025, the Special Magistrate Orally ruled that Respondent, VITALY STESIK did allow the following code violations to exist at property Respondent owns, located at 402 SE 5 Street, Dania Beach, which property is legally described as: HOLLYWOOD BEACH PARK 12-6 B LOT 6 W 21,7, Folio Number 5142 03 25 0600, to wit:

> 16-2(I) (1) Maximum occupancy of a dwelling unit for vacation rental use shall not exceed two (2) persons per bedroom plus two persons, but in no event shall the total occupancy of any single vacation rental dwelling unit exceed ten (10) persons or violate the minimum housing standards of chapter 8 "buildings" of this Code.

f. The Special Magistrate ruled on January 9th that the violation was considered irreparable, with a fine of $500.00 which must be paid to the City by February 8, 2025. There was also assessed $100.00 to cover costs incurred by the code compliance division in holding the hearing.

g. At the hearing of January 9th, 2025, the Broward Sheriff's Office, Detective Dominguez Perez did not testify.

h. At the rehearing on February 24th, 2025, BSO Detective Perez did testify, indicating he had no knowledge of whether the persons by the pool of the vacation rental premises were all staying as guests, overnight at this location. He testified that there were approximately 12 persons by the pool between 8:00 p.m. and 9:00 p.m., on April 28, 2024.

i. BSO Detective Perez testified that he was called out by the vacation rental property as a neighbor (later identified as Mr. Shawn de Rosa) was peeking/looking over the backyard fence of the vacation rental, into the pool where the girls were lounging in their bikinis. The young women were concerned for their privacy. The Detective did not hear any noise in violation of the City's Code. In fact, he testified that he heard normal conversation as he approached the pool.

j. At the rehearing, the City's Chief Planner and Deputy Community Development Director, Corinne LaJoie, testify that occupancy means overnight stay, with no more than 10 persons overnight.

k. Mr. Clark, counsel for Mr. de Rosa made certain objections and cross-examination of the BSO Detective and Ms. LaJoie.

Upon consideration thereof, it is ORDERED:

That the oral order of January 9, 2025, finding a violation is rescinded by the Special Magistrate. The Special Magistrate found that there was no competent substantial evidence to properly document that approximately 12 girls at the vacation rental property were actually all staying overnight on the premises. No costs were assessed with the hearing.

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Judge assigned to domestic family law division may not attend and participate in event where creation of a family justice center is being discussed

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-03. Date of Issue: March 5, 2025.

ISSUE

Can a Judge assigned to a Domestic Family Law Division attend and participate in an event where the creation of a Family Justice Center is being discussed?

ANSWER: No, a judge cannot attend this event regardless of whether the judge is recognized or whether the judge participates in fundraising.

FACTS

The inquiring judge is assigned to a Domestic Violence /Family Division. The judge received an invitation to attend a planning meeting where the topic of discussion will be the creation of a Family Justice Center. The email invitation was also directed to other judges in the division.

The email invitation contained the following heading,

"Where Victims Come First-Creating a Domestic Violence Homicide Prevention Program"

The email invitation states that the core mission of "The Family Justice Center" will be to assist victims of Domestic Violence, Family Violence, Sexual assault, Human Trafficking, Child Abuse, and Elder Abuse. The invitation includes an agenda that includes a discussion about the Center's funding. The Invitation also contains what type of services if created the Center would provide. These services range from legal assistance, child care, immigration issues, food and clothing, job skills, refers to law enforcement, job skills, parenting education, spiritual support, and victim advocacy.

DISCUSSION

Judges are required to act in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. Code of Judicial Conduct, Canon 2A. Therefore, judges must be aware of an organizations mission, goals, objectives, and activities. *Id.*; *see also* Code of Judicial Conduct, Canon 1 and Commentary.

Judges are encouraged "encouraged to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice". Fla. Code Jud. Conduct, Canon 4B. However, Judges should always remember that this activity is subject to the requirements and limitations of the other Canons.

Canon 2B sates that "Judges shall not lend the prestige of judicial office to advance the private interests of the judge or others."

Both Canon 4 and Canon 5C(3)(a) require a judge to determine if the organization will frequently appear before the court in adversary proceedings. Additionally, pursuant to Canon 5A, judges are required to conduct all extrajudicial activities so that they do not cast reasonable doubt on the judge's impartiality.

