Volume 33, Number 10, February 27, 2026

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 409-451

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.

- **REAL PROPERTY—EASEMENTS—BOAT DOCK—EXTINGUISHMENT—MARKETABLE RECORD TITLE ACT. The use restrictions and covenants regarding a boat dock in a declaration that did not grant an easement over the dock were extinguished by the MRTA where the declaration was not mentioned in the root title or any muniments of the title in the property's chain of title.** *BISHOP v. ARMSTRONG. Circuit Court, Fourth Judicial Circuit in and for Clay County. Filed December 19, 2025. Full Opinion at Circuit Courts-Original Section, page 423a.*

- **CRIMINAL LAW—DRIVING UNDER INFLUENCE WITH INJURY OR PROPERTY DAMAGE—EVIDENCE—EXPERT TESTIMONY—BREATH ALCOHOL LEVEL. A motion to exclude opinion evidence establishing that the defendant's breath alcohol level was above the legal limit based on the testing of four "volume not met" breath samples was denied. Based on the expert's testimony during the hearing, the court found that the expert's trial testimony and opinion would be based on sufficient facts and data, and was the product of reliable principles and methods. Admission of blood-alcohol evidence under the common law predicate does not trigger any presumption regarding impairment.** *STATE v. CALHOUN. County Court, Eighth Judicial Circuit in and for Alachua County. Filed November 26, 2025. Full Opinion at County Courts Section, page 433a.*

- **INSURANCE—PERSONAL INJURY PROTECTION—EXAMINATION UNDER OATH. An insured was not obligated to attend an EUO under their PIP policy. Even though the PIP statute requires an insured to comply with "the terms of the policy," including submitting to EUOs, the provision of the policy requiring only the "person seeking coverage" to submit to an EUO did not apply to the insured where the insured was referred to as "you" throughout the policy, and the policy's repeated use of the disjunctive formulation "you or the person seeking coverage" demonstrates that "person seeking coverage" was not synonymous with "you."** *HEALTH PROFESSIONAL SERVICES, INC. v. PROGRESSIVE SELECT INSURANCE COMPANY. County Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed October 4, 2024. Full Opinion at County Courts Section, page 438a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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

Bold denotes decision by circuit court in its appellate capacity.

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CIRCUIT COURTS—APPELLATE

Municipal corporations—Public employees—Dismissal—Personnel appeals board was required by town code to take action "as may be just" after board unambiguously found that employee was fired without cause—Board departed from essential requirements of law and rendered decision that was not supported by competent substantial evidence when it failed to take remedial action in accordance with its evidentiary finding and instead upheld employee's termination—Any due process that was afforded employee was illusory where board upheld termination when it found task of crafting just remedy too difficult or became frustrated by wrongfully terminated employee's unwillingness to take its suggestion that she retire or "move on"—Decision below is quashed

DINA GOLDSTEIN, Petitioner, v. TOWN OF SURFSIDE, FLORIDA, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2025-35-AP-01. December 12, 2025. On a Petition for Writ of Certiorari from a decision by the Personnel Appeals Board for the Town of Surfside. Counsel: Brian H. Pollock and P. Brooks LaRou, Fairlaw Firm, for Petitioner. Jack C. Reiter and Kristie Hatcher-Bolin, Gray Robinson, P.A., for Respondent.

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

OPINION

(ARECES, R., J.) Petitioner, Dina Goldstein ("Petitioner"), filed a Petition for Writ of Certiorari (the "Petition") wherein she claims that Respondent, the Town of Surfside ("Respondent"), rendered a decision to uphold her termination that departed from the essential requirements of the law, was unsupported by competent, substantial evidence, and deprived her of the due process of law. This Court agrees Petitioner is entitled to relief. The Petition is, therefore, granted.

On a petition for writ of certiorari, this Court must determine (1) whether procedural due process was afforded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings were supported by competent substantial evidence. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a].

In this case, the Court's analysis is simple.

I. Lack of Competent Substantial Evidence

Following a lengthy evidentiary hearing to determine if Petitioner's termination was for "cause," the Personnel Appeals Board (the "Board") *unambiguously* found there was no cause for Petitioner's termination. *See* Appx. 2 at 685 ("there's no cause for termination").

The Board then turned to what should happen next. *Id.* Specifically, the Board stated, "I think the question that we need to deliberate on next. Now what? What's next?" *Id.*

The Board and the Parties engaged in a lengthy discussion concerning a proper remedy. The Town Manager explained that the Board "can fashion all kinds of terms and conditions that would theoretically be binding as long as four [Board members] concur in that" but that "as a former judge. . .we always like the parties to resolve it." *Id.* at 687.

Some of the possible resolutions discussed included giving Petitioner a "decent recommendation" so that she could find another job. *Id.* at 686. Perhaps even a "glowing recommendation." *Id.* at 689. One Board member spoke bluntly,

> Could we possibly go on an agreement that the town will agree that, you know, we won't tarnish her moving forward, but we don't have anything to offer her. And after the last commission meeting, I'm sorry, but you're never getting $95,000 in this town. . . .**Look, if I was you, and I'm just being honest, if I was you, I would take that they're not going to tarnish you, that they're going to say you're rehirable, and I would move on**, because everything on the town board is about their job boards [sic] is $55,000. And if you were making 95 and they're not going to give more than a 5% raise, you need to go somewhere else. And, obviously, you can't work with Chief Doce. **I think its time to really cut your losses and move on.**

Id. at 689-90 (emphasis added). Finally, the Board suggested that, perhaps, Petitioner should just be "allowed to retire." *Id.* One Board member opined that Petitioner should "[t]ake a break. Enjoy life. Life is not all about work." *Id.* at 698.

Following these discussions, the Town Manager suggested the parties "adjourn perhaps to a date certain so that counsel [for Petitioner] and [the Town Manager] could try to work out the language of any resolution." *Id.* One Board member agreed they should adjourn and hoped there would be a "win-win" resolution. *Id.* Another Board member repeated that "resignation is the avenue that allows [Petitioner] to move on and leave the ship with all the high honors that she deserves." *Id.* at 699.

When the Parties reconvened before the Board, the Board learned that Petitioner had failed to reach a resolution with Respondent, and so they terminated her.

One Board member appeared bothered that Petitioner had not taken "the opportunity to negotiate her way out in an honorable way so that, you know, this didn't tarnish her reputation." *Id.* at 729. A second Board member appeared preoccupied with the fact that Petitioner, who having been terminated without cause, had not "remov[ed]" or "withdraw[n] all her grievances against the town." *Id.* at 730. That second Board member wondered if "there was any way that [Petitioner] can get a positive recommendation moving forward" mere moments before voting to uphold Petitioner's termination. *Id.* at 730-31.

Section 2-151 of Respondent's Code of Ordinances governed the proceedings below. *See* Code of Ordinances, Town of Surfside, FL, § 2-151. Said section consists of twelve rules. *Id.* Rule 11 provides that the Board must *first* determine if there "was no basis for the adverse employment action." *Id.* Following its determination, the Board is afforded wide discretion to craft an appropriate remedy. *Id.*

Specifically, Rule 11 reads as follows,

> The decision of the board must be based on whether the town's discharge or reduction in pay or rank of the employee was for cause. In order for the board to find the manager or his designee acted without cause, the board must find there was no basis for the adverse employment action. The board shall then take one or more of the following actions: order a new hearing; dismiss the appeal on the merits; order reinstatement of the employee, absolutely or on terms or conditions; or require such other action as may be just.

Id.

In this case, the Board found Petitioner was fired without cause. *See* Appx. 2 at 685 ("there's no cause for termination"). Following that determination, the Board was tasked, by its own Code, to take some action "as may be just." *See* Code of Ordinances, Town of Surfside, FL, § 2-151, Rule 11. The Board moved in that direction when, having determined Petitioner was terminated without cause, it deliberated over its remedial options.

The Board, however, proceeded to render a decision unsupported by competent and substantial evidence, when, without any new evidence, it chose to uphold Petitioner's termination *after* finding there was no cause for termination.

II. Departure from the Essential Requirements of the Law

The Board departed from the essential requirements of the law when it failed to take remedial action in accordance with its eviden-

tiary findings. There is no provision of Rule 11 that allows the Board to uphold Petitioner's termination simply because Petitioner could not reach an agreement as to the appropriate remedy for her termination *without* cause.

III. Petitioner was Deprived of the Due Process of Law

The basic requirements of due process are "notice and a *meaningful* opportunity to be heard." *Pena v. Rodriguez,* 273 So. 3d 237, 240 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a] (emphasis added). The Florida Supreme Court has, moreover, explained that "[t]here is. . .no single, unchanging test which may be applied to determine whether the requirements of procedural due process have been met." *Hadley v. Dept. of Administration,* 411 So. 2d 184, 187 (Fla. 1982); *see also Volynsky v. Park Tree Investments 21, LLC*, 322 So. 2d 714, 715 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1343a] ("the specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding.").

Additionally, Florida courts have long held that due process must not be illusory. *See e.g. Redman v. Kyle*, 76 Fla. 79 (Fla. 1919) ("the hearing allowed must be such as is practicable and reasonable in the particular case, not merely colorable and illusory."). Florida courts have, in fact, held that "due process requires that judicial decisions be reached by a means that preserves both the appearance and reality of fairness." *Pena*, 273 So. 3d at 240.

In this case, the transcript reveals that any due process afforded Petitioner was, at best, illusory. Petitioner attended an evidentiary hearing where both sides presented evidence. The Board then deliberated and found no cause for Petitioner's termination. The only thing left to do was for the Board to craft a just remedy. Finding the task too difficult, or perhaps simply frustrated that Petitioner was not keen on its suggestion that she just retire or "move on," the Board, *contrary to its own evidentiary findings,* voted to uphold her termination for cause.

That is not due process.

While the Board was, pursuant to Rule 11, free to reinstate Petitioner with or without conditions, or even require "such other action as may be just," the Board was *not* free to ignore its own evidentiary findings and uphold termination simply because it found the remedies available to it too unpopular, inconvenient or inexpedient.

The Board's actions rendered Petitioner's opportunity to be heard "illusory," and, as a result, deprived Petitioner of the due process of law.

In conclusion, and for the aforementioned reasons, the Petition is GRANTED and the decision below is QUASHED. (DE LA O, M., J., concurs. TRAWICK, D., J., concurs for the reasons stated in sections I and II of the Court's Opinion.)

* * *

MICHELLE FERREIRA, Petitioner, v. CITY OF MIAMI SPRINGS, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2025-000068-AP-01. December 15, 2025. On Petition for Writ of Certiorari from the City of Miami Springs. Counsel: Dennis A. Kerbel and Kristofer D. Machado, for Petitioner. Laura K. Wendell, for Respondent.

OPINION

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

(PER CURIAM.) The City of Miami Springs observed the essential requirements of the law, afforded due process, and its decision is supported by competent substantial evidence. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982).

Petition denied.

* * *

ARCADIO REYES, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2025-000042-AP-01. December 18, 2025. On Appeal from Parking Violations Bureau. Counsel: Arcadio Reyes, Pro se, Petitioner. Freddi Mack, for Unnamed Appellant, City of Miami Beach.

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

(PER CURIAM.) Affirmed. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979) ("When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial proceedings, the appellate court cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal.").[1]

[1]The City of Miami Beach several independent arguments which support affirming the decision on appeal, but we need not rely on those in light of Appellant's failure to provide a record of the proceedings below.

* * *

Municipal corporations—Code enforcement—Hearing officer's failure to make sufficient findings of fact and conclusions of law on owner's affirmative defenses undermined principles of due process and constituted a departure from essential requirements of law that cannot be remedied by reviewing court—Order imposing civil penalties reversed—Remand for further proceedings

MARY L. BARLEY FAMILY TRUST 1/10/1996, Appellant, v. ISLAMORADA VILLAGE OF ISLANDS, Appellee. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 23-AP-18-P. L.T. Case No. CEBFGC2023 0000134. March 7, 2025.

APPELLATE OPINION

(TIMOTHY J. KOENIG, J.) **THIS CAUSE** comes before the Court upon the Appellant's Notice of Appeal of an Order Imposing Civil Penalties Upon Default issued by the Islamorada, Village of Islands (the "Village") Code Compliance Hearing Officer on December 4, 2023. The Court, having considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply, the record, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. BACKGROUND

Appellant owns a parcel of real property in Islamorada, Florida, that adjoins a right-of-way owned by the Village. Over time, Appellant has made improvements to the Village's right-of-way including the installation of a propane tank and construction pavers. On April 20, 2023, the Village issued a courtesy letter to the Appellant stating that the propane tank and the pavers placed and constructed in the Village's right-of-way violated provisions of the Islamorada Code of Ordinances ("Code"). The letter advised the Appellant to take corrective measures by applying for and obtaining an after-the-fact permit and requesting required inspections to finalize the permit within ten (10) days. (App. Tab 1).

Appellants were issued a formal Notice of Violation issued on May 4, 2023, citing violations of Village Code Section 50-24(a), entitled "permit required" and Section 6-61(a), entitled "work requiring building permit". (App. Tab 2). On October 10, 2023, a hearing took place before a Code Compliance Hearing Officer for the Village. The Hearing Officer continued the hearing until November 14, 2023, to get further information about possible permits for the propane tank and/or pavers.

At the hearing on November 14, 2023, Ms. De La Sierra, the Code Compliance Officer, testified that "no permits [had] been issued for

the propane tank," and that "one permit was issued for a paver walkway," but she found no evidence that the inspection had been conducted and passed for the pavers. (App. Tab 4 at P. 91). At the conclusion of the hearing, the Hearing Officer ruled that he would enter an order affirming the notice of violation and give Appellant 120 days to come into compliance before imposing civil penalties. (App. Tab 4 at P. 107).

On December 4, 2023, the Hearing Officer entered an "Order Imposing Penalties Upon Default" affirming the decision of the Code Compliance Officer and finding Appellant in violation of Sections 6-61(a) and 50-24(a) of the Village Code. (App. Tab 5). This appeal of the Hearing Officer's Order followed.

II. STANDARD OF REVIEW

Pursuant to Fla. Stat. § 162.11, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Cent. Fla. Invs. v. Orange Cty.*, 295 So. 3d 292, 294 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." Fla. Stat. § 162.11. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Id.* "[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Cent. Fla. Invs.* at 295 (*quoting Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995) [20 Fla. L. Weekly S318a]).

When reviewing local government administrative action, the Court engages in a three-part standard of review to determine: (1) whether due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *Haines*, 658 So. 2d at 530.

III. DISCUSSION

In this case, Appellant seeks review of the Final Order based on the following arguments: (1) the Hearing Officer failed to make written findings of fact related to the Appellant's defenses of estoppel, laches, and selective enforcement, rendering the order noncompliant with statutory and regulatory requirements and departing from the essential requirements of law; (2) the Hearing Officer erroneously imposed the burden of proof on the Appellant rather than the Code Enforcement Officer; and (3) the Hearing Officer's findings are not supported by competent substantial evidence.

A. Sufficiency of Findings

Appellant argues that the Hearing Officer departed from the essential requirements of law because the Hearing Officer failed to consider and/or make any findings related to Appellant's defenses of estoppel, laches, and selective enforcement.

A circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with "observing the essential requirements of law." *Haines*, 658 So. 2d at 530. "A ruling constitutes a departure from the essential requirements of law when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " *Miami-Dade Cty. v. Omnipoint Holdings, Inc*. 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a] (quoting *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983)).

The Village Code requires that "[t]he code compliance officer shall make findings of fact and conclusion of law based on evidence of record." § 2-118(k). Likewise, the Local Government Code Enforcement Boards Act requires "findings of fact, based on evidence of record and conclusions of law. . .affording the proper relief." §162.07(4), Fla. Stat. While neither the Act nor the Code mandates any specific amount of detail, the Hearing Officer is required to make basic findings supported by the evidence. *Hayes v. Monroe County*, 337 So. 3d 442, 445 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D170b]. Detailed written findings may not be necessary, but the Appellant is entitled to notice of the specific findings of fact upon which the ultimate action is taken. *Borges v. Dep't of Health,* 143 So. 3d 1185, 1187 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1715a].

In this case, the Hearing Officer issued a perfunctory order affirming the decision of the Code Compliance Officer and finding "the Violator to be in violation of Section 6-61(a) of the Village Code entitled 'Work requiring building permit' and Section 50-24(a) of the Village Code entitled 'Permit required' of the Village Code. (App. Tab 5). Appellant argues that these findings are insufficient and depart from the requirements of Chapter 162 and the Village Code. Appellant argues that the Hearing Officer should have considered Appellant's defenses of estoppel, laches, and selective enforcement, and the failure to do so renders the order noncompliant with statutory and regulatory requirements.

At the code enforcement hearing, the Hearing Officer allowed Appellant's counsel to raise the defense of laches, but questioned its relevance stating: "I mean, to me, the question is simply whether or not permits were obtained for this work, and if not, whether there is a violation of the code." (App. Tab 3 P. 22 lines 11-13). The Hearing Officer failed to address Appellant's selective enforcement defense stating that he was from out of town and did not have personal knowledge of the facts forming the defense. (App. Tab 3 P. 21). As to the estoppel defense, the Hearing Officer stated, "I don't find that the estoppel argument is valid here, but it presents an interesting case of fairness, like you mentioned that it has been so long and it's been sitting in the right of way for many, many, many years, in excess of 20." (App Tab 4 P. 106 lines 10-15). The Hearing Officer stated that "it really comes down to compliance" and ultimately affirmed the decision of the code compliance officer. (App. Tab 4 Pp. 108-109). The Final Order does not address any of Appellant's defenses.

The Village argues that the Village Code limits the fact-finding determination to "whether the alleged violation occurred" and thus, the Hearing Officer did not depart from the essential requirements of law by failing to rule on the Appellant's affirmative defenses. The Village cites Section 2-118(l) of the Code which states as follows:

> The fact-finding determination of the code compliance hearing officer shall be limited to whether the alleged violation occurred, and, if so, whether the person named in the notice may be held responsible for that violation. Based upon this factfinding determination, the code compliance hearing officer shall either affirm or reverse the decision of the code compliance officer. If the code compliance hearing officer reverses the decision of the code compliance officer and finds the named violator not responsible for the code violation alleged in the notice, the named violator shall not be liable for the payment of any fine or costs, absent reversal of the code compliance hearing officer's findings on appeal pursuant to section 2-121.

While the Village correctly notes that Section 2-118(l) requires the Hearing Officer to determine if a violation occurred, this interpretation overlooks the latter part of subsection (l) which mandates that if a violation is found, the Hearing Officer must determine "whether the person named in the notice may be held responsible for that violation." Consideration of affirmative defenses would be relevant to this determination because an affirmative defense, if proven, can negate or reduce the violator's responsibility.

This case is analogous to *Hayes v. Monroe County,* where the homeowners argued that enforcement of the Code was barred by estoppel and laches, but "[e]fforts to develop these defenses were redirected by the Magistrate" and factual and legal findings did not accompany the Special Magistrate's decision. 337 So. 3d at 444. That case revolved around "the core concern that the magistrate failed to

consider the doctrines of estoppel and laches as defenses to the Code violations." *Id*. at 445. The Third District Court of Appeal determined that the lack of factual findings by the Magistrate rendered the order statutorily and regulatorily noncompliant, which, in turn, obfuscated the issue of whether the Magistrate considered estoppel and laches or considered himself absolved from doing so. *Id*. at 445. The Court noted, "such defenses are conclusive, allowing the decision to stand threatens to compromise the very due process the regulatory and statutory scheme strives to afford." *Id.* at 446. The Court held that the Circuit Court should have required written findings and quashed the decision affirming the code enforcement order. *Id.*

The failure to make sufficient findings of fact and conclusions of law in this case undermines principles of due process and constitutes a departure from the essential requirements of law. The failure to make written findings of fact and conclusions of law on the affirmative defenses cannot be remedied by the reviewing court. See *Id*. (error to place the "reviewing Circuit Court in the *de facto* position of performing the Special Magistrate's statutory duty of issuing findings of fact and conclusions of law.")