A Judge should consider eight factors that this committee has set out in Fla. JEAC Op. 2023-06 [31 Fla. L. Weekly Supp. 282a] in determining whether attendance and participation will create conflicts as well. Those eight factors are as follows:

1. Whether the activity will detract from full time duties;

2. Whether the activity will call into question the judge's impartiality; either because of comments reflecting on a pending matter or comments construed as legal advice;

3. Whether the activity will appear to trade on judicial office for the judge's personal advantage;

4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;

5. Whether the activity will lend the prestige of judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;

6. Whether the activity will create any other conflict of interest for the judge;

7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court;

8. Whether the activity will lack dignity or demean judicial office in any way.

In Fla. JEAC Op. 2014-25 [22 Fla. L. Weekly Supp. 767a], a circuit judge assigned to juvenile division was advised that they could not serve as the chair of an organization that "seeks to eradicate human trafficking through education, outreach, training, advocacy and awareness of human trafficking issues for juveniles and adults." We stated that doing so would cast doubt on the judge's ability to be impartial, as the organization is dedicated to an issue that is routinely before the judge.

Similarly, in Fla. JEAC Op. 2013-18 [21 Fla. L. Weekly Supp. 212a], the committee stated that a judge may not be member of committee of a non-profit organization that educates lawyers and judges about domestic violence and encourages lawyers to provide pro bono services to battered women and children.

In that opinion we explained that our prior opinions have allowed judges "to be a member of a domestic violence task force as long as it was gender-neutral, law related, and not an advocacy group." But "judges have been prohibited from participating in activities or events related to domestic violence when a judge's impartiality might be questioned." *Id*. We also noted that one area we discussed in the past was "judges" involvement with organizations providing aid to domestic violence victims." *Id*.

Although neither of these opinions are directly on point, they do conclude that attendance or participation at certain events may create issues of disqualification for Judges assigned to this division. Code of Judicial Conduct, Canon 3E(1)(f). That is true here too.

Upon the examination of the Canons and past opinions of this Committee the various services that would be offered by the proposed family center there exists various potential conflicts and prohibitions with attendance and participation by judges at the event. As such this Committee answers that attendance and participation is not permitted.

REFERENCES

Fla. Code Jud. Conduct, Canons 1, 2A, 2B, 3E(1)(f), 4, 4A (1), 4B, 5A, & 5C(3)(a)

Fla. JEAC Op. 2013-18 [21 Fla. L. Weekly Supp. 212a]; Fla. JEAC Op. 2013-23 [21 Fla. L. Weekly Supp. 455a]; and Fla. JEAC Op. 2014-25 [22 Fla. L. Weekly Supp. 767a]; Fla. JEAC Op. 2023-06 [31 Fla. L. Weekly Supp. 282a]

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Books—Judge may include on their website a picture of a book co-authored by judge along with a link to where book will be available for purchase so long as judge does not use prestige of office to promote book, and neither judge, judicial assistant, nor judge's family sells book to any member of Bar

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-04. Date of Issue: March 13, 2025.

ISSUE

May a judge include on their website a picture of a book co-authored by the judge along with a link to where the book will be available for purchase.

ANSWER: Yes. So long as the judge does not use the prestige of office to promote the book and neither the judge, the judicial assistant, nor a member of the judge's family sells the book to any member of the Bar.

FACTS

The inquiring judge informs us that they have co-authored a book "for self-represented parties who are trying to make their way through family court." This book will be self-published and available through

Amazon.com, and perhaps other websites as well. The judge also maintains a personal website, which includes information for self-represented parties and for college students. The inquiring judge asks if they can include a picture of this book along with a link to where it will be available for purchase on their personal website.

DISCUSSION

Over the years, this Committee has addressed numerous queries from judges who have authored various types of books that they wish to sell to the public. *See generally* Fla. JEAC Op. 98-01 (crime novel); Fla. JEAC Op. 2010-12 [17 Fla. L. Weekly Supp. 857a] (children's book); Fla. JEAC Op. 76-17 (appellate procedural manual); Fla. JEAC Op. 2019-18 [27 Fla. L. Weekly Supp. 336a] (family court and mental health); Fla. JEAC Op. 82-05 (children's book about the consequences of crime). In Fla. JEAC Op. 2010-12 [17 Fla. L. Weekly Supp. 857a], we summarized some of the ethical parameters for judges engaging in book promotion activities—such as including a photograph of the judge on the publisher's website, participating in book signings, and including the fact that the author was a judge in a press release—wherein we advised:

> Such activities are reasonable and commonplace for publishers and are incidental to the avocational activity of the author. These activities do not appear to lend the prestige of judicial office to advance the private interests of others; do not cast reasonable doubt on the judge's capacity to act impartially; do not undermine the judge's independence, integrity or impartiality; nor do they demean the judicial office.