Therefore, the matter is **REVERSED** and **REMANDED**.

* * *

Municipal corporations—Public rights-of-way—Abandonment—Consent—Affected property owners—Adjacent owners—Village council violated essential requirements of law by failing to address whether petitioners were adjacent property owners whose consent was required before concluding that no affected property owners had objections to abandonment—Appeals—Certiorari—Standing—Petitioners had standing to seek appellate review given their proximity to right-of-way and their participation in abandonment proceedings before the village council—Whether petitioners were affected property owners is properly before court where record evidence showed that petitioners' properties were across street and catty-corner across avenue from applicant's property, village had described petitioners as "adjacent," and issue was raised before council but not resolved—Resolution granting abandonment is quashed

MARY BARLEY FAMILY TRUST and PRINSTON, LLC, Petitioners, v. ISLAMORADA, VILLAGE OF ISLANDS and MM82.790 LLC, Respondents. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 24-AP-12-P. March 25, 2025.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(TIMOTHY J. KOENIG, J.) **THIS CAUSE** is before the Court on a Petition for Writ of Certiorari (the "Petition"), challenging Resolution 24-04-31, a final land use order of the Village of Islamorada, Village of Islands (the "Village") which granted an application to abandon a portion of a right-of-way. The Court, having considered the Petition, the Village's Response, the Response Brief of MM82.790 LLC, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. Factual and Procedural Background

Respondent MM82.790 owns real property located at 82790 Overseas Highway, in Islamorada, Florida, on which it operates a retail store called the Sandal Factory. (App. 175). A representative for the owner of the Sandal Factory applied for right-of-way abandonment of a portion of a road located between the Sandal Factory Property and the Overseas Highway. (App. 175). The road fragment is a paved 200-foot-long, 20-foot-wide strip of land called Orange Street which is owned by the Village but has been used as parking and access to the Sandal Factory. (App. 09; 220). Both sides of Orange Street were previously abandoned. (App. 130).

The Sandal Factory Owner's abandonment application was scheduled for a hearing on July 20, 2023. (App. 213). Pursuant to the public notice process, a letter was sent to property owners located within three hundred (300) feet of the proposed right-of-way abandonment. (App. 213). In response, the Village received five letters of no objection and two emails objecting to the abandonment. (App. 213). Petitioners, the two entities represented by Mary Barley, and two other nearby property owners, objected to the road abandonment. (App.191-198). The Staff Report prepared by the Village Planning Director recommended approval of the application. (App. 213).

At the hearing on July 20, 2023, the Village Planning Director testified and recommended approval of the right-of-way application. James Lupino addressed the Village Council as the representative of the Sandal Factory Owner/applicant. Council members remarked and members of the public testified that the Orange Street fragment had been used as a parking lot for the Sandal Factory Property for many years. Petitioners' attorney and Mary Barley spoke in opposition to the abandonment. Petitioners also presented the testimony of an architect, Matt Polack, who presented a conceptual layout of a proposed new parking/pedestrian plan the Village might implement. (App. 46-55). Ultimately the Village Council moved to continue consideration of the abandonment request to a future hearing date.

In advance of the second hearing, Petitioners again submitted a letter of objection stating that they are "affected owners" insofar as they "walk, bike and drive on the Village-owned property at issue." (App. 203). The Village Planning Director prepared a second staff report recommending approval of the abandonment application. (App. 220). The second hearing was held on April 11, 2024. The Sandal Factory Owner's representative spoke, as did counsel for the Petitioners. After discussion and consideration by the Village Council, a motion to approve the requested right-of-way abandonment passed. The right-of-way abandonment was memorialized in Resolution 24-04-31.

On May 10, 2024, Petitioners filed this Petition seeking to quash Village Council Resolution 24-04-31.

II. Standard of Review

First-tier certiorari review is limited to reviewing whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). In this case, Petitioners are challenging the Village's decision to abandon the right-of-way as a departure from the essential requirements of law and argue that it is not supported by competent substantial evidence.

III. Discussion

A. Standing

As a preliminary matter, Respondents argue that the Petition should be dismissed because Petitioners do not have standing to challenge the Resolution approving the right-of-way abandonment. Standing is a threshold issue which must be resolved before reaching the merits of a case. *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a]. When acting in its appellate capacity, a circuit court is prohibited from exercising jurisdiction over a petition for writ of certiorari if the petitioner lacks standing. *F&R Builders, Inc., v. Durant*, 390 So. 2d 784, 785-786 (Fla. 3d DCA 1980).

In land use cases, abutting homeowners ordinarily have standing by virtue of their proximity to the proposed area of rezoning. *Save Calusa, Inc. v. Miami Dade County*, 335 So. 3d 534, 540 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D224a]. "Such proximity generally establishes that the homeowners have an interest greater than 'the general interest in community good share[d] in common with all citizens.' " *Id.* quoting *Renard v. Dade County*, 261 So. 2d 832, 837

(Fla. 1972). In this case, Mary Barley testified that the Petitioner entities, of which she is principal, own three lots on De Leon Street within fifty feet of the subject property. (App. 42).

Petitioners also received formal notice from the Village of the proposed right-of-way abandonment based on the public notice process which requires a letter to be sent via certified mail to adjacent property owners located within three hundred (300) feet. (App. 220). In response, Petitioners objected to the right-of-way abandonment in writing and participated in the public hearings.

Petitioners' proximity to the proposed right-of-way abandonment, along with their participation in the proceedings below, give Petitioners standing to seek appellate review of the Village Council's Resolution.

B. The Village Code

The Village Code has two pertinent provisions governing the abandonment of public rights-of-way. Section 50-56 governs the process and provides as follows:

> **Sec 50-56 Vacation And Abandonment Of Rights-Of-Way And Easements**
>
> a. The village council may, of its own motion, or upon application of any person, adopt a resolution vacating, abandoning, discontinuing, and closing any existing public street, alleyway, road, highway, or easement, and renouncing and disclaiming any right of the village and the public in connection therewith, **upon a finding that there is no public interest in continued access by such right-of-way or easement.**
>
> b. Prior to the adoption of such resolution, the village shall hold a public hearing, to be noticed in accordance with the standards set forth in 30-218. **The abandonment shall not be granted unless all affected property owners agree to the abandonment.**
>
> c. The resolution, as adopted, shall be recorded in the public records of the county.
>
> (Emphasis added).

Section 50-55 of the Village Code (Definitions) provides the definition of "affected property owner" as follows:

> *Affected property owner* means a property owner adjacent to the applicant's property or who, by virtue of a proposed abandonment will:
>
> a. Have access which is currently used by that property owner eliminated;
>
> b. Have the only platted access eliminated;
>
> c. Have the paved area adjacent to that property increased for turnaround purposes; or
>
> d. Be increased in size.

Thus, prior to granting an application for the abandonment of a right-of-way, the Village Code requires that the Village Council find that: (1) all affected property owners agree to the abandonment, and (2) there is no public interest in continued access by such right-of-way.

C. Essential Requirements of Law

Petitioners argue they qualify as "affected property owners" under the Village Code, and since they objected to the right-of-way abandonment, the Village departed from the essential requirements of the law by granting the abandonment application. A circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with "observing the essential requirements of law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. "A ruling constitutes a departure from the essential requirements of law when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " *Miami-Dade Cty. v. Omnipoint Holdings, Inc.* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a] (quoting *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983).

i. Adjacent Property Owner

There are two ways to establish oneself as an "affected property owner" under the Village Code. First, the property owner could be "adjacent" to the applicant's property. §50-55, Code of Ordinances, Islamorada, Village of Islands, Florida. Alternatively, the property owner can be "affected" if they suffer one of the four consequences listed in Section 50-55 of the Village Code by virtue of a proposed abandonment.

The term "adjacent" is not defined in Section 50-55, nor is it defined in the general "Definitions and Rules of Construction" Section 1-2 of the Village Code. Section 30-31, which applies to Land Use Regulations and is titled "Rules of Construction and Definitions Generally" contains the following definition of "adjacent land":

> Adjacent land means a parcel of land sharing a boundary with another parcel of land. For purposes of the plan, an intervening road, right-of-way, easement or canal shall not destroy the adjacency of the two parcels. For the purposes of article V, division 4 of this chapter, intervening canals and U.S. 1 shall destroy the adjacency of the two parcels.

In this case, the notice of the public hearing regarding the proposed right-of-way abandonment was sent to the Petitioners in accordance with Section 30-218 of the Village Code, as required by Section 50-56(b), because the Petitioners' property is located within 300 feet of the property subject to the application. In Response, Petitioners objected to the abandonment in writing and at the public hearings.

Prior to both right-of-way abandonment hearings, the Village Planning Director, Jennifer DeBoisbriand, drafted a Staff Report to the Mayor and Village Council that states as follows:

> During the public notice process, a letter is required to be sent via certified mail to **adjacent property owners** located within three hundred (300) feet of the proposed right-of-way abandonment, posting of the property, and notice in a local publication. The Village has received 5 letters of no objection and 2 emails objecting to the abandonment. As of the writing of this report, no other comments have been received.

(App. 213; 220) (Emphasis added).

Despite using the term "adjacent property owners" to describe Petitioners and other nearby property owners, the Planning Director goes on to state that the "applicant owns the only property that would be affected by the abandonment." (App. 214; 221). The Planning Director also opened the first public hearing by stating: "[p]ursuant to code Section 50-56B all affected property owners are required to agree to the abandonment. I would note that the applicant owns the only property that would be affected by this abandonment." (App. 18 lines 15-19).

At the hearings, the Village Attorney acknowledged that there are two elements that the Village Council must find before abandoning the right-of-way, one of which being that no affected property owners object to the abandonment. (App. 69-70;128). However, at the hearing, there was no discussion whatsoever as to whether Petitioners are "adjacent" to the applicant's property.

During the hearing, Councilmember Gregg noted that the word "adjacent" is defined in Chapter 30 of the Code and questioned if it applies in this case. He remarked that "It might, but I was not able to understand. . ." He then appealed to the Village attorney for guidance. (App. 121-122). The Village Attorney instructed the Council that there are four things that could make an affected property owner under Section 50-55. (App. 122). He stated that the Petitioners are not affected parties because "they have not been deemed to be because they were not sought out to see if they had an objection, or if they consent to it, I should say, which is one of the requirements." (App. 123 lines 1-4). This analysis precluded further discussion on whether

Petitioners were adjacent property owners.

The Village argues that since Petitioners did not previously claim that they qualify as an "affected property owner" by virtue of being adjacent, they have waived this argument. However, the Village uses the term "adjacent" in the "affected property owner" definition in Section 50-55 of the Village Code. The Village again used the term "adjacent" in the Village Planning Director's Staff Report to describe the property owners, including Petitioners, who were contacted about the proposed abandonment. The question of whether Petitioners were adjacent was also raised at the hearing although it was never discussed or answered. Therefore, the issue is before the Court.

In its Response, the Village argues that Petitioners are not "adjacent" property owners because "the cited portions of the record plainly reflect the referred-to parcel does not share a boundary with the Sandal Factory Property, but is across a public intersection of two roads, and that at the rear of the Sandal Factory Property." (Response at P. 21 n. 7). However, Mary Barley testified that Petitioners own three lots on De Leon street "within fifty feet of the subject property" (App. 42), and record evidence demonstrates that Petitioners' properties are across De Leon and "catty-corner" across Avacado Avenue from the Sandal Factory. (App. 316; 394). Therefore, the issue of whether Petitioners are adjacent property owners is a disputed question of fact that the Village Council should have addressed and resolved prior to finding that "all affected property owners have no objection to the proposed abandonment and vacation of the Right-of-Way." (App. 008).

Pursuant to Village Code Section 50-56, the Village Council was required to find that all affected property owners agreed to the abandonment. Prior to making this finding, the Village Council was required to apply the definition found in Section 50-55 of the Code, to determine if any of the objectors, including Petitioners, were "affected property owners." Part of this analysis required the Village Council to determine if Petitioners were "adjacent to the applicant's property." The record does not show that the Village Council engaged in this analysis, which violates the essential requirements of law.

Since the Court finds a departure from the essential requirements of law, it need not address Petitioners' argument that the Resolution is not supported by competent substantial evidence.

IV. Conclusion

The Village Council did not apply the plain and unambiguous language of the Village Code to determine whether Petitioners were adjacent to the applicant's property and thus, affected property owners, which constitutes a departure from the essential requirements of law.

The Petition for Writ of Certiorari is **GRANTED**, and Resolution No. 24-04-31 granting the right-of-way abandonment is **QUASHED**.

* * *

Counties—Code enforcement—Tree removal—Special magistrate departed from essential requirements of law by holding that vacant lot zoned for residential use did not qualify as residential property under version of section 163.045(1) in existence prior to July 1, 2022, which prohibited local government from requiring permit for removal of trees from residential property if property owner obtained documentation from certified arborist or licensed landscape architect that tree presented danger to persons or property—Because vacant lot in residential zone qualified as residential property at time of tree removal, owner was not required to obtain permit for removal of trees that qualified arborist found presented danger—Finding of violation for tree removal is reversed—Finding of violation for parking vehicle on vacant lot is affirmed

DENISE JOY SNYDER LIVING TRUST, Appellant, v. MONROE COUNTY, FLORIDA, Appellee. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 24-AP-003-K. L.T. Case No. CE23070007. April 20, 2025.

OPINION

(TIMOTHY J. KOENIG, J.) **THIS CAUSE** comes before the Court upon a Notice of Appeal filed by Appellant, Denise Joy Snyder Living Trust, appealing a Final Order entered by the Monroe County Code Compliance Special Magistrate on December 11, 2023. The Court, having considered the Appellant's Initial Brief, Monroe County, Florida ("Appellee's") Answer Brief, the record, the argument of counsel, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. BACKGROUND

Appellant owns the subject property located at 19617 Date Palm Drive, Sugarloaf Key, Florida. (Appellant's App. 024). The subject property is a vacant lot which is zoned for residential use. (*Id.*; Tr. at 6). On June 9, 2022, Appellant obtained documentation from an arborist certified by the International Society of Arboriculture (ISA) detailing that the subject property contained tree species which posed a danger to persons or property. (Appellant's App. 001). After obtaining documentation from the (ISA)-certified arborist under section 163.045, Florida Statutes, Appellant removed the trees from the subject property without obtaining a permit. (Appellant's App. 016). On July 1, 2022, the Legislature amended section 163.045, Florida Statutes, to define "residential property" as "a single-family, detached building located on a lot that is actively used for single-family residential purposes. . ." Fla. Stat. § 163.045 (2022).

After inspecting the subject property on July 12, 2023, the Code Compliance Department issued Appellant a "Notice of Violation/Notice of Hearing" for the following violations of the Monroe County Code ("MCC"):

> MCC § 118-11—ENVIRONMENTAL RESTORATION UNAUTHORIZED VEGETATION REMOVAL HAS OCCURRED IMPACTING THE NATURAL CONDITION OF THE LOT.
>
> MCC § 17-6(b)(3)—VEHICLES ON VACANT LOTS THE RECREATIONAL VEHICLE MAY ONLY BE PARKED ON THE SAME LOT OR CONTIGUOUS LOT WITH A PRINCIPAL STRUCTURE.
>
> MCC § 6-100.(a)—PERMITS REQUIRED PERMIT(S), APPROVAL(S), AND ALL INSPECTIONS ARE REQUIRED FOR THE CLEARING.
>
> MCC § 6-110.(a)(4)—LAND CLEARING COMMENCED PRIOR TO THE ISSUANCE OF A PERMIT OR APPROVAL BY THE BUILDING OFFICIAL IS SUBJECT TO AFTER-THE-FACT FEES.

On September 28, 2023, a hearing took place before the Code Compliance Special Magistrate. During the hearing, the Monroe County Assistant Director for Environmental Resources ("Assistant Director") testified that Appellant did not obtain the required permits before clearing vegetation on the subject property and that Appellant must restore the native vegetation. (Tr. at 6). Additionally, the Assistant Director testified that Appellant did not qualify for the exception to the permit requirement under section 163.045 because the exception only applies to residential properties. (Tr. at 7). Jeffrey Snyder appeared on behalf of Appellant and contested the violations by testifying that he acquired documentation from an (ISA)-certified arborist before the Legislature amended section 163.045 in July 2022 to exclude vacant lots from the definition of "residential property." (Tr. at 8). In response, Monroe County's counsel argued that Appellant cannot claim the exception to the permit requirement under the previous version of the statute because a vacant lot is not a residential property. (Tr. at 12). Appellant did not contest the Code Inspector's finding that Appellant parked an RV on the subject property in violation of MCC § 17-6(b)(3) and corrected the violation prior to the compliance date of November 7, 2023. (Tr. at 10; Appellee's Brief at

8). At the conclusion of the hearing, the Special Magistrate took the matter under advisement.

On December 11, 2023, the Special Magistrate entered a Final Order affirming the Code Compliance Department's Notice of Violation/Notice of Hearing and finding Appellant cleared trees on the subject property without a permit in violation of MCC sections 118-11, 6.100.(a), and 6-110.(a)(4). (Appellant's App. at 002-004). The Special Magistrate found that although Appellant presented a report from an arborist, the exception to the permit requirement under section 163.045 did not apply because the subject property is a vacant lot and is not a residential property. *Id.* In doing so, the Special Magistrate ordered the Appellant to bring the subject property into compliance by making the corrections required in the Notice of Violation/Notice of Hearing. *Id.* The Special Magistrate imposed a fine of $200 per day if Appellant did not correct the violations before 05/29/24. *Id.* This appeal of the Special Magistrate's Final Order followed.

II. STANDARD OF REVIEW

Pursuant to Fla. Stat. § 162.11, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Central Florida Investors v. Orange County*, 295 So. 3d 292 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." Fla. Stat. § 162.11. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Id.* at 294; § 162.11 Fla. Stat. This includes the jurisdiction to consider and resolve constitutional issues as part of a code enforcement appeal. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982). "[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995) [20 Fla. L. Weekly S318a]. The Court engages in a three-part standard of review to determine: (1) whether due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *Id.* at 530. Neither party raised the issue of procedural due process and it is not at issue in this appeal.

III. DISCUSSION

Adherence to the Essential Requirements of Law

Appellant seeks review of the Special Magistrate's Final Order on grounds that the Special Magistrate incorrectly applied the law by holding that Appellant could not invoke the exception to the permit requirement under the pre-amended version of section 163.045.

Review by appeal requires the court to consider whether the correct law was applied and whether the law was correctly applied. See *Central Florida Investors*, 295 So. 3d at 295.

In this case, the Special Magistrate's Final Order departed from the essential requirements of law by holding that vacant lots do not qualify as residential property under the pre-amended version of section 163.045. Prior to the amendment which took effect on July 1, 2022, section 163.045(1) provided as follows:

> A local government may not require a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree on residential property if the property owner obtains documentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to persons or property.