Subject to the ethical restrictions that apply to all communications from judicial officers, judges are generally allowed to maintain personal websites and social media pages. *See, e.g.*, *Law Offs. of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, 271 So. 3d 889, 896-99 (Fla. 2018) [43 Fla. L. Weekly S565b] (addressing the question of whether Facebook friendships between judges and attorneys is a basis for disqualification). "We have also agreed that a judge may make a profit through the use of the internet." Fla. JEAC Op. 2019-18 [27 Fla. L. Weekly Supp. 336a]. Judges may, therefore, offer their books for sale through the internet, so long as they are not improperly utilizing the prestige of their judicial office to promote the book, *see* Fla. Code Jud. Conduct, Canon 5D(1)(a), and "neither the judge, the judge's assistant, nor any member of the judge's family [ ] sell the book to members of the bar." Fla. JEAC Op. 2019-18 [27 Fla. L. Weekly Supp. 336a]. In sum, the authoring judge's promotional activities must not: "(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality; (3) demean the judicial office; (4) interfere with the proper performance of judicial duties; (5) lead to frequent disqualification of the judge; or (6) appear to a reasonable person to be coercive. Fla. Code Jud. Conduct, Canons 4A, 5A." *Id.* As we said in Fla. JEAC Op. 2020-21 [28 Fla. L. Weekly Supp. 562a]:

> The overriding caution the committee wishes to convey to the judge, whether it involves the pursuit of a book promotion or any other extra-judicial activity, is the precept expressed in Canon 3A. Specifically, "*The judicial duties of a judge take precedence over all the judge's other activities*". The plain language of such a directive requires no further explanation from us.

Accordingly, and subject to the foregoing, we answer this inquiry in the affirmative.

REFERENCES

Law Offs. of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n, 271 So. 3d 889 (Fla. 2018) [43 Fla. L. Weekly S565b]
Fla. Code Jud. Conduct, Canons 3A, 4A, 5A, 5D
Fla. JEAC Ops. 2020-21 [28 Fla. L. Weekly Supp. 562a], 2019-18 [27 Fla. L. Weekly Supp. 336a], 2010-12 [17 Fla. L. Weekly Supp. 857a], 98-01, 82-05, 76-17

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure of non-public information—Judge should not extrajudicially notify others of upcoming foreclosure sales or details about those cases in mortgage foreclosures over which judge presided

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-05. Date of Issue: March 13, 2025.

ISSUE

Are there limitations on what a Judge can advise relatives and others who may be interested in properties listed for upcoming foreclosure sales in cases over which the inquiring Judge presided.

ANSWER: Yes, there are limitations. A judge should not extrajudicially notify others of upcoming foreclosure sales or details about those cases in mortgage foreclosures over which the judge presided.

FACTS

The inquiring judge presides over numerous mortgage foreclosure cases resulting in public auctions for the subject properties. The judge would like to know if it is permissible to tell people known to the judge about upcoming foreclosure sales after the judge has signed the order scheduling the properties for public auction. All of the sales are listed on a public website and the auctions are conducted by the Clerk of Court at least 35 days after the judge signs the orders.

DISCUSSION

Sharing information about upcoming judicial sales beyond that given to the general public implicates Canon 5 of the Florida Code of Judicial Conduct, which provides: "A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict with Judicial Duties." Canon 5A(1)-(4) explains:

> A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:
>
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
>
> (2) undermine the judge's independence, integrity, or impartiality;
>
> (3) demean the judicial office; or
>
> (4) interfere with the proper performance of judicial duties.

Further, Canon 3B(12) states, "A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity." The only opinion of this committee on Canon 3B(12)(original version numbered Canon 3B(11)), is Fla. JEAC Op. 2015-03 [22 Fla. L. Weekly Supp. 862a], which advised that a judge may not disclose nonpublic information to an employer of a party, which information was disclosed in a nonpublic domestic violence injunction case. While the date of foreclosure sales is not confidential, the use of such information either prior to the information being made public, or the disclosure of details learned as presiding judge not otherwise available to the public runs afoul of Canon 3B(12).