Under the pre-amended version of section 163.045, "residential property" included vacant property zoned for residential use. See *Vickery v. City of Pensacola*, 342 So. 3d 249, 255 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1366c] ("Residential property" is property zoned for residential use or, in areas that have no zoning, property used for the same purposes as property zoned for residential use. To hold otherwise would ignore the term's common use and improperly limit section 163.045(1)."). Although the subject property is a vacant lot, it qualified as residential property under the pre-amended version of section 163.045 because it remains zoned for residential use.

Therefore, the Special Magistrate's Final Order departed from the essential requirements of law because Appellant complied with the statute by obtaining documentation from the (ISA)-certified arborist before July 1, 2022, and thus qualified for the exception to the permit requirement under the pre-amended version of section 163.045.

IV. CONCLUSION

In this case, the Final Order of the Special Magistrate is **AFFIRMED in part** and **REVERSED in part** as follows:

1. The finding of violation as to MCC § 17-6(b)(3) is **AFFIRMED**.
2. The finding of violation as to MCC sections 118-11, 6.100.(a), and 6-110.(a)(4) is **REVERSED**.

* * *

Counties—Contracts—Competitive bidding—Non-conforming bid—Bid protest—Denial—County commission departed from essential requirements of law by awarding contract to bidder who failed to submit security along with its bid, as required by county's request for proposals, and by allowing successful bidder to bring its bid into conformance with RFP specifications by submitting cashier's check for security after bids were opened—Decision to deny bid protest quashed

KEARNS CONSTRUCTION COMPANY, Petitioner, v. MONROE COUNTY, a political subdivision of the State of Florida, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 24-CA-1134-M. June 27, 2025.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(TIMOTHY J. KOENIG, J.) **THIS CAUSE** is before the Court on Kearns Construction Company's ("Petitioner") Petition for Writ of Certiorari to review Monroe County's ("Respondent") denial of Petitioner's bid protest. Having heard arguments of counsel, considered Petitioner's Petition, Respondent's Response in Opposition to the Petition, Petitioner's Reply, pertinent legal authority, and being otherwise fully advised in the premises, the Court finds and orders as follows:

I. Factual and Procedural Background

On August 3, 2024, Respondent published a request for proposals No. 568 (RFP) seeking proposals for the deployment of artificial reef materials to the Gulfside Ten (10) Mile Reef. (Pet. App. 1-74). The RFP required each proposal to be accompanied by a proposal security in the form of a certified check made payable to Respondent, or in the form of a bond from a surety company authorized to do business in Florida. (Pet. App. 14). Respondent reserved the right to waive informalities, technical errors, variations, and irregularities in any or all proposals that did not render the proposal non-conforming. (Pet. App. 13). Respondent's Notice of Request for Competitive Solicitations directed all proposers to submit their bids by 3:00 PM on Wednesday, August 28, 2024. (Pet. App. 3).

Respondent received bids from Biscayne Towing & Salvage, Inc. ("Biscayne"), Kearns Construction Company ("Petitioner"), and Adventure Environmental, Inc. (Pet. App. 79). On September 19, 2024, the County's Selection Committee ranked these bids based on their price and compliance with required forms such as the Proposal Security (Bid Bond). (Pet. App. 14, 75-79). On September 24, 2024, the County's Selection Committee ranked Biscayne's bid the highest and issued a recommendation to the Monroe County Board of County Commissioners to award the contract for RFP No. 568 to Biscayne.

(Pet. App. 82).

Petitioner filed a formal bid protest on October 11, 2024, arguing that Biscayne submitted a non-conforming bid which required Respondent to award the project to Petitioner, the second-highest bidder. (Pet. App. 208). In its bid protest, Petitioner argued that Biscayne submitted a non-conforming bid because Biscayne's Bid (Proposal) Bond form lacked the name of the proposer, the surety company, and the surety's signature. (Pet. App. 205).

On October 16, 2024, the Board of County Commissioners (BOCC) held a meeting to award the contract for RFP No. 568. (Pet. App. 231). During the meeting, the BOCC heard Petitioner's bid protest where both the Petitioner and the Respondent presented their arguments and submitted evidence. (Pet. App. 233-245). Petitioner argued that Biscayne submitted a non-conforming bid with a material defect that could not be cured because it lacked a completed Bid (Proposal) Bond form before the proposals were opened. (Pet. App. 235-240). Respondent argued that Biscayne cured this defect by submitting a cashier's check after the proposals were opened and that the BOCC should approve Biscayne's proposal. (Pet. App. 243-244).

After conducting a quasi-judicial hearing on Petitioner's bid protest, the BOCC denied the bid protest and affirmed the County Selection Committee's recommendation to award the contract for RFP No. 568 to Biscayne. (Pet. App. 244-45).

On November 8, 2024, Petitioner filed a petition for writ of certiorari seeking to quash Respondent's decision to deny Petitioner's bid protest and award the bid to Biscayne.

II. Standard of Review

First-tier certiorari review is limited to reviewing whether procedural due process is accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Neither party raised the issue of procedural due process and it is not at issue in this proceeding. Regarding the evidence, circuit courts are not permitted to analyze the record and make their own factual findings. See *Haines City Com'ty Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. Circuit courts cannot usurp the fact-finding authority of the agency and are constrained to determining whether the agency's decision is supported by competent substantial evidence. See *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093 (Fla. 2000) [25 Fla. L. Weekly S461a].

III. Analysis

A. Adherence to the Essential Requirements of Law

Petitioner argues that Respondent departed from the essential requirements of law by failing to apply Section 2-347 of the Monroe County Code and awarding the contract for RFP No. 568 to Biscayne who failed to submit a Proposal Security (Bid Bond) before the proposals were opened and was permitted to bring its bid into conformance with the specifications after the bids were opened. . Respondent, however, contends that it adhered to the essential requirements of law because the missing Bid Bond did not constitute a material deviation from bid specifications and Biscayne cured this defect by providing a cashier's check before the BOCC voted to award the contract to Biscayne.

A circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with "observing the essential requirements of law." *Haines City Cmty. Dev.*, 658 So. 2d at 530. An administrative agency departs from the essential requirements of law if it applies the wrong law. *Id.* at 531 n.7.

In this case, the Respondent departed from the essential requirements of law by failing to apply the correct law to the evidence. Code Section 2-347(i) provides that:

> Each bid to a competitive solicitation for a construction project estimated to be **$200,000 or more** must be accompanied by a good faith bid security in an amount equal to five percent of the bid price by way of a bid bond from a surety insurer authorized to do business in Florida as a surety or any method permitted in F.S. § 255.051, and as amended, pursuant to Monroe County Code section 2-347(i). . . The county administrator or his designee shall have discretion to require a good faith bid security for construction projects estimated to be less than $200,000.00.

Since the RFP required each proposal to be submitted with a proposal security and Biscayne submitted a bid for $440,000, Respondent needed to apply Section 2-347(i) of the Code to determine whether to affirm the County Selection Committee's recommendation to award the contract for RFP No. 568 to Biscayne. (Pet. App. 58, 81-83). Although Biscayne submitted its bid without the required proposal security, Respondent deemed this irregularity to be immaterial because Biscayne submitted a cashier's check after the proposals were opened to ensure that all proposers were on a level playing field. (Pet. App. 243; Resp. App. 157). However, Section 2-347(j) of the Code prohibits this practice by providing that "[a]ll responses must be sealed and submitted before the time described in the published notice for the bid opening [and that] [a]ny responses submitted after that time shall not be considered."

The Court finds that Respondent departed from the essential requirements of law by failing to apply both Section 2-347 of the Code and its own proposal criteria in the RFP. The legislative intent is clear from the plain language of the section and thus Code Section 2-347(i) requires every bid for a construction project estimated to be $200,000.00 or more to be accompanied by a proposal security and Code Section 2-347(j) prohibits a proposer from submitting responses after the bid opening. Additionally, Article I. Section D. of the RFP required each proposer to attach a Bid (Proposal) Bond to their bid. (Pet. App. 13-14). Although Florida Courts may exercise judicial deference in public agency competitive bidding disputes, they do not do so when there is evidence that the agency engaged in illegality, fraud, oppression, or misconduct. See *Department of Transportation v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988). In this case, Respondent could not permit Biscayne to submit a proposal security once the proposals were opened because allowing Biscayne to bring its bid into conformance with the specifications after the bids were opened exceeded the County's authority. See *City of Opa-Locka v. Trustees of Plumbing Indus. Promotion Fund*, 193 So. 2d 29, 31-32 (Fla. 3d DCA 1966)

Moreover, the Second District also relied on this principle of law and held that a city could not permit a proposer to subsequently amend its bid after the submission deadline to conform to the specifications in the original proposal. . See *Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1978) ("Though the facts of Opa-Locka and this case are dissimilar, in both instances the municipal authority permitted the bidder to bring his bid into conformance with the specifications after the bids were opened. Our sister court did not approve of this procedure, nor can we.").

Therefore, by permitting Biscayne to bring its bid into conformance with the specifications in the RFP after the bids were opened, Respondent departed from the essential requirements of law.

IV. Conclusion

Having found that Respondent departed from the essential requirements of law, the Court is compelled to **GRANT** the Petition for Writ of Certiorari and **QUASH** the Respondent's decision to deny Petitioner's bid protest and award the bid to Biscayne.

* * *

Municipal corporations—Zoning—Legal nonconforming use—Modification—Denial—City commission did not depart from essential requirements of law in affirming planning director's denial of owner's request to increase seating allowance in legally nonconforming bar/restaurant from permitted 49 seats to 156 seats because city code prohibited extension, expansion, enlargement, or increase in intensity of nonconforming use—Commission's determination that increase in seating would extend or expand nonconforming use is supported by competent substantial evidence that included fact-based statements by city officials and interested citizens

LKT SERVICES & COMPANIES, LLC, a Florida Limited Liability Company, Petitioner, v. CITY COMMISSION, sitting as the BOARD OF ADJUSTMENT OF THE CITY OF KEY WEST, FLORIDA, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 24-AP-4-K. March 25, 2025.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(TIMOTHY J. KOENIG, J.) THIS CAUSE is before the Court on LKT SERVICES & COMPANIES, LLC's ("Petitioner") Petition for Writ of Certiorari to review Resolution No. 23-354 issued by the Key West Board of Adjustment ("Respondent"). Having heard arguments of counsel, considered Petitioner's Petition, Respondent's Response in Opposition to the Petition, Petitioner's Reply, pertinent legal authority, and being otherwise fully advised in the premises, the Court finds and orders as follows:

I. Factual and Procedural Background

Petitioner owns the property located at 409 Caroline Street, Key West, Florida ("Subject Property"). The original zoning ordinance permitted the previous owner to establish a bar and restaurant business on the Subject Property. (Pet. App. 41). In 1997, the City of Key West ("City") amended its zoning laws and included the Subject Property within the Historic Residential/Office (HRO) zoning district which prohibited the operation of a bar or restaurant outside of the Appelrouth Business Corridor. (Pet. App. 41). Acknowledging that the bar and restaurant business constituted a legal nonconforming use, the City permitted forty-nine (49) seats on the Subject Property. (Pet. App. 18, 41, 42). When Petitioner acquired the Subject Property in 2018, the City issued Petitioner a business tax receipt for a bar and restaurant business with forty-nine (49) seats. (Pet. App. 41).

After performing a restaurant seat license compliance audit in early 2023, the Code Compliance Department cited Petitioner for having sixty-nine (69) unlicensed seats on the Subject Property. (Pet. App. 41). In response, Petitioner submitted a request to the Planning Department to increase seating on the Subject Property from forty-nine (49) seats to one hundred and fifty-six (156) seats. (Pet. App. 42). On September 20, 2023, the Planning Director denied Petitioner's seating request pursuant to Section 122-32(d) of the Key West Code of Ordinances. (Pet. App. 42). Petitioner filed its Notice of Appeal on September 26, 2023, to appeal the Planning Director's denial of the request to increase seating. (Pet. App. 8).

After conducting a quasi-judicial hearing on Petitioner's appeal, Respondent issued Resolution No. 23-354 ("Resolution") denying the appeal and affirming the Planning Director's denial of Petitioner's seating request. (Pet. App. 22-24). In the Resolution, Respondent concluded that "the proposed additional seats in [sic] an extension or an expansion or an intensity of non-conformity at Subject Property." *Id.* at 23.

On January 18, 2024, Petitioner filed a petition for writ of certiorari seeking to quash the Resolution.

II. Standard of Review

Certiorari review of an administrative action is given in the circuit court as a matter of right. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). First-tier certiorari review is limited to reviewing whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *Id.* Neither party raised the issue of procedural due process and it is not at issue in this proceeding. Regarding the evidence, circuit courts are not permitted to analyze the record and make their own factual findings. See *Haines City Com'ty Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. Circuit courts cannot usurp the fact-finding authority of the agency and are constrained to determining whether the agency's decision is supported by competent substantial evidence. See *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093 (Fla. 2000) [25 Fla. L. Weekly S461a].

III. Analysis

A. Adherence to the Essential Requirements of Law

Petitioner argues that Respondent departed from the essential requirements of the law because Respondent did not accurately interpret and apply the Key West Code of Ordinances ("Code") in its Resolution. The Court disagrees.

A circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with "observing the essential requirements of law." *Haines City Cmty. Dev.*, 658 So. 2d at 530. An administrative agency departs from the essential requirements of law if it applies the wrong law. *Id.* at 531 n.7.

In this case, the Respondent observed the essential requirements of law by applying the correct law to the evidence. Since the bar and restaurant business on the Subject Property is a legal nonconforming use, Respondent applied Section 122-32(d) of the Code to determine whether to affirm the Planning Director's denial of Petitioner's seating request. (Pet. App. 58, 81-83). Code Section 122-32(d) pertains to the modification of nonconforming uses and provides that "[a] nonconforming use shall not be extended, expanded, enlarged, or increased in intensity." Immediately before voting on the Resolution to affirm the Planning Director's denial of Petitioner's seating request, the City Attorney explained that Code Section 122-32(d) prohibits the extension, expansion, enlargement, or intensity of a nonconforming use. (Pet. App. 83). The Court agrees that Section 122-32(d) of the Code is not limited to prohibiting the intensification of nonconforming uses.

Petitioner's claim that Respondent departed from the essential requirements of law by not applying the Code's definition of "intensity" is incorrect. The Court finds that the legislative intent is unclear from the plain language of the section and that when read in accordance with the doctrine of the last antecedent, Code Section 122-32(d) prohibits the extension or expansion of nonconforming uses. When courts must interpret unclear language to determine legislative intent, they apply the doctrine of the last antecedent which provides that a qualifying phrase is read as limited to the last item in the series when the phrase follows that item without a comma. See *Kasischke v. State*, 991 So. 2d 803, 813 (Fla. 2008) [33 Fla. L. Weekly S481a]. However, the rule is not inflexible and can be overcome where the qualifying phrase is applicable as much to the first and other words as to the last. See *Id.* When applying the rule to Code Section 122-32(d), "in intensity" only modifies the last verb in the series and the context does not support Petitioner's interpretation because "intensity" is defined in the Code as a ratio and ratios can only be increased or decreased. Thus, Respondent observed the essential requirements of law because Code Section 122-32(d) also prohibits the extension or expansion of nonconforming uses and Respondent determined that granting additional seats would constitute an extension or an expansion of the nonconforming use on the Subject Property. (Pet. App. 23).

Therefore, by affirming the Planning Director's decision on the

basis that granting the seating request would violate Section 122-32(d), Respondent adhered to the essential requirements of the law.

B. Competent Substantial Evidence

Petitioner argues that Respondent's determination is not supported by competent and substantial evidence because it did not provide studies, data, or expert testimony to support its conclusion that the additional seats would extend or expand the nonconforming use on the Subject Property. The Court disagrees.

Competent evidence is evidence that is sufficiently relevant and material to the ultimate determination that a reasonable mind would accept it as adequate to support the conclusion reached. See *Degroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred. *Id.* Circuit courts are required to defer to the findings of an agency fact-finder in the context of zoning determinations. *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a]. When determining whether an administrative decision is founded on competent, substantial evidence, circuit courts may only look for facts in the record that support the agency fact-finder's conclusions. *Id.*

Based on a review of the record in this case, Respondent's determination is supported by competent and substantial evidence. Before voting on the Resolution to affirm the Planning Director's denial of Petitioner's seating request, Respondent heard testimony from the Planning Director, the Assistant City Attorney, and interested citizens regarding whether an increase in seating would extend or expand the nonconforming use on the Subject Property. (Pet. App. 60, 68-72, 79-80). The Court finds that the testimony included relevant fact-based statements which constitute competent, substantial evidence. Therefore, Respondent's determination that an increase in seating would constitute an expansion or extension of the bar and restaurant business on the Subject Property is supported by competent, substantial evidence.

IV. Conclusion

The Court finds that Respondent observed the essential requirements of the law and based its determination to affirm the Planning Director's denial of Petitioner's seating request on competent, substantial evidence. Therefore, the Petition for Writ of Certiorari is **DENIED**.

* * *

Municipal corporations—Code enforcement—Special magistrate order imposing fine for failure to complete construction by permit deadline, continuing to work after expiration of permit, and performing work after issuance of stop work order and requiring property owner to retain licensed general contractor if he continues work is affirmed—No merit to argument that owner was entitled to work continuously because original permit for which he secured several extensions never expired—Finding that permit had expired was established by prior code enforcement board action that was affirmed by district court—Whether expiration date of continuation permit that was obtained after prior enforcement action was tolled was not raised before special magistrate and is waived on appeal—Magistrate's order did not violate section 553.79(1)(f), which prohibits local government from requiring a contract between a builder and an owner for the issuance of a building permit or as a requirement for the submission of a building permit application—Order did not impose improper obligation by requiring owner to have a licensed general contractor apply for demolition permit to conduct a reversal of work performed which was not built to code and further providing that owner "may" have licensed general contractor submit a new application or "may" apply for after-the-fact building permit after all non-compliant work was reversed—Constitutionality of fines—Daily fines were not unconstitutional or indefinite—Evidence at hearing showed that work was not completed by deadline and did not support argument that remaining work was cosmetic, owner did not raise any objections at hearing based on lack of procedural due process or notice, and order contained all information needed to calculate daily fine—Evidence was sufficient to support magistrate's decision that owner conducted work after expiration of permit under either preponderance of evidence standard or clear and convincing evidence standard espoused by owner, and magistrate's findings are supported by competent substantial evidence—Argument that code section regarding performance of work following stop work order is an inapplicable flood-plain regulation was not raised before magistrate and therefore not preserved for appeal—Further, argument is not supported by evidence or any authority

RICHARD HARPER, Appellant, v. CITY OF KEY COLONY BEACH, Appellee. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 24-AP-0002-M. January 3, 2025.

APPELLATE OPINION

(TIMOTHY J. KOENIG, J.) **THIS CAUSE** comes before the Court upon Richard Harper's ("Appellant's"), Appeal of Special Magistrate's Code Enforcement Final Order Imposing Fine ("Final Fine Order") entered on December 1, 2023. The Court, having considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

BACKGROUND

Appellant is the owner of real property located in the City of Key Colony Beach, ("KCB"), Florida. In September 2019, Appellant was issued Permit No. 11261 for renovations to his property, including but not limited to the elevation of the residence from ground floor to above base flood requirements. The KCB City Code requires that all work under the permit be completed within fifteen (15) months of the start of construction. Construction commenced on Appellant's property on October 1, 2019. Shortly after work started, the COVID-19 pandemic hit, and a state of emergency was declared by the State of Florida which tolled the expiration of any building permits during the state of emergency and for six months afterward.