Finally, divulging information about a foreclosure sale or the case beyond that available to the public by the judge overseeing the case could be perceived as use of inside information for the advantage of others. Judges should avoid even "the appearance of impropriety." Canon 2. As stated in the comment to Canon 2A, in part, "*A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizens and should do so freely and willingly*."

REFERENCES

Fla. Code Jud. Conduct, Canons 2, 2A, 5, 5A (1)-(4)
Fla. JEAC Op. 2015-03 [22 Fla. L. Weekly Supp. 862a]

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Judge may serve on a subcommittee of condominium association board of directors

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-06. Date of Issue: March 19, 2025.

ISSUE

Can a judge volunteer on the subcommittee of a condominium association board of directors?

ANSWER: Yes, subject to the Florida Code of Judicial Conduct.

FACTS

The inquiring judge lives in a condominium association. The condominium association's board of directors has various subcommittees. Those subcommittees include an architectural review committee, building committee, compliance committee, finance and budget committee, fines committee, and social committee. The inquiring judge asks if the judge is permitted to volunteer on one of the subcommittees.

DISCUSSION

We once again address an issue relating to a condominium association board of directors.

In Fla. JEAC Op. 1977-09, we answered that a spouse could serve on the board of a condominium association. But in Fla. JEAC Op. 1981-07, this Committee opined that a judge should not serve on the board of directors of a townhouse association. We wrote:

> Canon 5B permits a judge to participate in civic activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. Sub-paragraph 1 of paragraph B, however, says that a judge should not serve if it is likely that an organization will be engaged in proceedings that would ordinary come before him or would be regularly engaged in adversary proceedings before any court.

Id. Relying on the volume of association litigation we concluded the judge could not serve.

Later, in Fla. JEAC Op. 1984-01, we applied Fla. JEAC Op. 1981-07 to a condominium association and concluded a judge should not serve on the board of a condominium association. And, in Fla. JEAC Op. 2004-10 [11 Fla. L. Weekly Supp. 377a], we applied those opinions and concluded a retired judge should not serve on the board of a homeowners association.

But in Fla. JEAC Op. 2023-04 [31 Fla. L. Weekly Supp. 175a] we began to retreat from that firm position. In that opinion, the inquiring judge asked if the judge was required to resign from an out of state property owners' association. We quoted Canon 5C(3)(a), Fla. Code Jud. Conduct, which states:

> (3) A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, sororal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.
>
> (a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization
>
> (i) will be engaged in proceedings that would ordinarily come before the judge, or
>
> (ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

We concluded that service on the board of directors of an out-of-state property owners association does not implicate any of the factors set forth in Canon 5C(3)(a). As a result, the judge was not required to resign.

We reach the same conclusion here, with a caveat. We believe nothing in Canon 5C(3)(a) categorically prohibits service on a condominium board subcommittee. Nor do we find a categorical prohibition elsewhere in the Canons. Even so, we do believe it is necessary for the inquiring judge to be mindful of the Canons both in selecting a subcommittee and in performing duties for the subcommittee. For example, service on the party planning subcommittee might present different challenges than the fines subcommittee. Further, the committee recommends that the judge regulate the judge's activities so as to not conflict or appear to interfere with judicial duties or other provisions of the Code of Ethics.

REFERENCES

Fla. Code Jud. Conduct, Canons 5
Fla. JEAC Op. 2023-04 [31 Fla. L. Weekly Supp. 175a]; Fla. JEAC Op. 2004-10 [11 Fla. L. Weekly Supp. 377a]; Fla. JEAC Op. 1984-01; Fla. JEAC Op. 1981-07; Fla. JEAC Op. 1977-09

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Judge may open and incorporate a closely-held and individually financed FAA-approved flight training school

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-07. Date of Issue: March 19, 2025.

ISSUE

Whether an active judge may open and incorporate a closely-held individually financed, FAA-approved flight training school.

ANSWER: Yes.

FACTS

An active judge would like to open and incorporate a closely-held individually financed, FAA-approved flight training school. According to the inquiring judge, the business would be a Subchapter S Corporation licensed and in compliance with all applicable State and Federal laws. Additionally, it would meet all FAA requirements.

The business aspect of the school and concept of operations are as follows:

SERVICES PROVIDED: The propose Flight School would provide one on one training in the form of ground and flight training for purposes of FAA certifications; private pilot, instrument, commercial, and multi-engine ratings; flight reviews, and additional flight related activities.

TRAINING: Training would be conducted with individuals as outlined in a written flat fee contract with the judge as the primary flight instructor/chief pilot.