After the state of emergency was lifted, Appellant submitted a request for an extension of the deadline from the KCB City Commission, and that relief was granted. Appellant secured extensions of the original 15-month deadline until April 28, 2022, when permit No. 11261 expired, and Appellant was cited for violations of KCB City's Code of Ordinances section 6-7(d) and section 6-7(e) for failing to complete the residential construction project within 15 months of the start date.

On May 11, 2022, a hearing took place before the KCB Code Enforcement Board (the "Board"). The Appellant appeared at this hearing along with counsel. The Appellant testified that the original permit had expired, and he had not completed the project. (Transcript of May 11, 2022, Code Enforcement Hearing at P. 17). Appellant requested more time to complete the project and requested that the remedy be an "equitable" application of the City Code. (Tr. at 7;29). At the conclusion of the hearing, the Board found a violation of the City Code (Tr. at 38).

On May 12, 2022, the Board entered "Findings of Fact and Conclusions of Law, and Order" (the "Enforcement Order") finding Permit No. 11261 remained expired and finding Appellant in violation of section 6-7(d) for failing to complete construction as required by the City Code (Appellant's Exhibit 1). The Enforcement Order granted the Appellant's request for additional time, and directed the Appellant to apply for a Continuation of Construction Permit in accordance with City Code section 6-7(e) which would extend the time to complete the project to December 30, 2022. The Appellant

was ordered to pay 15 percent of the original permit fee prior to the issuance of the Continuation Permit. No additional fine would be imposed if the Appellant timely secured the Continuation Permit.

On June 7, 2022, Appellant appealed the Enforcement Order in appellate case number 22-AP-1-M. The Defendant filed two motions within the Enforcement Order Appeal seeking reinstatement of Permit No. 11261, both of which were denied by the Court. On August 14, 2023, the Court issued an Appellate Opinion affirming the Enforcement Order. The Appellant challenged the Appellate Opinion by filing a petition for a writ of certiorari in the Third District Court of Appeal which was denied. *Harper v. City of Key Colony Beach,* 394 So.3d 205 (Fla. 3d DCA 2024) [49 Fla. L. Weekly D1583a].

On December 29, 2022, while the Enforcement Order Appeal was pending, The City's Building Official conducted an inspection of the Appellant's property to determine if all the work under the Continuation of Construction Permit was completed before its expiration date on December 30, 2022. Work was determined to be incomplete, and the City initiated new code violation proceedings. The Amended Notice of Violation alleged the following: (i) that the Appellant failed to complete work by the December 30, 2022, deadline; (ii) that the Appellant thereafter continued to perform work without a permit; and (iii) that the Appellant performed work after the City issued a stop work order on January 10, 2023.

A public code enforcement compliance hearing was held on October 11, 2023. The City's Building Official, Lenny Leggett, testified that he conducted an inspection of the Appellant's property and determined that there were multiple unfinished elements, and that Appellant had not completed the work by the December 30, 2022, deadline. (Transcript of October 11, 2023, code enforcement hearing Pp. 88-90;133).

KCB Code Enforcement Officer Barry Goldman testified that Appellant had not completed the work by the December 30, 2022, deadline and that Appellant was continuing to work without a valid permit and in violation of the Stop Work Order posted by the City on the property in January 2023. Goldman testified that he personally observed the Appellant performing work after December 30, 2022. (Transcript of October 11, 2023, code enforcement hearing at P. 31). He testified that he observed the Appellant using table saws on the second-floor balcony on two occasions after the Stop Work Order was posted. (Tr. at 31;33). Goldman testified he also received multiple complaints from Appellant's neighbors that construction activities were taking place at the property after the expiration of Appellant's permit on December 30, 2022. (Tr. at 38). Barbara Baran-Cisma, whose residence is located immediately next-door to Appellant's property, testified that she often heard construction noise emanating from Appellant's property after December 30, 2022. (Tr. at 138). The testimony of these witnesses was supported by several exhibits, including photographs, and the Appellant's own February 11, 2023, post on social media discussing work he had performed after the Continuation Permit expired. (Tr. at 39-40). The Appellant did not testify at the code enforcement compliance hearing.

On December 1, 2023, the Special Magistrate entered the Final Order Imposing Fine (Appellant's Exhibit 1-A) making the following findings of fact and conclusions of law:

1. That the Appellant failed to complete construction of the Appellant's residence by the December 30, 2022, deadline and subjecting the Appellant to a $25 daily fine for the time period from May 12, 2023, through the date of the final hearing (October 11, 2023).

2. That the Appellant violated section 6-6 of the City's Code of Ordinances by performing construction activities without a building permit during the period from January 1, 2023, through at least February 8, 2023, thus subjecting the Appellant to an additional fine totaling $9,338.

3. That the Appellant violated section 101-98 of the City's Code of Ordinances by performing construction activities after a stop work order had been issued, thus subjecting the Appellant to a third fine totaling $9,338.

The Appellant filed his Notice of Appeal of the Final Order Imposing Fine on January 9, 2024.

STANDARD OF REVIEW

Pursuant to section 162.11, Florida Statutes, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Cent. Fla. Invest., Inc. v. Orange Cty.*, 295 So. 3d 292, 294 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." § 162.11, Fla. Stat. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Cent. Fla. Invest.,* at 294. "[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Id*. at 295 (*quoting Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995) [20 Fla. L. Weekly S318a]). The Circuit Court also has jurisdiction to consider and resolve constitutional issues as part of a code enforcement appeal. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982).

DISCUSSION

Generally, an appellate court is called upon to determine: (1) whether due process was accorded; (2) whether the correct law was applied; and (3) whether the decision is supported by "competent substantial evidence." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a]. In this case, these requirements are not directly challenged. Rather, the Appellant makes the following arguments: (1) by operation of law, the prior and current executive orders tolled the expiration of the original permit; (2) the Magistrate did not have jurisdiction to require Appellant to employ a building contractor; (3) the retroactive fine is unconstitutional as applied; (4) there is not clear and convincing evidence supporting a violation of City Code section 6-6.; and (5) City Code section 101-98 is not applicable. Each argument will be addressed below.

A. Tolling of Permit No. 11261

At the code enforcement compliance hearing held on October 11, 2023, Appellant argued that he was entitled to work continuously because Permit No. 11261 never expired. In the Final Order Imposing Fine, the Magistrate rejected this argument finding that Permit No. 11261 expired and the Continuation of Construction Permit had expired, and Appellant continued to work in violation of City Code.

The Magistrate's finding that Permit No. 11261 expired is in line with previous decisions of the code enforcement board and this Court. In the May 12, 2022, Enforcement Order, the code enforcement board found that building Permit No. 11261 expired on April 28, 2022. (Appellant's Exhibit 1). In the Appellate Opinion in case number 22-AP-1-M, the Court affirmed the Enforcement Order and noted that "Appellant secured extensions of the original 15-month deadline until April 28, 2022, when the permit expired. . ." (Opinion at P. 2). The Third District Court of Appeal denied Appellant's writ of certiorari challenging the Court's Opinion. Therefore, at the time of the Fine Hearing on October 11, 2023, the record established that Permit No. 11261 expired on April 28, 2022, and that Appellant needed to secure a Continuation Permit to continue any work.

At the code enforcement compliance hearing held on October 11, 2023, Appellant did not specifically raise the defense that the Continuation Permit was independently subject to statutory tolling, and thus the Special Magistrate did not address this argument in the

Final Order Imposing Fine. Although the Appellant raised the concept of statutory tolling as a general matter, his presentation was limited to the issues framed in the May 5, 2023, Writ Motion directed to Permit No. 11261. "As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbour Condo. Assoc. v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) [30 Fla. L. Weekly S763a]. "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Id. (quoting Tillman v. State,* 471 So.2d 32, 35 (Fla.1985)). Since the separate matter of whether the Continuation Permit may have been subject to tolling was not specifically raised and evidence was not presented in support of this argument it cannot be addressed in this appeal.

B. Improper obligation

In the Final Order Imposing Fine, the Magistrate directs the Appellant to retain a Florida licensed general contractor should he continue construction on the non-compliant structure. Appellant argues this is contrary to Florida Statutes section 553.79(f) [559.79(1)(f)], which states: "a local government may not require a contract between a builder and an owner for the issuance of a building permit or as a requirement for the submission of a building permit application."

The Final Order Imposing Fine does not impose an improper obligation contrary to section 553.79(f) [559.79(1)(f)]. The Fine Order requires the Appellant to retain a Florida licensed general contractor to review the building plans and to be present for an onsite inspection. For work performed after expiration of the permit that does not meet building code standards, the Fine Order requires the Appellant to have a licensed general contractor apply for a demolition permit to conduct a reversal of work performed which is not built to code. After all of the non-compliant work is reversed, the Appellant "*may* then have a licensed general contractor submit a new application" (Fine Order at ¶ 7) (emphasis added), or alternatively, "*may* apply for an 'after-the-fact building permit." (Fine Order at ¶ 8) (emphasis added). These directives do not "require a contract between the Appellant and a builder for the issuance of a building permit or as a requirement for the submission of a building permit application" in contravention of section 553.79(f) [559.79(1)(f)], Florida Statutes.

The Fine Order is consistent with Florida Statutes section 162.08(5) which gives enforcement boards power to "issue orders having the force of law to command whatever steps are necessary to bring a violation into compliance." The Magistrate's instructions in the Final Order Imposing Fine are within the Magistrate's enforcement powers contained in Florida Statutes section 162.08(5).

C. Constitutionality of fines imposed

Appellant argues that the fines imposed in the Final Fine Order are unconstitutional because: 1) the City did not have a schedule of required inspections as mandated by the City Code; 2) the City did not conduct monthly inspections as required by the City Code; 3) the City did not identify the alleged deficiencies with specificity in a timely manner; 4) the remaining work was primarily "cosmetic"; and 5) the City refuses to recognize the tolling orders.

The Appellant is not challenging the fine, but rather the process of imposing the fine that has already been litigated. The evidence presented at the code enforcement compliance hearing held on October 11, 2023, established that Appellant had not completed all the work by December 30, 2022. The record does not show that the remaining work was cosmetic. The Appellant did not identify deficiencies with specificity, and did not challenge the alleged failure to conduct inspections in the code enforcement hearing. Appellant received fair notice and had an opportunity to be heard. Appellant elected not to offer any opposing evidence and raised no procedural due process objection or lack of notice objection. The Final Order Imposing Fine includes all the information needed to calculate the amount of daily fine through the date of the Fine hearing. The daily fine is neither indefinite nor unconstitutional.

D. Standard of proof

Appellant argues that the clear and convincing standard of proof applies, and there is no clear and convincing evidence that he conducted work that required a building permit that would support a violation of City Code section 6-6.

At the code enforcement compliance hearing held on October 11, 2023, the Appellant offered no legal argument or case law to support his assertion that the preponderance of the evidence standard was inapplicable, and the clear and convincing standard applied. Nevertheless, the evidence supporting the violations in this case meets both standards of proof. The evidence was undisputed that the Appellant did not complete all work by the deadline and that he continued to perform work after the permit expired. The record confirms that the Appellant received fair notice and an opportunity to be heard but decided not to contest the violations. The record demonstrates that the evidence was sufficient to support the Magistrate's decision under any of the standards of proof suggested. *Peden v. State Board of Funeral Directors & Embalmers*, 189 So. 2d 526, 528 (Fla. 3d DCA 1966) (Carroll, J., specially concurring).

The appellate court merely examines the record made below to determine whether the lower tribunal has before it competent substantial evidence to support its findings and judgment. *DeGroot v. L.S. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Competent substantial evidence is evidence that "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred [and] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* In this case, there is competent substantial evidence supporting the Special Magistrate's findings and conclusions of law.

E. Applicability of City Code section 101-98

Appellant argues that KCB City Code section 101-98 is a flood plain regulation that is not applicable and cannot support the fine for violation of the Stop Work Order in this case. This argument was not presented to the Special Magistrate for consideration, and therefore, it is not preserved on appeal. *Eaton v. Eaton*, 293 So. 3d 567, 568 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D674d] (explaining the key to issue preservation is giving the tribunal an opportunity to correct the purported error).

Further, the Appellant's effort to limit the scope of City Code 101-98 exclusively to flood plain regulation cases relies upon no testimony, cites no facts, and is not supported by any authority. The unrebutted testimony at the Code Enforcement hearing was that issuing a stop work order under section 6-9 and issuing a fine for noncompliance under section 101-98(3) is the recourse to put a stop to illegal work.

CONCLUSION

The Final Order Imposing Fine is supported by competent substantial evidence, due process was accorded, and the correct law was applied.

For the foregoing reasons, the Special Magistrate's Final Order Imposing Fine is **AFFIRMED**.

* * *

ROBERT CASTRO and SOFIA CASTRO, Appellants, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE25-004935 (AP). Admin. Hearing Case No. CE24060338. November 13, 2025. Appeal from the City of Fort Lauderdale, Broward County; Annette Cannon, Special Magistrate. Counsel: Michael Garcia, Michael Garcia, P.A., Fort Lauderdale, for Appellants. Rhonda Montoya Hasan, City of Fort Lauderdale, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Based upon the Appellee City's Confession of Error dated October 28, 2025, stating that the Special Magistrate's March 11, 2025, Final Order in underlying case CE24060338 departed from the essential requirements of the law, the March 11, 2025 Final Order, is hereby **REVERSED**. (BOWMAN, CARBUCCIA, and SIEGEL, JJ., concur.)

* * *

JOSHUA WYDRA, et al., Appellants, v. CITY OF CORAL SPRINGS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE25-005679. Admin. Hearing Case No. CC24-2079. November 13, 2025. Appeal from the City of Coral Springs, Broward County; Harry Hipler, Special Magistrate. Counsel: Rachel Allison Streitfeld, Caldera Law, Miami, for Appellants. Christina M. Gomez, City of Coral Springs, Coral Springs, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief and the applicable law, without oral argument, the Special Magistrate's March 20, 2025, Order, is hereby **AFFIRMED**. (BOWMAN, CARBUCCIA, and SIEGEL, JJ., concur.)

* * *

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February 27, 2026
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CIRCUIT COURTS—ORIGINAL

Real property—Claim and counterclaim seeking declaration regarding rights of defendants to construct boat lift on dock owned by plaintiffs—Marketable Record Title Act—1983 declaration creating easement is not contested as being extinguished by MRTA and does not grant easement over dock; however, provisions in declaration regarding the dock are capable of being extinguished by MRTA—Use restrictions and covenants regarding dock in declaration were extinguished by MRTA where declaration is not mentioned in root title or any muniments of title in the chain of title of plaintiffs' property—No merit to argument that 2021 declaration is muniment of title that serves to preserve 1983 declaration—Existence of 2021 declaration that is duplicative of 1983 declaration in many respects implies extinguishment of 1983 declaration, and declaration is not vital link in chain of title so as to constitute muniment—Argument that court should deny plaintiffs' motion for summary judgment or stay proceedings pending outcome of defendants' effort to revitalize 1983 declaration is denied as there is no evidence before court that any action has been taken to revitalize declaration; revitalization would require that defendant admit plaintiffs' allegation that declaration has been extinguished; existence of revitalization remedy demonstrates that no irreparable harm would come from ruling that declaration has been extinguished; and determination of defendants' entitlement to revitalization rests with Department of Commerce, not court—Plaintiffs shall have good fee simple title in and to their property free of any interests or encumbrances created in favor of defendants in 1983 declaration except as to easement for drainage, utilities, and pedestrian access

GERALD W. BISHOP and PAMELA D. BISHOP, Plaintiffs, v. BRIAN S. ARMSTRONG and JULIA M. ARMSTRONG, Defendants. BRIAN S. ARMSTRONG and JULIA M. ARMSTRONG, Counterclaim Plaintiffs, v. GERALD W. BISHOP, PAMELA D. BISHOP, ROBERT A. KUCHLER, and HEATHER B. KUCHLER, Counterclaim Defendants. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 10-2025-CA-000092. Division A. December 19, 2025. Steven B. Whittington, Judge. Counsel: Hannah S. Rullo, Terrell K. Arline, Zachary R. Roth, and Barry Ansbacher, Ansbacher Law, P.A., Jacksonville, for Plaintiffs. John C.W. Cherneski and Pierce Giboney, Milam Howard Nicandri & Gillam, P.A., Jacksonville, for Defendants.

ORDER REGARDING PLAINTIFF/COUNTERCLAIM-DEFENDANTS GERALD W. BISHOP AND PAMELA D. BISHOP'S AMENDED AND RESTATED MOTION FOR SUMMARY JUDGMENT AND ARMSTRONG'S AMENDED MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on *Plaintiff/Counterclaim-Defendants Gerald W. Bishop and Pamela D. Bishop's Amended and Restated Motion For Summary Judgment* [Docket No.: 32, Filed: 8.27.25] ("Bishops' Motion") and *Armstrongs' Amended Motion For Summary Judgment* [Docket No.: 38, Filed: 9.12.25] ("Armstrongs' Motion"), and this Court, having reviewed the Motion and associated evidence, having heard arguments of counsel in hearing on November 5, 2025, and being otherwise fully advised of the premises, finds:

BACKGROUND

Procedural Posture

1. Plaintiffs, Gerald W. Bishop and Pamela D. Bishop ("Bishop"), filed their *Complaint* [Docket No. 3; Filed 01.31.25] (the "Complaint") for declaratory and injunctive relief against Defendants/Counterclaim-Plaintiffs, Brian S. Armstrong and Julia M. Armstrong ("Armstrong"), for quiet title pursuant to Chapter 86, Florida Statutes as it relates to the Defendants' contention that they have a right to construct a boat lift on a boat dock owned by Bishop (the "Dock").

2. In response, Armstrong filed a counterclaim in *Defendants' Answer, Affirmative Defenses, and Counterclaim* [Docket No. 9; Filed 03.13.25] (the "Counterclaim") seeking declaratory relief that Armstrong (i) have the right to use the Dock pursuant to that certain *Declaration of Covenants, Restrictions and Easements* dated August 16, 1983 and recorded in the official records of Clay County, Florida at Book 747, Page 607 ("1983 Declaration"), (ii) have rights to use property owned by Bishop pursuant to a "1983 Easement" recorded in the official records of Clay County, Florida at Book 747, Page 614, and (iii) that that certain *Declaration of Covenants, Restrictions and Easements* dated January 4, 2021, and recorded in the official records of Clay County, Florida at Book 4446, Page 1973 ("2021 Declaration"), is invalid.

3. Bishop filed the Bishops' Motion, seeking an adjudication that the 1983 Declaration has been extinguished by the Chapter 712, Florida Statutes, the Marketable Record Title Act ("MRTA") and that the Armstrongs have no right to use the Dock.

4. Armstrong filed the Armstrongs' Motion, seeking an adjudication that MRTA has not operated to extinguish the 1983 Declaration and that the Armstrongs have the right to use the Dock under the 1983 Declaration.

5. The parties subsequently filed responses to the opposing motions setting forth their positions.

6. Bishop does not assert a claim that MRTA has extinguished the 1983 Easement or the easement set forth in the 1983 Declaration, but that the remainder of the 1983 Declaration, including Armstrong's rights to use the Dock, are extinguished by MRTA.

MRTA

7. MRTA was adopted as a curative statute to clear real property of certain encumbrances, stating that:

> This law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in s. 712.02 subject only to such limitations as appear in s. 712.03.
>
> Fla. Stat. 712.10

8. Regarding the effect of MRTA, Fla. Stat. 712.02, states in pertinent part:

> Any person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in s. 712.03. A person shall have a marketable record title when the public records disclosed a record title transaction affecting the title to the land which has been of record for not less than 30 years purporting to create such estate either in:
>
> **(1)** The person claiming such estate; or
>
> **(2)** Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate, with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

9. MRTA goes on to state in Fla. Stat. 712.04, in pertinent part, that:

> Subject to s. 712.03, a marketable record title is free and clear of all estates, interests, claims, covenants, restrictions, or charges, the existence of which depends upon any act, title transaction, event, zoning requirement, building or development permit, or omission that occurred before the effective date of the root of title. Except as provided in s. 712.03, all such estates, interests, claims, covenants, restrictions, or charges, however denominated, whether they are or

appear to be held or asserted by a person sui juris or under a disability, whether such person is within or without the state, natural or corporate, or private or governmental, are declared to be null and void. However, this chapter does not affect any right, title, or interest of the United States, Florida, or any of its officers, boards, commissions, or other agencies reserved in the patent or deed by which the United States, Florida, or any of its agencies parted with title. This section may not be construed to alter or invalidate:

(1) A comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval, to the extent such law, regulation, or regulatory approval operates independently of matters recorded in the official records; or

(2) Any recorded covenant or restriction that on the face of the first page of the document states that it was accepted by a governmental entity as part of, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval.

10. Fla. Stat. Section 712.03 provides the exceptions to those matters extinguished by MRTA when it states:

Such marketable record title shall not affect or extinguish the following rights:

(1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title, **provided that in the muniments of title those estates, interests, easements, or use restrictions created before the root of title are preserved by identification in the legal description of the property by specific reference to the official records book and page number,** instrument number, or plat name or there is otherwise an affirmative statement in a muniment of title to preserve such estates, interests, easements, or use restrictions created before the root of title as identified by the official records book and page or instrument number; subject, however, to subsection (5).

11. Fla. Stat. Section 712.01 provides the following relevant definitions:

(6) "Root of title" means any title transaction **purporting to create or transfer the estate claimed by any person** which is the **last title transaction to have been recorded at least 30 years before the time when marketability is being determined**. The effective date of the root of title is the date on which it was recorded.

(7) "Title transaction" means any recorded instrument or court proceeding that affects **title to any estate or interest in land and that describes the land** sufficiently to identify its location and boundaries.

12. "A muniment of title is any documentary evidence upon which title is based. Muniments of title are deeds, wills, and court judgments *through which a particular land title passes and upon which its validity depends*. . . . Muniments of title do more than merely 'affect' title; they must carry title and be a vital link in the chain of title." *Cunningham v. Haley*, 501 So. 2d 649, 652 (Fla. 5th DCA 1986). (Emphasis in original).

13. The chain of title is the series of instruments that trace record title to the subject property, beginning with the original grant from the sovereign and ending with the current record title holder. A chain of title is constructed by examining the grantee grantor index and identifying the instruments transferring title to the grantor, to the grantor's grantor, and so forth back to the original grant. The grantor grantee index must then be checked to determine what other interests were created in the property. An instrument is within the chain of title if the owner created the interest during the time the title was vested in him or her. 2 Florida Real Estate Transactions § 27.03(2)(b).

14. "*Chain of title*" and "*root of title*" are not synonymous. *See Holland v. Hattaway*, 438 So. 2d 456, n. 8 (Fla. 5th DCA 1983)("Under [the predecessor to §712.01(6)] a chain of title has but one 'root of title' and it is not necessarily the origin of the chain of title.").

15. In other words, under MRTA, a marketable record title is free and clear of all estates, interests, claims, covenants, restrictions, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title Fla. Stat. 712.04 and if no subsequent muniment of title preserved it by specific reference to the official book and page number.

16. Declarations of restrictions and other rights of use can be extinguished by MRTA. *See, e.g.*, *Martin v. Town of Palm Beach*, 643 So. 2d 112, 114 (Fla. 4th DCA 1994)("Thus, pursuant to section 712.03(1), the use restrictions created prior to the 1957 deed (the Town's root of title) are extinguished by section 712.02 unless the use restrictions are disclosed and specifically identified in any muniment of title."); *Cunningham* at 651 ("In effect section 712.03 provides that as to use restrictions created prior to appellants' respective roots of title the restrictions are extinguished by section 712.02(1), Florida Statutes, unless the use restrictions are disclosed and specifically identified in one or more of the muniments of title in appellants' chains of title since the date of appellants' respective roots of title.").

17. When multiple properties are subject to a single document being evaluated under MRTA, each property is evaluated independently based on its own chain of title. *See generally Southfields of Palm Beach Polo & Country Club Homeowners Ass'n v. McCullough*, 111 So. 3d 283, 285 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D862a] (If parcels were to drop out piecemeal without the requisite votes required by the [governing] documents, the Association would begin to resemble a piece of Swiss cheese, with portions of Southfields covered by the restrictions and other portions . . . not covered by the restrictions.")

FINDINGS OF FACT AND CONCLUSIONS OF LAW

18. Bishop owns the real property located at 581 Creighton Road, Fleming Island, FL 32003 ("Bishop Property") and fronts on Doctors Lake. *See Bishop Complaint* ¶1; *Armstrongs' Answer and Affirmative Defenses and Counterclaim,* ¶ 1; see also *Armstrongs' Answer and Affirmative Defenses and Counterclaim, Counterclaim* ¶ 5, *Bishop's Answer and Affirmative Defenses to Counterclaim, Counterclaim* ¶ 5.

19. Armstrong owns the real property located at 591 Creighton Road, Fleming Island and fronts on Creighton Road ("Armstrong Property"). *Id.* at ¶ 4.

20. Robert A. Kuchler and Heather B. Kuchler ("Kuchler") own real property between Bishop Property and the Armstrong Property ("Kuchlers Property"). *Armstrongs' Answer and Affirmative Defenses and Counterclaim, Counterclaim* ¶ 6, *Bishop's Answer and Affirmative Defenses to Counterclaim, Counterclaim* ¶ 6.[1]

The 1983 Declaration

21. The 1983 Declaration was recorded at Book 747, Page 607 of the official records of Clay County, Florida, on September 7, 1983. *Id.* at ¶ 11; Bishops' Motion; Armstrongs' Motion.

22. The 1983 Declaration states in Section 13:

> 13. There is hereby created an easement for drainage, utilities and pedestrian access over that certain real property described in Exhibit "B" attached hereto and made a part hereof. Said easement shall be perpetual in nature and shall run to and for the benefit of each lot owner and their guests.
>
> (a) The dock structure shall be maintained in good, safe, useable condition, and the owners of each of the three lots shall share equally in the cost of maintenance and upkeep thereof.
>
> (b) The cost of any such maintenance and upkeep approved shall be payable as decided in said meeting. Each such sum shall constitute a debt from the owner of each lot with respect to which same has been assessed, payable to all other owners.
>
> (c) There shall be no more than three (3) boat slips permitted, only one of which slips may be enclosed by boathouse. The use of such boathouse shall be reserved to waterfront lot owner, who shall likewise be responsible for all maintenance and upkeep costs associated with such boathouse, which such boathouse shall be located upon the west side of the dock. All other boat slips shall be located upon the east side of the dock. No such boathouse, slips, and dock construction shall be placed or altered upon or added to such dock until the construction plans and specifications in a plan showing the location of the structure have been approved by the Declarants as to quality of workmanship and materials. All such materials shall be of new quality and compatible with any existing dock and structures thereon.

23. The easement referenced in Section 13 for drainage, utilities and pedestrian access is not contested as being extinguished by MRTA by Bishop, but it is important to note that, according to the legal description set forth in the reference Exhibit "B", such easement terminates at "the waters of Doctors Lake" and runs "along said waters of Doctors Lake and along the northerly face of a concrete bulkhead."

24. Such easement, therefore, does not grant an easement over the Dock.

25. None of the provisions regarding the Dock set forth in sections (a), (b), and (c) are easements and are, instead, use restrictions and covenants, capable of being extinguished by MRTA.

MRTA Analysis

26. Given that the 1983 Declaration is capable of being extinguished by MRTA, the next step is to perform an analysis under MRTA.

27. The allegation by Bishop is that MRTA operates to extinguish the burdens of the 1983 Declaration from the Bishop Property.

28. To determine if this is the case, the Court must evaluate the chain of title to the Bishop Property.

29. The chain of title to the Armstrong Property is irrelevant to the Court's consideration of the Bishop's Motion and Armstrong's Motion because the motions only relate to a determination of whether the Bishop Property is burdened by the Armstrong Property.

30. Any arguments of equity or similar arguments by Armstrong in evaluating their chain of title are irrelevant to an analysis under MRTA, which is a curative statute to be liberally construed and does not contain equitable exceptions.

31. The analysis of the chain of title to the Bishop Property is based on the evidence set forth in the *Affidavit of Lori Klinger Manis*, which is unrebutted by any evidence by Armstrong.[2]

32. As the only matter before the Court is whether MRTA has extinguished the 1983 Declaration as to the Bishop Property, the chain of title and a MRTA analysis as to the Armstrong Property is irrelevant.

33. An analysis under MRTA is based upon the chain of title of the property sought to be cleared of the burden, not the property seeking the right to rely on the document at issue.

34. There is no evidence before the Court that there are competing chains of title to the Bishop Property; therefore, Armstrong's case law related to such matters is irrelevant to this action.

35. The first step is to determine the root of title for a MRTA analysis of the Bishop Property.

36. After going back in time thirty (30) years from the date of the hearing, November 5, 2025, to November 5, 1995 and continuing backward in the chain of title, the first title transaction in the chain of title for the Bishop Property is that certain Warranty Deed recorded on November 20, 1990 in Official Records Book 1366, Page 1337, of the official records or Clay County, Florida (the "Root Deed").

37. The Root Deed conveys title to the Bishop Property and is more than thirty years prior to the date of the hearing.

38. The Root Deed was recorded after the 1983 Declaration and makes no mention of the 1983 Declaration, in the fashion required to preserve same under MRTA or otherwise.

39. The Root Deed is, therefore, the root of title for a MRTA analysis of the Bishop Property.

40. The 1983 Declaration is not the root of title, even if it is the origin of the chain of title, because additional documents exist in the chain of title to the Bishop Property that were recorded more than thirty years ago. *See Holland v. Hattaway*, 438 So. 2d 456, n. 8 (Fla. 5th DCA 1983).(noting "[b]oth parties were apparently treating the term 'root of title' as descriptive rather than as defined in section 712.01(2). Under that section a chain of title has but one "root of title" and is not necessarily the original of the "chain of title."

41. While documents prior to the Root Deed but after the 1983 Declaration in the chain of title to the Bishop Property may have been relevant to a MRTA analysis in the past and may have served as the root of title, as time has passed the Root Deed has become the root of title.

42. The next step is to determine whether any muniment of title in the chain of title of the Bishop Property preserves the 1983 Declaration as required by MRTA.

43. The following documents constitute muniments of title under MRTA in the Bishop Property's chain of title:

a. That certain Warranty Deed from Dorothy Sue Walley, Dennis H. Walley and Mark R. Walley, Co-Trustees of the Bourbon R. Walley Revocable Trust dated March 7, 1990, Grantor, and Dorothy Sue Walley and her successors as Trustee of the Marital Deduction Trust dated November 15, 2004, Grantees, dated October 4, 2006 and recorded on October 16, 2006, in Official Records Book 2804, page 1684, of the Public Records of Clay County, Florida;

b. That certain Trustee's Special Warranty Deed from Mark R. Walley, as Trustee of the Bourbon R. Walley Marital Deduction Trust, a/k/the Marital Deduction Trust dated November 15, 2004, Grantor, and Mark R. Walley, Grantee, dated February 10, 2012 and recorded on February 29, 2012, in Official Records Book 3385, page 1724, of the Public Records of Clay County, Florida;

c. That certain Special Warranty Deed from Mark Randon Walley a/k/a Mark R. Walley, a single man, Grantor, and Mark Randon Walley, as Trustee, of the Mark Randon Walley Living Trust of February 6, 2007, a revocable Living Trust, Grantee, dated January 25, 2017 and recorded on February 6, 2017, in Official Records Book 3941, page 1313, of the Public Records of Clay County, Florida; and

d. That certain Trustee's Deed from Mark Randon Walley, individually and as Trustee, of the Mark Randon Walley Living Trust of February 6, 2007, a revocable Living Trust, Grantor, and Gerald W. Bishop and Pamela D. Bishop, his wife, Grantee, dated April 19, 2021 and recorded on April 22, 2021 in Official Records Book 4446, page 1989, of the Public Records of Clay County, Florida.

44. None of these documents reference the 1983 Declaration in any way, including as may be required to preserve the 1983 Declaration from extinguishment under MRTA.

45. The 1983 Declaration was not preserved in the root of title or in any muniment of title. "No record instruments for the subject property subsequent to said muniment of title make any reference to the *Declaration of Covenants and Restrictions* recorded in Official Records Book 747, Page 607 of the public records of Clay County, Florida." Affidavit of Lori Klinger Manis, p. 5.

46. Accordingly, with regard to the Bishop Property, the 1983 Declaration is extinguished by MRTA with the exception of the easement described above.

47. Armstrong incorrectly argues that the 2021 Declaration constitutes a muniment of title and serves to preserve the 1983 Declaration.

48. First, the 2021 Declaration does not mention the 1983 Declaration directly or indirectly, and certainly does not refer to its recording information or state an intent to preserve such document.

49. Instead, the existence of the 2021 Declaration implies the extinguishment of the 1983 Declaration because it is duplicative in many respects.

50. Second, the 2021 Declaration is not a document through which title to the Bishop Property passes and upon which its validity depends; it is, instead, a document that merely 'affects' title and is not a vital link in the chain of title.

51. Armstrong's reliance on *Berger v. Riverwind Parking, LLP*, 842 So. 2d 918 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D669a] is misplaced; the 2021 Declaration may be a title transaction pursuant to MRTA, but not all title transactions are muniments of title, as discussed above.

52. Even if the 2021 Declaration could serve as the root of title because it is a title transaction, it is not a muniment of title because muniments of title have a more narrow scope than roots of title.

53. The 2021 Declaration is otherwise irrelevant because Bishop and Armstrong agree in their filings that the 2021 Declaration is invalid with regard to its enforceability for providing rights to use the Dock and therefore no further discussion is required of that document.

54. Armstrong makes the final argument that they are, out of an abundance of caution, engaging in efforts to revitalize the 1983 Declaration pursuant to the process allegedly authorized by Fla. Stat. Section 712.12 and that the Court should deny the Bishops' Motion or, in the alternative, stay the proceedings pending the outcome of such proceeding.

55. The Court declines that invitation for the following reasons.

56. First, many of the factual allegations argued by Armstrong are not properly before the Court.

57. The only evidence before the Court regarding preservation is the *Declaration of Brian Armstrong* [Docket No.: 43, Filed: 10.27.25], and only then, as evidence in response to the Bishops' Motion; it cannot serve as evidence in support of the Armstrong's Motion.

58. Such *Declaration* merely provides, in relevant part, that:

> 7. Out of an abundance of caution—and because the Bishops continue to deny us access to the Dock Easement—The Kuchlers and I have discussed pursuing the statutory procedures to formally revive the 1983 Declaration and the Dock Easement. The Kuchlers have expressly confirmed their intention to provide written consent to revive 1983 Declaration.
>
> 8. Together, the Armstrongs and the Kuchlers constitute a majority of the affected parcel owners.
>
> 9. The purpose of this effort is to formally reaffirm and preserve the Dock Easement for continued joint use by the affected parcel owners, consistent with the intent of the 1983 Declaration.

59. There is no evidence before the Court that any action has actually been taken for preservation as alleged.

60. Second, any efforts to revitalize would, by law, require Armstrong to make an affirmative statement to the Department of Commerce that the 1983 Declaration has been extinguished by MRTA in order to revive.

61. In other words, for such process to have any merit and not result in a false statement in a filing to the State of Florida, the allegations of the Bishops' Motion must be admitted as true by Armstrong.

62. Third, aside from seeking a stay in their response to the Bishop's Motion, Armstrong has not taken a single step to demonstrate entitlement to a stay.

63. Armstrong essentially request that the Court grant a temporary injunction against the relief sought by Bishop pending the revitalization proceeding, resulting in an ongoing encumbrance on title of something otherwise extinguished by MRTA and impairing marketability of title to the Bishop Property for an indefinite period without a showing of irreparable harm or posting of a bond as required for injunctive relief.

64. Notably, Armstrong admitted in hearing that there is no irreparable harm because if this Court rules the 1983 Declaration extinguished, revitalization would cure any harm.

65. In fact, only a ruling by this Court that the 1983 Declaration is extinguished could ever give merit to a potential revitalization as discussed above.

66. Therefore, the existence of the remedy of revitalization as argued by Armstrong demonstrates there is no irreparable harm with the Court proceeding to adjudicate the matters before it and no reason to stay the relief sought by Bishop.

67. Fourth, the determination of whether Armstrong are entitled to revitalization falls with the Department of Commerce, not this Court.

68. It is improper for the Court to stay its proceedings on matters ripe before it to await a determination of a filing in another venue for which no evidence is before the Court that it is actually proceeding.

69. Finally, and most importantly, an analysis under MRTA is retrospective.

70. The Bishops' Motion and Armstrong's Motion are based on facts that have already occurred and are before the Court uncontested.

71. The Court's role is to evaluate the motions and evidence before it; not to await new evidence that could arise in the future.

72. To deny or stay relief because of a potential outcome in the future is inappropriate, especially when such duration is open-ended.

In view of the above, it is

ORDERED and ADJUDGED, that:

A. Bishop's Motion is GRANTED.

B. Armstrong's Motion is DENIED.

C. With the sole exception of the easement for drainage, utilities, and pedestrian access set forth in Section 13 as depicted on Exhibit "B" thereto, the 1983 Declaration is extinguished pursuant to MRTA as to the Bishop Property.

D. Bishop has and shall have a good fee simple title in and to Bishop Property, free from any interests or encumbrances created in favor of Armstrong as set forth in the 1983 Declaration, except specifically as to the Section 13 easement described in the preceding paragraph.

E. The Court retains jurisdiction regarding the remaining matters pending in this action and to grant such further and general relief as this Court deems just.

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[1]The Complaint and Bishops' Motion do not seek relief against Kuchler. Kuchler are counterclaim defendants under the Counterclaim and their rights are impacted for purposes of the relief sought by Armstrong in the Armstrong's Motion.

[2]Ms. Manis has been a professional title examiner and abstractor since December 1998.

* * *

Insurance—Property—Insurer did not breach policy by paying its own determination of actual cash value of loss and depreciation where insured 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

SCOTT TAYLOR, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COM-

PANY OF FLORIDA, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County, Circuit Civil Division. Case No. 2020-CA-07513-O. December 9, 2025. Patricia L. Strowbridge, Judge. Counsel: David Neblett, Miami, for Plaintiff. Nicole Wulwick, Kubicki Draper P.A., Miami, for Defendant.