The FAA sets forth benchmarks tested over time for the sought after rating(s) that do not require interpretation.

TRAINING TIMES: All training would be conducted outside of any Court time and would not interfere with judicial duties. Specifically, training would be conducted during the evening hours, holidays, and weekends.

CONFLICTS: Procedural safeguards would be enacted to eliminate any foreseeable conflict or perception of impropriety.

The FAA defines a flight school as any organization providing flight instruction, including pilot schools, flight training centers, and flight instructors in conformity with an applicable regulations and requirements.

Any advertising conducted would have no mention, either directly or indirectly, of being a judge.

The inquiring judge would be the sole owner of the flight school and utilize personal finances and institutional loans to the corporation and as a personal guarantor. The judge's spouse is also a judge but would not have any involvement in the operations of the school.

DISCUSSION

It is well-established in previous advisory opinions that judges are not precluded from owning or having an interest in a private for-profit

business, as long as the business is only owned by him/her and members of his/her family.

In Fla. JEAC Op 2022-09 [30 Fla. L. Weekly Supp. 393a], this committee determined that a judge, who wrote a children's book could establish a limited liability company related to the sales of the book. In doing so, the committee said as follows:

> As for the contemplated establishment of a limited liability company, we look to Canon 5A(4) of the Florida Code of Judicial Conduct, which cautions judges against any extrajudicial activities that would interfere with the proper performance of a judge's duties "that is, consume an inordinate amount of the judge's time. Nothing about the judge's inquiry suggests to us that marketing the book, so long as it is done on the judge's personal time, away from the courthouse, and did not involve soliciting lawyers, would interfere with the judge's job.

In the instant request for advisory opinion, the inquiring judge specifically asserts that all training will be conducted during evening hours, holidays, and weekends so as not to interfere with judicial duties.

In the same advisory opinion, this committee addressed Canon 5D(1)(a) which bars judges from conducting themselves in a manner that "may reasonably be perceived to exploit the judge's judicial position." We do not interpret owning or providing training at a flight school, even for profit, as qualifying as such exploitation. Further, subsection (b) discourages "frequent transactions" between judges and "lawyers or other persons likely to come before the court." However, there is no reason to believe that individuals who enroll in training at the judge's flight school would be more likely to come before the court than any other individual. Additionally, there is nothing to indicate that the flight school will be marketed specifically to lawyers or anyone under the judge's direction.

Finally, the same advisory opinion addresses Canon 5D, which does not forbid judges from participating in private businesses, if the business is "closely held by the judge or members of the judge's family." Canon 5D(3)(a).

> A small LLC, set up for a limited purpose, should not run afoul of this provision. As was made clear in Fla. JEAC Op. 2014-27 [22 Fla. L. Weekly Supp. 769a], the primary concern over LLC's is that judges must choose their professional associates carefully so as not to require frequent disqualification.

In this case, the inquiring judge has asserted that he will be the sole owner of the flight school.

Consistently, in Fla. JEAC Op 2016-17 [24 Fla. L. Weekly Supp. 585b], this committee concluded that a judge may not own an interest in a closely held business with a person who is not a member of the judge's family, be employed by the business during non-business hours, or be compensated for services provided by the business if owned by someone other than him/herself or his/her immediate family. Additionally, it concluded that a judge may not be employed by a closely held business where the judge's spouse owns an interest in the business with a person who is not a member of the judge's family.

The conclusion was based on Canon 5D(3), which prohibits a judge from serving at all as an officer, director, manager, general partner, advisor, or employee of any business entity except a business closely held by the judge or members of the judge's family, or a business entity primarily engaged in the investment of the financial resources of the judge or members of the judge's family.

Likewise, in Fla. JEAC Op 2008-25 [16 Fla. L. Weekly Supp. 207b], this committee concluded that, "the inquiring judge may be an officer and director of a closely held family corporation and may receive compensation in the form of a commission." In the instant inquiry, the judge expressly asserts that he will be the sole owner of the company thereby complying with Canon 5D(3).

Based on the conclusions of the JEAC opinions discussed above, this committee concludes that the inquiring judge may open and incorporate a closely held individually financed, FAA-approved flight training school.

REFERENCES

Fla. Code Jud. Conduct, Canon 5

Fla. JEAC Ops. 22-09 [30 Fla. L. Weekly Supp. 393a], 16-17 [24 Fla. L. Weekly Supp. 585b], and 08-25 [16 Fla. L. Weekly Supp. 207b].

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