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

THIS CAUSE came before the Court on September 16, 2025 upon Defendant's Motion for Summary Final Judgment filed on April 23, 2025. The Court has considered Defendant's Motion, Plaintiff's Response in Opposition filed on June 3, 2025, and the arguments of counsel, and it is now,

CONSIDERED, ORDERED and ADJUDGED, as follows,

I. Material Facts Not in Dispute

a. Defendant, American Integrity Insurance Company of Florida (hereinafter "Defendant" or "American Integrity") issued an insurance policy to Plaintiff, Scott Taylor (hereinafter "Plaintiff" or "Taylor"), for his property located at 615 Cathcart Avenue, Orlando, Florida 32803.

b. Taylor's property was damaged by wind on or about June 29, 2018.

c. American Integrity investigated the claim and, on July 27, 2018, issued payment to Taylor in the amount of $7,009.32 based upon the Actual Cash Value ("ACV") of the damages estimated by American Integrity.

d. On October 9, 2018, American Integrity paid an additional sum of $2,340.83 for recoverable depreciation for the shingle roof replacement based upon documentation that the roof had been replaced.

e. On December 5, 2018, Taylor sold the property.

f. Taylor filed this lawsuit on April 25, 2019.

g. Although Taylor subsequently produced a repair estimate from Experienced Public Adjusters totaling $70,803.20, this estimate was not provided to American Integrity before the lawsuit was filed. In addition, the estimate provided by Experienced Public Adjusters was a Replacement Cost Value ("RCV") estimate, as it calculated only the cost of repairs, but no depreciation.

h. There is no evidence that Taylor ever submitted a competing ACV estimate to American Integrity.

i. Taylor provided no evidence that the repairs listed in the Experienced Public Adjusters RCV estimate, were completed, except for the roof replacement. Taylor also provided no evidence that any other repairs were completed on the property, or that evidence of any covered repairs had been provided to American Integrity before the suit was filed.

j. On October 18, 2024, this Court granted Partial Summary Judgment as to the Assignment of Benefits with A First Choice Roofing and The Kidwell Group, LLC d/b/a Air Quality Assessors of Florida. Pursuant to these Court Orders, Taylor may not recover for work performed by A First Choice Roofing (shingle roof replacement) and The Kidwell Group, LLC d/b/a Air Quality Assessors of Florida (mold assessment) in this action.

II. Legal Analysis

American Integrity argues on summary judgment that it did not breach the insurance contract by not paying RCV because there is no dispute that Taylor has not repaired or replaced the damage and, therefore, American Integrity cannot be held liable for RCV. American Integrity also contends that it could not have breached the insurance policy by refusing to negotiate the ACV because Taylor never presented it with a competing ACV estimate.

"Courts have almost uniformly held that an insurance company's liability for replacement cost does not arise until the repair or replacement has been completed." *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007) [32 Fla. L. Weekly S566a]; *see also Universal Prop. & Cas. Ins. Co. v. Qureshi*, 396 So.3d 564, 567 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D1575a] (holding that "insureds are not entitled to their repair costs unless and until work is performed and expenses are incurred.").

Taylor, in turn, argues that he provided an invoice from A First Choice Roofing for the completed roof replacement, for which American Integrity thereafter paid recoverable depreciation. The work performed by A First Choice Roofing pursuant to the AOB, is not recoverable by Taylor in this action, pursuant to the Court's prior Order addressing this, and the roof replacement was paid in full.

Taylor's reliance upon other miscellaneous invoices from ABC Supply Co. Inc. to purchase roofing nails ($46.88), City of Orlando permit records ($74.88), Marhamn Services mold test ($950.00), Mite-T Tech invoice for bat exclusion service ($475.00) or the Home Depot for lock box repairs receipt ($32.97), to support additional recovery from American Integrity is unavailing because there is no evidence that these invoices were submitted to American Integrity before the suit was filed. Assuming these records support expenses for completed repairs, they cannot support a breach of contract claim against American Integrity if there is no evidence they were submitted to American Integrity American Integrity asserts, and Taylor does not dispute, that these invoices were first provided by Taylor in his Response to Summary Judgment.

The Loss Settlement provision of the insurance contract is clear and unambiguous. It provides that American Integrity "will initially pay no more than the actual cash value of the loss, less any applicable deductible. We will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred" American Integrity was therefore, required to pay only the ACV of the loss, until such time as the property was repaired or replaced. *See Vazquez v. Citizens Prop. Ins. Corp.,* 304 So. 3d 1280, 1285 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a] (analyzing similar language); *Goldberg v. Universal Prop. & Cas. Ins. Co.*, 302 So. 3d 919, 921 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2118b] (same). American Integrity paid the ACV, and later the estimated depreciation.

As stated above, the Experienced Public Adjusters estimate was a RCV estimate, as it provided the same amounts for RCV and ACV, and contained no depreciation calculations. *See Homeowners Choice Prop. & Cas. Ins. Co., Inc. v. Clark*, 410 So. 3d 99, 102 (Fla. 1st DCA 2025) [50 Fla. L. Weekly D648b] (finding estimate that provided same figures for Actual Cash Value and Replacement Cost was a Replacement Cost estimate); See also, *Metal Products Co., LLC v. Ohio Sec. Ins. Co.,* No. 21-11612, 2022 WL 104618, at *2 (11th Cir. Jan. 11, 2022).

In *Homeowner's Choice Prop. & Cas. Ins. v. Clark*, the First District Court of Appeal held: "when (1) an insured's estimate and evidence provides only for RCV costs and (2) no evidence is presented to challenge the insurer's ACV payout, no breach of contract occurs when the insurer fails to pay monies under the insured's estimate." 410 So. 3d at 112. American Integrity could not have breached the insurance contract by not paying RCV, because RCV is not owed where the insured has not completed the repairs. In addition, American Integrity could not have breached the insurance contract by not negotiating the ACV because Taylor never provided an ACV estimate to American Integrity.

In addition to *Homeowner's Choice Prop. & Cas. Ins. v. Clark*, other recent cases with similar facts have come to this same conclusion. *See e.g., Metal Products*, 2022 WL 104618, at *2 (finding that "[b]ecause Metal Products made no repairs, Ohio Security was not obligated to pay the replacement cost value of the buildings."); *Pauly v. Hartford Ins. Co. of the Midwest*, No. 2:24-CV-874-SPC-NPM, 2025 WL 1677514, at *3 (M.D. Fla. June 13, 2025) (holding that "to the extent Plaintiffs have not incurred any repair or replacement costs,

their damages are limited to ACV"); *Predelus v. Atain Spec. Ins. Co.,* No. 21-CV-23382, 2023 WL 1331229, at *5 (S.D. Fla. Jan. 31, 2023) (granting summary judgment where the plaintiff's report was "based solely on replacement cost value and . . . Plaintiff had not requested actual cash value. Therefore, there can be no breach for failure to pay something that was never requested."); *Gulf Breeze Presbyterian Church v. Church Mut. Ins. Co.,* No. 3:21CV909-TKW-EMT, 2022 WL 2431440, at *1 (N.D. Fla. Mar. 15, 2022) (granting summary judgment where it was "undisputed that Plaintiff did not submit a claim for the actual cost value (ACV) of the covered loss and that the record contains no evidence of the ACV of the loss from which it could be inferred that the ACV of the loss exceeds the applicable deductible.").

III. Conclusion and Ruling

For all of the reasons set forth herein, the Defendant, American Integrity Insurance Company of Florida has shown that the undisputed material facts establish that no competing ACV estimate was provided prior to suit being filed, and no evidence of completed repairs was provided prior to suit being filed, and therefore no reasonable fact finder could conclude that the Defendant breached its obligations under the insurance contract.

For these reasons, and the reasons stated on the record at the hearing, it is hereby ORDERED and ADJUDGED:

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

2. **FINAL JUDGMENT** is entered for Defendant, AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA and against Plaintiff, SCOTT TAYLOR. Plaintiff shall take nothing by this action. Defendant, AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, shall go hence without day. The Court reserves jurisdiction over any award of fees and costs in favor of AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA as a prevailing party in this matter.

* * *

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COUNTY COURTS

Civil procedure—Pro se filings—Prohibition—Plaintiff is prohibited from commencing any new pro se actions or filing further pro se pleadings without leave of court where plaintiff has abused right to pro se access to courts by filing vexatious and frivolous pleadings—As a vexatious litigant, plaintiff is required to post security for any additional filings—Pending motions are denied

RONNIE WOODS, Plaintiff, v. EVIAN WHITE DE LEON, Defendant. County Court, 5th Judicial Circuit in and for Marion County, Small Claims. Case No. 24SC006838AX. October 17, 2025. Leann Mackey-Barnes, Judge. Counsel: Evian White De Leon and Elizabeth Soto, MIAMI Association of REALTORS, Miami; Marianne Curtis, Berger Singerman, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT UNDER FLA. STAT. SEC. 68.093 (2025), PROHIBITING PLAINTIFF FROM COMMENCING, PRO SE, ANY NEW ACTION IN THE FIFTH JUDICIAL CIRCUIT WITHOUT LEAVE OF THE COURT, REQUIRING PLAINTIFF TO POST SECURITY, BARRING PLAINTIFF FROM FUTURE PRO SE FILINGS IN THIS CASE, AND DENYING PLAINTIFF'S PENDING MOTIONS

This Court having reviewed this matter and after a hearing on Defendant EVIAN WHITE DE LEON's "Motion to: Declare Plaintiff a Vexatious Litigant under Fla. Stat. Sec. 68.093 (2025); Enter a Prefiling Order Prohibiting Plaintiff from Commencing, *Pro Se,* Any New Action without Leave of the Court; Require Plaintiff to Post Security; Render an Order Requiring Plaintiff to Show Cause as to Why He Should Not Be Barred from Future *Pro Se* Filings in this Case; and, Enjoin Plaintiff from Extorting Defendant" (the "Motion to Declare Plaintiff a Vexatious Litigant") [DE 60], on October 15, 2025, IT IS ORDERED AND ADJUDGED that:

A. Plaintiff Ronnie Woods is declared a "vexatious litigant" pursuant to Fla. Stat. Secs. 68.093(2)(c)(2), (3), (4) (2025).

1. Fla. Stat. Sec. 68.093 (2025), has been revised, updated, and in effect since July 1, 2025. The law has expanded the definition of a vexatious litigant and has provided additional protections to parties to protect themselves from continuous, unfounded, frivolous, and vexatious litigation.

2. Here, Plaintiff Ronnie Woods ("Mr. Woods") falls within the definition of a "vexatious litigant" under multiple sections of Fla. Stat. Sec. 68.093(2)(c).

3. Under Fla. Stat. Sec. 68.093(2)(c)(2), a vexatious litigant is a person (as defined under Fla. Stat. 1.01(3) (2025)) proceeding *pro se* who, after a case has been finally and adversely determined against the person, repeatedly attempts to relitigate either the validity or cause of action against the same party.

4. Here, the Court finally and adversely determined this case against Mr. Woods, yet he repeatedly attempted to relitigate the validity of the same.

5. On February 17, 2025, after a hearing on the same, this Court rendered its Order Granting Motion to Dismiss, with prejudice [DE 32], "finally and adversely," as defined in Fla. Stat. Sec. 68.093(2)(c) (2025), in determining a case against Plaintiff. In that same order, this Court also granted Defendant's Motion to Dismiss and for Sanctions Pursuant to Fla. Stat. § 57.105, awarded entitlement to attorneys' fees to Defendant as sanctions, reserved ruling on the amount of fees, and directed Defendant to provide Plaintiff with fees sought and evidentiary support for the same [DE 32].

6. Since then, after numerous filings and two additional hearings on the same, on September 2, 2025, the Court rendered a "Final Judgment for Costs and Reasonable Attorneys' Fees Against Plaintiff Ronnie Woods" [DE 67].

7. While Mr. Woods appealed, the Fifth District Court of Appeal dismissed his appeal on October 8, 2025, prior to the hearing on the Defendant's Motion to Declare Plaintiff a Vexatious Litigant [DE 91].

8. Nonetheless, throughout the entire case, Mr. Woods repeatedly attempted to relitigate the validity of the Court's rulings. This is clearly reflected in the court docket DE 35, 38, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 61, 62, 63, 72, 73, 75, 76, 77, 78, 79, 84, 87, 88, 89, 90, 92, 93, and 94.

9. As such, Mr. Woods is defined as a vexatious litigant pursuant to Fla. Stat. Sec. 68.093(2)(c)(2).

10. Furthermore, under Fla. Stat. Sec. 68.093 (2)(c)(3), a vexatious litigant is a person (as defined in Fla. Stat. 1.01(3) (2025)) proceeding *pro se* who repeatedly files pleadings that have been subject of previous rulings by the court in the same action.

11. Here, Plaintiff incessantly continued to file frivolous pleadings that related to the Court's previous rulings. The court docket clearly reflects this [DE 35, 38, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 61, 62, 63, 72, 73, 75, 76, 77, 78, 79, 84, 87, 88, 89, 90, 92, 93, and 94]. As such, Mr. Woods is also defined as a vexatious litigant pursuant to Fla. Stat. Sec. 68.093(2)(c)(3).

12. Lastly, under Fla. Stat. 68.093(2)(c)(4), a vexatious litigant is a person (as defined in Fla. Stat. 1.01(3) (2025)) proceeding *pro se* who repeatedly files pleadings without merit or that are simply frivolous.

13. Again, the court docket clearly reflects Mr. Woods' frivolous pleadings and filings, all without merit [DE 35, 38, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 61, 62, 63, 72, 73, 75, 76, 77, 78, 79, 84, 87, 88, 89, 90, 92, 93, and 94]. As such, Mr. Woods is defined as a vexatious litigant pursuant to Fla. Stat. Sec. 68.903(2)(c)(4).

B. As a vexatious litigant, Plaintiff Ronnie Woods is prohibited from commencing, *pro se*, any new action in the Fifth Judicial Circuit in and for Marion County, Florida without leave of the Court pursuant to Fla. Stat. Secs. 68.093(4)-(5).

14. Pursuant to Fla. Stat. Sec. 68.093(4), the Court enters this prefiling order prohibiting Ronnie Woods, as a vexatious litigant, from commencing, *pro se,* any action in the Courts of the Fifth Judicial Circuit in and for Marion County, Florida, without first obtaining leave of said Court. Leave of Court shall be granted by the Court only up on a showing that the proposed action is meritorious and is not being filed for the purpose of delay or harassment. This Court also reserves the right, pursuant to Fla. Stat. Sec. 68.093(4), to condition the filing of any such action upon the furnishing of security.

15. Also pursuant to Fla. Stat. Sec. 68.093(4), Mr. Woods' disobedience of this prefiling order may be punished as contempt of court.

16. Pursuant to Fla. Stat. Sec. 68.093(5), the Clerk of the Court is directed not to file any new action by Mr. Woods, as a *pro se* vexatious litigant, unless Mr. Woods has obtained an order from the Courts of the Fifth Judicial Circuit in and for Marion County, Florida, allowing such filing. If the Clerk of the Court mistakenly allows Mr. Woods, a *pro se* vexatious litigant, to file any new action in contravention of a prefiling order, any party to that action may file with the Clerk of the Court and serve on Mr. Woods, the vexatious litigant, and all other parties a notice stating that Mr. Woods, the vexatious litigant, is subject to a prefiling order. The filing of such a notice shall automatically stay the litigation against all parties to said action. The Court

shall automatically dismiss the action with prejudice within 10 days after the filing of such notice unless Mr. Woods, the vexatious litigant, files a motion for leave to file the new action. If the Court issues an order granting leave, the pleadings or other responses to the complaint need not be filed until 10 days after the date of service by Mr. Woods, the vexatious litigant, of a copy of the order granting leave.

C. As a vexatious litigant, Plaintiff Ronnie Woods is required to post security pursuant to Fla. Stat. Sec. 68.093(3) (2025), for any additional filings.

17. Fla. Stat. Sec. 68.093(3)(a), provides that any party may move the court, upon notice and hearing, for an order requiring the opposing party to furnish security. "The motion shall be based on the grounds and supported by the showing that [Plaintiff] subject to the motion is a vexatious litigant and is not reasonably likely to prevail on the merits of the action against [Defendant]".

18. Mr. Woods has failed prevail on the merits of the action against Defendant Evian White De Leon in this case and is not reasonably likely to prevail on any future filings in this matter.

19. Mr. Woods is a vexatious litigant as defined in Fla. Stat. Sec. 68.093(2)(c)(2), (3), (4)(2025), and his pleadings were all frivolous, unsubstantiated, nonsensical, designed to unreasonably delay the proceedings and/or to harass the Court and the Defendant, Evian White De Leon.

20. Accordingly, Mr. Woods, as a vexatious litigant and pursuant to Fla. Stat. Sec. 68.093(3) (2025), is required to post security in the amount of $13,090 with the Clerk of the Court if Mr. Woods either: (a) attempts to enter any more filings in this case; (b) wants to start new case against MIAMI Association of REALTORS® or, any of MIAMI Association of REALTORS® employees, agents, directors, officers, and/or Evian White De Leon.; and/or, (c) attempts to either relitigate or start a new case against the Defendant, either in her capacity as Chief Legal Counsel and COO for MIAMI Association of REALTORS® or in a personal capacity.

D. Plaintiff Ronnie Woods is also barred from filing future *pro se* filings in this case.

21. On August 15, 2025, the Fifth Judicial Circuit Court rendered an Order to Show Cause in a separate, unrelated case: *Ronnie Woods v. Florida Real Estate Commission and Governor Ron Desantis* (Case No. 2025-CA-0209). In that order, the Fifth Judicial Circuit Court, faced with the same frivolous, vexatious, harassing, and repetitive behavior from Plaintiff that the Court faced in this matter, required that Mr. Woods show cause as to why Mr. Woods should not be prohibited from representing himself. This Court takes judicial notice of the same.

22. In that order, the Court stated, "Plaintiff has filed numerous repetitious and frivolous papers and motions that require the Court to devote an inequitable amount of time to rule on such."

23. Moreover, the Court in *Ronnie Woods v. Florida Real Estate Commission and Governor Ron Desantis* (Case No. 2025-CA-0209), stated that Florida courts ". . .have long recognized their inherent authority to sanction litigants who abuse the judicial process." It cited to *State v. Spencer*, 751 So. 3d 47 (Fla. 1999) [24 Fla. L. Weekly S433a] and *Platel v. Maguire, Voorhis & Wells, P.A.,* 436 So. 2d 303 (Fla. 5th DCA 1983).

24. In *Platel*, the appellant filed various appeals, and numerous filings and the court rendered an order to show cause providing the appellant with 20 days to file his response. After receiving appellant's response, that court stated that "Mr. Platel's response evinces the necessity for the issuance of this Order." *Platel*, 436 So. 2d at 305. In short, the appellant submitted a series of responses quoting inapplicable statutes and the remainder of his response contained arguments regarding the merit of his cases before the court. Ultimately, the court ordered that in an exercise of their inherent power to prevent abuse of court procedure, the appellant was barred from appearing on his own behalf (as an appellant or petitioner) because the appellant had abused his *pro se* right of access to the court. *Platel*, 436 So. 2d at 305.

25. *Spencer* was an appeal of a criminal case, where the Florida Supreme Court addressed whether a court had to provide a litigant with notice and an opportunity to respond prior to prohibiting *pro se* filings. *Spencer*, 751 So. 3d at 48. The *Spencer* court ordered that, to "achieve the best balance," courts must provide litigants with notice and an opportunity to respond prior to preventing their access to the courts. *Spencer*, 751 So. 3d at 48. The *Spencer* court also clarified that providing the notice and opportunity to be heard through an order to show cause provides a more complete record. *Spencer*, 751 So. 3d at 48-49.

26. Both *Spencer* and *Platel* support the proposition that an order to show cause is the appropriate mechanism when prohibiting parties from filing future *pro se* pleadings. *Spencer*, 751 So. 3d at 47-49; *Platel*, 436 So. 2d at 303-305.

27. Here, similarly to the other filings that have plagued the Fifth Judicial Circuit Court, and the courts in *Spencer* and *Patel*, Mr. Woods filed 37 filings since the inception of this matter. [DE 35, 38, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 61, 62, 63, 72, 73, 75, 76, 77, 78, 79, 84, 87, 88, 89, 90, 92, 93, and 94] These have consumed this Court as well as the Defendant Evian White De Leon's and her company, MIAMI Association of REALTORS®, Inc.'s, time and resources.

28. Mr. Woods' filings have all been unfounded, unwarranted, and unnecessary given that he has been given numerous opportunities to be heard at hearings on this matter—February 12, 2025, July 24, 2025, August 26, 2025, and on October 15, 2025. In the meantime, he has also filed numerous other motions and requests of the Court. Again, the court docket clearly reflects Mr. Woods' frivolous pleadings and filings, all without merit [DE 35, 38, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 61, 62, 63, 72, 73, 75, 76, 77, 78, 79, 84, 87, 88, 89, 90, 92, 93, and 94].

29. Mr. Woods has had numerous opportunities at hearings and in written filings with the Court to show cause as to why he should not lose his *pro se* right of access to the Court.

30. However, despite being provided with due process through numerous hearings and filings, and because Mr. Woods had abused his *pro se* right of access to the court, Mr. Woods is barred from future *pro se* filings in this particular case.

F. Plaintiff Ronnie Woods' pending motions are denied.

31. All of Mr. Woods' pending motions are denied.

32. This includes but is not limited to "Plaintiff's Motion to Stay Enforcement Pending Appeal," which he filed on September 4, 2025 [DE 78]

33. And the Motion to Vacate the Final Judgment for Cost and Attorneys Hearing, Motion to Sanction Defense Counsel and Motion to Stay Entry of Final Judgment [DE 74]

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Erratic driving pattern—Officer's observation of defendant driving outside of his lane for brief moment without impacting any vehicles or pedestrians, briefly pulling into and out of hotel parking lot without parking, and swerving within his lane for undetermined length of time were not sufficient to warrant stop as either welfare check or traffic stop—Motion to suppress is granted

STATE OF FLORIDA, v. TOMMY BOZEMAN, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2025 105513 MMDB. Division 80. December 2, 2025. Bryan A. Feigenbaum, Judge.

ORDER ON MOTION TO SUPPRESS

THIS CAUSE having come before the Court on the Defendant's Motion to Suppress, pursuant to Rule 3.190, Florida Rules of Criminal Procedure, the Fourth Amendment of the U.S. Constitution, and Article 1, Section 12 of the Florida Constitution, and 901.15 Florida Statute (2022), and having heard testimony and argument, and after reviewing evidence and case law, and the Court being fully advised in the premises, the following findings are made:

Daytona Beach Shores Department of Public Safety Officer Carmin was on duty around 1:10 am. He was parked in his marked SUV car in such a manner as to observe any traffic passing him on the four-laned A1A in his city. He heard vehicle acceleration and thought a vehicle was possibly being driven over the speed limit. He then pulled out behind a convertible heading northbound. As he followed the same, as there were no other vehicles in the area, he saw the vehicle move over from the right lane into the left, or passing lane, by some distance but not fully over, and then go back to the right lane. No other traffic or pedestrian was around to be impacted. The police vehicle was driven close enough for the officer to read the license plate. The convertible then made a quick turn into a hotel parking lot on the right, or east, side of A1A. The officer noted that the vehicle pulled into the parking lot but did not park in a designated spot.

Off. Carmin decided not to pursue the matter, thinking the driver was parking for the night, and proceeded past going northbound. After passing the parking lot, he observed the same vehicle pulling back onto A1A and again proceeding northbound. Losing sight of the vehicle for just a few seconds, Off. Carmin did a U-turn so he could continue to follow behind the vehicle. There was no other traffic present.

As he followed the vehicle, he noticed the convertible continually swerving within the left lane, from the center lane to the right-hand lane. The officer described it as "ping-ponging" within the lane, but did not elaborate on how many times this happened, how long this went on for, nor if it was gradual or rapid. The vehicle switched lanes then to the right-hand lane and the officer followed the vehicle for another mile and a half. No other erratic driving was observed. The officer decided to put his lights and sirens on and make a traffic stop for a "welfare check". Once he activated the lights and sirens, the dash-cam began recording and captured the prior thirty seconds and forward. No unusual driving was shown on the recording. The officer could have activated the dash-cam earlier without putting on his lights and sirens if he so chose. In total, Off. Carmin observed the Defendant driving for two and a half miles and saw the one brief lane deviation and some type of swerving for an indeterminate amount of time within the lane which was not captured by the dash-cam. Off. Carmin testified that he saw no other erratic driving and was not concerned about any danger posed to anyone else.

After the traffic stop, conversations and observations led to a DUI investigation and subsequent arrest. The only other witness was Sgt. Frank of the same agency. Sgt. Frank testified he was situated north of where the driving occurred but did see the driver pulling into the hotel parking lot while Off. Carmin passed by and seeing the same vehicle re-enter A1A northbound. Although he didn't describe seeing the swerving within the lane, he testified there was a lane change, which he thought was unusual, and suspected the driver's earlier actions to be an attempt to avoid law enforcement.

The Defendant's first words upon being approached by Off. Carmin were that "you were blinding me", referring to the officer's headlights which sit much higher than the convertible that he was driving. Off. Carmin told the Defendant he got behind him since ". . . he was doing a little swerving". Off. Carmin did not inquire whether the driver was feeling well, was tired, or if there were any mechanical issues with the convertible. Before starting the DUI investigation, Off. Carmin relayed to Sgt. Frank that he "saw him swerve a little bit" and then the driver switched lanes before he pulled into the hotel parking lot. Off. Carmin told Sgt. Frank that after the driver re-entered AIA, after the officer got behind him again, the driver again switched lanes but he did not mention anything about seeing him continuously swerving within the lane.

The defense argues there was no legal basis for the traffic stop, and thus the subsequent investigation and arrest should be suppressed. A traffic stop may be based on probable cause that a traffic violation occurred and the court should use an objective approach to make that determination. *Dobrin v. Florida Department of Highway Safety and Motor Vehicles,* 874 So. 2d 1171 (Fla. 2004) [29 Fla. L. Weekly S275a]. Also, a traffic stop is justifiable if there is a "founded suspicion", or reasonable suspicion, of criminal activity, such as driving under the influence, *Florida Department of Motor Vehicles v. DeShong,* 603 So.2d 1349, 1352 (Fla. 2d DCA 1992), or that the driver may be ill, tired, impaired, or that there are vehicle mechanical defects. *See Ndow v. State,* 864 So. 2d 1248 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a]. (The driver, at 2 a.m., was stopped at a green light for the light's entire cycle, then slowed down to not pass the police officer, then pulled over and occupants were changing places). ". . . [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." *DeShong, id.* at 1352.

There are police-citizen contacts involving automobiles where there is not a law enforcement belief of a criminal law violation. The police community caretaker function is ". . . totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. The community caretaker function [is] recognized as an exception to the warrant requirement of the Fourth Amendment." *See Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S. Ct. 2523 (1973); *State v. Perez,* 12 Fla. L. Weekly Supp. 35a (Fla. 11th Jud. Cir., Miami-Dade County Cir. Ct. Oct. 5, 2004), and *State v. Madzel,* 20 Fla. L. Weekly Supp. 501a (Fla. 7th Jud. Cir., Flagler County Ct. March 1, 2013). "Under the community caretaker doctrine, an officer may stop a vehicle without reasonable suspicion of criminal activity if the stop is necessary for public safety and welfare. . . . Even a stop pursuant to an officer's community caretaker responsibilities, however, must be based on specific articulable facts showing that the stop was necessary for the protection of the public." *Majors v. State,* 70 So. 3d 655, 661 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a], *citing to Castella v. State,* 959 So. 2d 1285, 1292 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1784a]. The three recognized subdivisions to the community caretaker doctrine are: (1) the emergency aid exception, (2) the automobile impoundment/inventory exception, and (3) the public servant exception. *See Perez, id.*

None of these exceptions are applicable in this case. If "welfare check" is to be interpreted as falling under the emergency aid exception, there have to be sufficient facts. A good guideline is the three part test articulated in *People v. Mitchell,* 347 N.E. 2d 607, 609 (N.Y. 1976): (1) Was there an objectively reasonable basis for a belief in the immediate need for police assistance for the protection of life or property?; (2) Were the officer's actions motivated by an intent to aid or protect, rather than solve a crime?; and (3) Do the police actions fall within the scope of the emergency?

This is not a case where a driver is slumped over behind the wheel of a car with the motor running. *See Perez, id.*; *Madzel, id.*; and *Danielewicz v. State,* 730 So. 2d 363 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D793a]. There are some unusual driving moments but nothing that rises to the level of an emergency concern.

Driving outside the lane of travel for a brief moment is not by itself

enough to violate the failing to drive in a single lane statute. No other vehicles or pedestrians were impacted. *See* Section 316.089 (1), Florida. Statutes (2015); *Crooks v. State*, 710 So. 2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b]; *Jordan v. State,* 831 So. 2d 1241, 1243 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2651a] ("[I]t is not practicable, perhaps not even possible, for a motorist to maintain a single lane at all times and that the crucial concern is safety rather than precision."); *Peterson v. State*, 264 So. 3d 1183 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a]; and *State v. Taylor*, 18 Fla. L. Weekly Supp. 397b (Fla. 7th Jud. Cir., Volusia County Ct. Jan. 13, 2011).

Driving into a hotel parking lot at night for a brief moment or two, even if not pulling into a designated parking spot, is not so unusual as to constitute an emergency concern. A driver may be lost or may be pulling over to respond to a text or phone call. It is true that it may also be indicative of an effort to get away from a police officer and could have been a factor in other situations, but this was stated to be a "welfare check" stop. The driving pattern here does not fit a "headlong flight" scenario which the United States Supreme Court has deemed "the consummate act of evasion." *Illinois v. Wardlow,* 528 U.S. 119, 121, 120 S. Ct. 673 (2000). "Additionally, when a vehicle drives away from the scene "in an unremarkable fashion," the act of leaving the scene is not likely to give rise to a reasonable suspicion of criminal activity." *Majors, id.* at 660, *citing to Hill v. State,* 51 So. 3d 649, 651 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D170b].

While continuous swerving within a lane can justify a traffic stop, there were insufficient details as far as how long or pronounced was this swerving. "Ping-ponging" within a lane can mean a lot of different things and the dash-cam footage certainly did not convey any concerning swerving. The officer's initial summary to his fellow officer did not relay any swerving and the other officer, who was watching the vehicle approach his direction, testified he saw a lane switch but did not mention any swerving. There were no allegations of non-compliance with the posted speed limit, any sudden unusual changes in speed, nor unexplained delay at a traffic light. *See Agreda v. State,* 152 So. 3d 114 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2516a] (the driver going 45 MPH in a 65 MPH zone was not enough on its own to justify a stop for a police officer's community care function); *State v. Ledo,* 27 Fla. L. Weekly Supp. 537a (Fla. 7th Jud. Cir., St. Johns County Ct. Aug.7, 2019); *Harapas v. State of Florida, Department of Highway Safety and Motor Vehicles,* 22 Fla. L. Weekly Supp. 989a (Fla. 7th Jud. Cir. Ct., Aug. 4, 2014), and *State v. Fletcher,* 24 Fla. L. Weekly Supp. 545a (Fla. 7th Jud. Cir., Volusia County Ct. June 21, 2016) ("A driving pattern may be unusual without being erratic.").

Contrast the instant fact pattern with the following cases: *Roberts v. State,* 732 So. 2d 1127 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D533a] (the driver's continuous weaving within a lane was captured by the dash-cam and the officer had a reasonable suspicion of an impaired driver); *Yanes v. State,* 877 So. 2d 25 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a] (the officer saw the driver, on the Florida Turnpike, cross the fog-line three times within a mile, each time by about one-half of its width, thus believing the driver was impaired, sick, or tired and, also, the deviation outside the lane was a violation of the single lane statute since the driving was by more then what was practicable); *Esteen v. State,* 503 So. 2d 356 (Fla. 5th DCA 1987) (after midnight, the driver was seen on I-95 going 45 MPH and "weaving within the lane, executing an S shape up the Interstate"); *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975) ("Because of the dangers inherent to our modern vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation."; the driver was only going 45 MPH on the Florida Turnpike and weaving from one side to the other); *State v. Carrillo,* 506 So. 2d.495 (Fla. 5th DCA 1987) (at 2 a.m., the driver was weaving in an extreme manner within a lane, in excess of five times within one-quarter of a mile, thus officer believed the driver was intoxicated); *Davidson v. State* [Editor's note: *State v. Davidson*], 744 So. 2d 1180 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a] (the driver was going between 40 and 50 MPH where there was a 70 MPH speed limit, and drifting in and out of the lane, jerking the vehicle back in a correcting manner, creating a reasonable suspicion of impairment); *DeShong, id.* (the driver was using the lane markers to position his vehicle and, for no apparent reason, abruptly slowed from 55 to 30 MPH and then accelerated rapidly so the officer had founded suspicion that this erratic driving was indicative of driver impairment or vehicle malfunction); *State v. Vinci,* 146 So. 3d 1255 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1970c] (within a mile, the driver continually went from the right side of the lane to the other, hitting reflectors, and then switched lanes and left his turn sign blinking, creating reasonable suspicion of impairment). *DeSouza v. Department of Highway Safety and Motor Vehicles,* 30 Fla. L. Weekly Supp. 544b (Fla. 18th Jud. Cir. Ct. Oct. 18, 2022) (on multiple occasions, the driver both swerved within his lane and left his lane of travel, including into the center turn lane; the stop was warranted under the community caretaker doctrine and, reflecting that, the officer asked the driver if there was something mechanically wrong with the vehicle or if the driver was having a medical issue to explain the swerving); and *Baden v. State,* 174 So. 3d 494, 497 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1913b] (at 2 a.m., the driver repeatedly hit a curb, while riding alongside a pedestrian, causing the person to flinch, and the officer feared an accident.) ("What establishes one's driving as 'erratic' is determined on a case-by-case basis as there is no statutory definition of erratic driving.").

The fact that a vehicle switched lanes in and of itself is not necessarily erratic. A convertible driver might not like higher level headlights in his or her rear-view and side mirrors. Both times the convertible switched lanes, it was when the first officer was behind him; the first time when he got close enough to read the license plate. The Defendant, even before being questioned, stated that he was being blinded by the officer's lights.

A "welfare concern" should not be invoked so broadly as to cloak what may otherwise be a hunch that a driver is impaired. *See Bell v. State of Florida, Department of Highway Safety and Motor Vehicles,* 9 Fla. L. Weekly Supp. 354a (Fla. 7th Cir. Ct. April 10, 2002) ("This Court will not grant police officers blanket authority to conduct investigatory stops for DUI, by virtue of a 'well-being check', on motorists who are simply lost, unfamiliar with the vicinity, or pose no danger to surrounding traffic."); *Callaghan v. State of Florida, Department of Highway Safety and Motor Vehicles,* 04-20192-CINS (Fla. 7th Jud. Cir., Cir. Ct. Sept. 17, 2004); *State v. Rohde,* 864 N.W.2d 704, 709 (Neb. App. 2015) ("The [community caretaker] exception should be narrowly and carefully applied in order to prevent its abuse."); and *State v. Wright,* 28 Fla. L. Weekly Supp. 618a (Fla. 7th Jud. Cir., Flagler County Ct. Aug. 31, 2020). Even considering the driving pattern in its totality, there was insufficient evidence of erratic driving to justify the traffic stop for a "welfare check".

Additionally, Off. Carmin's report and testimony claimed this was a "welfare check" and was not based on a well-founded or reasonable suspicion of criminal activity. If the traffic stop was for that latter reason, the Court would have examined the totality of the circumstances surrounding the detention and would have considered relevant factors which includes "the time of day; the appearance and behavior of the suspect; the appearance and manner of operation of any vehicle involved; and anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge" to analyze whether this was more than "[a] hunch or mere suspicion". *Huffman v. State,* 937 So. 2d 202, 206 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2227a]

(citing to other cases). *See also Faunce v. State,* 884 So. 2d 504, 506 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D2251b].

Based on all the evidence and case law, balancing the public's right to be free from overbroad traffic stops and law enforcement's ability to protect the public, it is

ORDERED and ADJUDGED that the Motion to Suppress is **GRANTED** and the evidence flowing from the traffic stop is inadmissible.

* * *

Criminal law—Driving under influence with injury or property damage—Evidence—Expert testimony—Breath alcohol level—Motion to exclude opinion evidence establishing that defendant's breath alcohol level was above legal limit based on testing of four "volume not met" breath samples is denied—Expert's trial testimony and opinion will be based on sufficient facts and data and is product of reliable principles and methods—Admission of blood-alcohol evidence under common law predicate does not trigger presumption of impairment

STATE OF FLORIDA, Plaintiff, v. FREDRICK LEON CALHOUN, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2023-CT-001704-A. County Criminal Division I. November 26, 2025. Meshon T. Rawls, Judge.

ORDER DENYING MOTION TO EXCLUDE OPINION EVIDENCE

THIS CAUSE comes before the Court upon Defendant's "Motion to Exclude Opinion Evidence," filed June 17, 2025 pursuant to section 90.702, Florida Statutes (2023) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). A hearing was held on the motion on October 21, 2025. Upon consideration of the motion, the testimony presented at the hearing, the legal argument of the parties, and the record, this Court finds and concludes as follows:

1. The State has charged Defendant with three (3) counts of Driving Under the Influence with Injury or Property Damage in violation of section 316.193(3)(c)(1), Fla. Stat. Defendant participated in two breath alcohol tests which resulted in a total of four breath samples. The State intends to use the expert testimony of Phillip Nicodemo during trial to establish that Defendant's breath alcohol was above 0.08 grams of alcohol per 210 liters of breath (g/210L) based on four "volume not met" samples tested by the Intoxilyzer 8000, indicating alcohol levels of .167g/210L, .180g/210L, .192g/210L, and .176g/210L.

2. Defendant moves this Court to exclude Mr. Nicodemo's expert testimony because he alleges that it does not meet the admissibility requirements of section 90.702, Fla. Stat., and *Daubert*, 509 U.S. 579 (1993).

3. Section 90.702, Fla. Stat., which codifies the *Daubert* standard, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

4. As the Fourth District Court of Appeal explained in *Kemp v. State*,

> Under *Daubert*, a trial judge has a gatekeeping role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 113 S.Ct. 2786. The trial judge is "charged with this gatekeeping function 'to ensure that speculative, unreliable expert testimony does not reach the jury' under the mantle of reliability that accompanies the appellation 'expert testimony.' " *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C255a] (citation omitted).
>
> A trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93, 113 S.Ct. 2786. This basic gatekeeping obligation applies not only to scientific testimony, but "to all expert testimony." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).
>
> The Supreme Court in *Daubert* outlined a list of factors that bear on the reliability inquiry: (1) whether the theory can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of a particular scientific technique, as well as the existence of standards controlling the technique's operation; and (4) general acceptance in the scientific community. 509 U.S. at 593-94, 113 S.Ct. 2786. The *Daubert* "test of reliability is flexible, and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire*, 526 U.S. at 141, 119 S.Ct. 1167 (internal quotation marks omitted).
>
> "[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ("*Daubert II*"). However, an expert's opinion must be based upon "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786. Nothing in *Daubert* requires a court "to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert," and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

Kemp v. State, 280 So. 3d 81, 88-89 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1974a], *review denied*, SC19-1931, 2020 WL 1066018 (Fla. Mar. 5, 2020). "*Daubert* provides that expert testimony is admissible if it is relevant and reliable." *Vitiello v. State*, 281 So. 3d 554, 560 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2480e], *review denied*, SC19-2033, 2020 WL 2316636 (Fla. May 11, 2020). "The results of scientific tests are admissible if they are demonstrated to be sufficiently reliable." *State v. Burke*, 599 So. 2d 1339, 1341 (Fla. 1st DCA 1992) (citing *Ramirez v. State*, 542 So.2d 352 (Fla.1989); *Copeland v. State*, 566 So.2d 856 (Fla. 1st DCA 1990). "Reliability may be proven by a showing of general acceptance within the scientific community." *Id.* (citing *Stokes v. State*, 548 So.2d 188 (Fla. 1989)).

5. Florida Administrative Code Rule 11D-8.002(12) sets forth the standard for administering a breath alcohol test:

> Approved Breath Alcohol Test—a minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level, on a single breath test affidavit. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.

Fla. Admin. Code. R. 11D-8.002(12). "A minimum of two results are required for comparison, with a third being required in the event that the difference between the first two results exceeds a specified margin." *Williams v. State*, 331 So. 3d 826, 829-30 (Fla. 2d DCA

2021) [46 Fla. L. Weekly D2457a]. "However, each result can independently be acceptable as a valid breath alcohol level if it is proved to be reliable." *Id.* "[T]he rule language unequivocally establishes that an inadequate number of results cannot be grounds for unreliability[.]" *Id.*; *see also State v. Abalo*, 26 Fla. L. Weekly Supp. 499a (Escambia Cty. Ct. August 1, 2018) ("The plain reading of the Rule indicates that if the required number of valid breath samples is not obtained, any result, or results, obtained will be acceptable as a valid breath alcohol level if proven to be reliable. This is consistent with the Florida Supreme Court's holdings in *State v. Bender*, 382 So. 2d 697 (Fla. 1980); and *Robertson v. State*, 604 So. 2d 783 (Fla. 1992)."); *see also*, David A. Demers, *Florida DUI Handbook* §6:8, 619-620 (2017-2018 ed. 2017). "[U]nder *Robertson v. State*, 604 So. 2d 783 (Fla. 1992), the State may seek admission of the breath test results by establishing a traditional scientific predicate, including 1) the reliability of the test; 2) that the test was performed by a qualified operator with proper equipment; and 3) an expert explanation of the meaning of the test." *State v. Berfield*, 23 Fla. L. Weekly Supp. 258a (Fla. 7th Cir. Ct. March 4, 2015); *see also State v. Jacobson*, 14 Fla. L. Weekly Supp. 714a (Fla. 14th Cir. Ct. Aug. 10, 2006).

6. The State's expert, Phillip Nicodemo, testified during the motion hearing that he is the Technical Leader of the Alcohol Testing Program at the Florida Department of Law Enforcement ("FDLE"). Mr. Nicodemo has been employed with FDLE for approximately five years, and has been employed in his current role for approximately one year. Mr. Nicodemo was initially hired as the Department Inspector for the Alcohol Testing Program. Mr. Nicodemo holds a Bachelor of Science degree in Ecology and Natural Resources from Rutgers University; a Master of Science degree in Biological Sciences from the University of Cincinnati; and a Master of Science degree in Biomedical Sciences from Stony Brook University. Based on his education, Mr. Nicodemo has routinely applied scientific principles related to biology, anatomy, physiology, physics, and mathematics in his positions at FDLE. Further, while at FDLE, Mr. Nicodemo completed a year-long Department Inspector training program, which covers the fundamentals of alcohol, basic biochemistry, the science of breath testing, in general, and the Intoxilyzer, specifically; basic pharmacology and pharmacokinetics of alcohol; and the relevant rules and regulations related to breath testing in Florida. Additionally, Mr. Nicodemo received a Breath Test Operator permit, an Agency Inspector permit, and a Department Inspector certificate. Mr. Nicodemo is also a breath test instructor.

7. In reaching his expert opinion, Mr. Nicodemo reviewed the relevant breath testing documents in this case. During the hearing, Mr. Nicodemo explained that the approved method for determining breath/blood alcohol content in Florida is through infrared spectroscopy and is currently facilitated by the Intoxilyzer 8000. Breath test machines rely on the scientific principle known as Beer Lambert's Law to measure alcohol content in a breath sample. Further, Mr. Nicodemo explained that the Intoxilyzer measures breath alcohol based on time, volume, and slope. The time, volume, and slope components of a breath sample are intended to ensure a deep lung sample, i.e., that the breath alcohol concentration is coming from the alveoli where the blood and air meet in a person's lungs. According to Mr. Nicodemo, a person cannot give a breath sample that reflects an amount of alcohol that is greater than what is in their body. Further, Mr. Nicodemo pointed out that volume is not part of the Beer Lambert equation; nor is it a requisite factor is how the Intoxilyzer measures breath alcohol. Thus, according to Mr. Nicodemo, the Intoxilyzer can accurately measure breath alcohol without volume being a necessary variable. And, as more volume of a sample is produced, it would be expected that the alcohol content of the sample would either remain constant or increase. It would not be expected for the alcohol content to decrease as the volume increased.

8. Mr. Nicodemo also explained how the administration of breath alcohol testing and the Intoxilyzer itself have several protections to ensure the reliability of the breath alcohol tests: (1) Intoxilyzers are inspected monthly by qualified monthly maintenance operator; (2) breath alcohol tests are only administered by certified Breath Test Operators; (3) control tests are run before, during, and after breath testing; (4) diagnostic tests are done during breath testing; and (5) "air blanks" are run between each control test and subject sample to clear the testing chamber. All of these safeguards were in place and functioned as intended within departmental regulations when Defendant provided his four breath samples in this case.

9. According to Mr. Nicodemo, even though Defendant's four breath samples did not contain sufficient breath volume to be considered a valid result by the Intoxilyzer 8000, the machine will nonetheless generate a reading of a breath alcohol level for each sample, and did so in this case. Each of Defendant's four samples reflected an alcohol content above the legal limit of 0.08. Thus, according to Mr. Nicodemo, it can be concluded that had Defendant's samples been of sufficient volume for the Intoxilyzer to render a valid result, that alcohol content of that result would have been the same or greater than the amount that was contained in the invalid results. Further, according to Mr. Nicodemo, it is undisputed that alcohol is present in the four samples provided by Defendant; and given that the trooper observed Defendant for two hours, in addition to the 20-minute observation period of Defendant prior to the administration of the each breath test (which specifically occurred in this case,) it can be concluded that the alcohol in the samples provided by Defendant did not come from his mouth (burping, belching, emesis, or drinking) or from the ambient air. It can be concluded that the alcohol came from Defendant's lungs.

10. In applying his understanding of the scientific principles undergirding the Intoxilyzer 8000, his experience using and servicing the instrumentation, and his review of Defendant's samples, Mr. Nicodemo opined that the breath test results are reliable to establish that alcohol is present; the alcohol came from the Defendant's body; that the four breath test results accurately reflect a breath alcohol amount higher than 0.08g/210L. Defendant provided four breath samples of .167g/210L, .180g/210L, .192g/210L, and .176g/210L; Mr. Nicodemo noted that three of the four samples were within .02g/210L of each other, further pointing to the accuracy of the tests.

11. Here, based on Mr. Nicodemo's testimony during the hearing, this Court finds that his trial testimony and opinion will be based on sufficient facts and data; and is the product of reliable principles and methods. Further, it is clear to this Court that Mr. Nicodemo has applied the relevant principles and methods reliably to the facts of the case. It is not the role of this Court to opine on the correctness of Mr. Nicodemo's opinion. *See Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ("Daubert IP") ("[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology.").

12. This Court acknowledges that "[i]n cases where the Intoxilyzer 8000 registered a reading or readings of 'volume not met' . . . it appears that the circuit courts have routinely concluded that such a reading was unreliable and, therefore, not valid." *Dep't of Highway Safety & Motor Vehicles v. Cherry*, 91 So. 3d 849, 856-57 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D1562a] (citing *Kenyon v. Dep't of High. Saf. & Motor Veh.*, 16 Fla. L. Weekly Supp. 899a (Fla. 4th Cir.Ct.2009) ("The machine produced a print-out that read "volume not met" which means that Petitioner was not providing a sufficient amount of breath in order for the machine to produce a valid test result."); *Underwood v. Dep't of High. Saf. & Motor Veh.*, 15 Fla. L. Weekly Supp. 299a (Fla. 4th Cir.Ct.2008) ("The printout from the machine established that both of the samples given by Petitioner were

designated as 'Volume Not Met,' and the machine indicated that because of this, both samples were not reliable to determine breath alcohol level"); *Saladino v. State of Florida, Dep't of High. Saf. & Motor Veh.*, 15 Fla. L. Weekly Supp. 222a (Fla. 12th Cir.Ct.2008) ("The Petitioner submitted two breath samples, but the results for both indicated 'volume not met,' meaning the samples were insufficient to determine Petitioner's breath alcohol level."). However, no District Court of Appeal nor the Florida Supreme Court has conclusively opined on the issue before this Court.

13. "When there is no binding precedent from the [U.S. Supreme Court or the Florida Supreme Court], a trial judge is bound to follow the decisions of other district courts of appeal on point." *McGauley v. Goldstein*, 653 So. 2d 1108, 1109 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D966a]. "In the absence of other district court precedent, the judge must make an independent exercise of judgment." *Id.*; *see also Adams v. State*, 289 So. 3d 958, 959 n.1 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D60a] ("Absent precedent from an appellate court, a trial court is obligated to independently exercise its judgment and make its own determination as to the merits of the issue before it."), *reh'g denied* (Feb. 7, 2020), *review denied*, SC20-337, 2020 WL 4463105 (Fla. Aug. 4, 2020); *Rosen By & Through Rosen v. Zorzos*, 449 So. 2d 359, 361 (Fla. 5th DCA 1984), *decision quashed*, 467 So. 2d 305 (Fla. 1985) ("[L]ack of precedent alone does not take away a common-law court's responsibility to decide each claim presented before it on its own merit."). Here, there is no precedent from any appellate court on the issue of whether four "volume not met" results from an Intoxilyzer 8000 are otherwise reliable if they meet the scientific predicate. Accordingly, this Court is independently exercising its judgment and making its own determination as to the merits of the issue before it. In doing so, this Court is considering the testimony presented before it during the hearing as well as the applicable scientific principles and theory related to breath testing which the expert is relying relying on in reaching his opinion.

14. The State is reminded that "[a]dmission of blood-alcohol evidence under the common law predicate does not trigger any presumption regarding impairment." *Cardenas v. State*, 867 So. 2d 384, 390 (Fla. 2004) [29 Fla. L. Weekly S90a]. "[N]oncompliance with [the implied consent law] precludes the State from relying on the presumption of impairment [at trial]." *Id.* "[T]here [i]s a clear trade-off in conditioning the grant of presumptions on the integrity of the testing process." *State v. Miles*, 775 So. 2d 950, 953 (Fla. 2000) [25 Fla. L. Weekly S1082a].

Based on the foregoing, it is **ORDERED AND ADJUDGED** that: Defendant's motion is hereby **DENIED.**

* * *

Insurance—Automobile—Windshield repair—Limitation of liability—Insurer's payment for windshield replacement parts and labor was proper according to limit of liability specified in policy—Insurer did not breach policy by failing to reimburse admin fee, fuel surcharge fee, storage fee, mobile fee, and disposal fee where policy did not provide coverage for those fees—Insurer did not breach policy by paying tax on parts and labor at rate lower than sales tax rate applicable in county where transaction occurred where insurer determined tax rate that was applied by repair shop in invoice and applied that rate to reimbursed amount

1 STOP TOTAL SOLUTIONS, LLC, d/b/a WINDSHIELD GEEKS, a/a/o Ashley Murphy, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-SC-044259-O. December 16, 2025. Carly S. Wish, Judge. Counsel: Marc Locascio, Law Offices of Michael B. Brehne, P.A., Altamonte Springs, for Plaintiff. William Austin Shaw, Law Offices of Dillon K. McLean, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the Court for hearing on September 11, 2025, on Defendant's Motion for Summary Judgment filed November 22, 2024, and the Court having reviewed Defendant's Motion, Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, the court file, case law, considered argument of counsel, and being otherwise duly advised in the premises, the Court finds as follows:

Plaintiff, as the insured's assignee, filed a Complaint alleging breach of contract regarding a windshield replacement. Plaintiff invoiced Defendant for the replacement work $1,563.45 and Defendant reimbursed Plaintiff $547.56, an amount less than the invoice, which excluded payment of the "Admin" Fee, Fuel Surcharge Fee, Storage Fee, Mobile Fee, and Disposal Fee ("fees"). This alleged underpayment is the basis of Plaintiff's breach of contract claim. Defendant denied Plaintiff's breach allegations, asserting it paid in accordance with the policy's clear and unambiguous limitation of liability that applies to this windshield loss and that nothing more is owed to Plaintiff.

Summary judgment is appropriate when there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. *See* Fla. R. Civ. P. 1.510. Defendant presented competent substantial record evidence within the affidavit of its Corporate Representative, Bryan Tuczynski. Mr. Tuczynski attested he has personal knowledge of the policies and procedures GEICO utilizes in managing insurance claims involving repair or replacement of windshields and reviewed the business records relevant to the instant windshield replacement claim. The affidavit contains an itemized breakdown of the reimbursement payment by GEICO and refers to and attaches the relevant insurance policy, invoice, and payment information. *See* Affidavit of Bryan Tuczynski, Composite Exhibit. #1, attached to Defendant's Motion for Summary Judgment.

It is undisputed that Defendant issued an insurance policy governing this windshield claim. The relevant portion of the insurance policy, which affords comprehensive coverage for glass breakage subject to the limit of liability, states:

The limit of our liability for ***loss***:

. . .

#6. To damaged windshield glass will not exceed the price determined as follows:

For Windshield Replacements: Windshield Glass:	50% of the pricing for like kind and quality windshield glass as set forth in the National Auto Glass Specifications on the date the approved windshield transaction occurs
Windshield Replacement Labor Rate:	$40.00 per recommended hour as set forth in the National Auto Glass Specifications on the date the approved windshield installation occurs
High Modulus/ Non-Conductive Urethane:	$20.00 for 1.0 Kit $30.00 for 1.5 kits $40.00 for 2.0 kits
All other Urethanes:	$15.00 per kit
Molding:	80% of the manufacturer list pricing for like kind and quality molding on the date the approved windshield installation occurs
For Windshield Repairs:	$60.00 single payment per windshield

. . .

See Florida Family Automobile Insurance Policy, A30FL (03-20) Pages 21-22 of 26 (Pages 41-42 of Defendant's Motion for Summary Judgment).

The affidavit as well as deposition testimony of Mr. Tuczynski establish payment was made pursuant to the glass breakage limit of liability. Mr. Tuczynski attested to and testified the specific amounts GEICO reimbursed Plaintiff for the windshield part, labor, adhesive kits, and molding are items enumerated in the limit of liability[1]. Plaintiff's arguments in opposition to Defendant's Motion include three portions of GEICO's claim payment: 1) replacement parts and labor, 2) additional fees, and 3) tax reimbursement. For the reasons set forth below, Plaintiff's arguments fail.

I. Replacement Parts and Labor

The policy provides comprehensive coverage for a windshield loss. There is a limit of liability within the comprehensive coverage section of the policy, and within that limit of liability, paragraph #6 plainly states "[the limit of liability] to damaged windshield glass will not exceed the price determined as follows" and specifies the items GEICO will reimburse and its limit of reimbursement. *Id*. Plaintiff's contention that Defendant did not properly reimburse these invoiced items is found in Plaintiff's Corporate Representative's argument that National Auto Glass Specification (NAGS) prices, implemented in Plaintiff's invoice, are "nationally recognized in the windshield replacement industry for providing fair, reasonable, and current prices." *See* Affidavit of Jorge Fernandez.

While NAGS may recommend pricing for the windshield replacement parts and recommend the number of labor hours needed, this assertion does nothing to refute that the insurance contract clearly limits Defendant's payment to 50% of the NAGS price for the windshield. The Court finds Defendant's payment for the windshield was proper according to its limit of liability. Further, the Court finds there is no dispute as to the number of labor hours invoiced, which were determined by NAGS. Additionally, there is no dispute Defendant properly reimbursed at a labor rate of $40 per hour as defined in its limit of liability. The Court finds based on the evidence in the record Defendant properly reimbursed Plaintiff for two (2) adhesive kits at its limit of liability, and Defendant properly reimbursed Plaintiff for molding at 80% of the price invoiced by Plaintiff. The record evidence demonstrates Defendant's payment for the windshield, labor, adhesive kits, and molding was made pursuant to its limit of liability and Plaintiff has failed to contradict Defendant's claim with competent substantial evidence giving rise to a genuine dispute as to any material fact. Accordingly, Defendant is entitled to summary judgment as to its payment of the windshield, labor, adhesive kits, and molding.

II. Additional Fees

Plaintiff invoiced GEICO for five (5) additional line-item fees: "Admin Fee," "Fuel Surcharge Fee," "Storage Fee," "Mobile Fee," and "Disposal Fee," ("fees"). Reimbursement of these fees is not provided for in the Policy's limit of liability for windshield replacements. Plaintiff contends that nonpayment of these fees is a breach of the insurance contract. Plaintiff contends these fees were invoiced and should be paid because they "are an integral and necessary component of the entire windshield replacement process." *See* Affidavit of Jorge Fernandez. Plaintiff's affidavit goes on to explain generally what the fees entail in support of its position that each should have been covered under the policy and paid in full.[2]

This argument fails on several grounds. First, the language of the policy is clear and unambiguous. Coverage is afforded under the comprehensive coverage section of the policy. The comprehensive coverage limit of liability for glass breakage is clearly identified and pricing parameters for items covered within that limit are defined. "The cardinal rule of contractual construction is that when language of the contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning." *Columbia Bank v. Columbia Devs., LLC*, 127 So. 3d 670, 673 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2438a]. Defendant's limit of liability is clear and unambiguous. Plaintiff reads the first paragraph of the "LOSSES WE WILL PAY" section under the comprehensive coverage portion of the policy in insolation. "A single policy provision should not be read in isolation and out of context, for the contract is to be construed according to its entire terms, as set forth in the policy…" *State Farm Mut. Auto. Ins. Co. v. Mashburn*, 15 So. 3d 701, 704 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1320a]. The comprehensive coverage section of the policy, read in its entirety, clearly includes a limit of liability that applies to glass breakage, the type of loss of the subject claim.

The Court also finds the doctrine of *expressio unius est exclusio alterius* further supports Defendant's reimbursement of only the fees expressly stated in the policy. This canon of interpretation means that the expression of one thing implies the exclusion of another thing not mentioned. *See Shumrak v. Broken Sound Club, Inc.*, 898 So. 2d 1018 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D694a]. The four items for which Defendant reimbursed Plaintiff are stated in the limit of liability (windshield, labor, adhesive kits, and molding). The additional fees Plaintiff invoiced Defendant are not. Thus, applying *expressio unius est exclusio alterius*, the additional fees are excluded from Defendant's payment obligations for the windshield claim. Plaintiff's argument that these fees could be paid under another provision of the policy is not convincing. By Plaintiff's own admission, the fees are "integral" to windshield replacements. The windshield breakage portion of the comprehensive coverage section of the policy controls. The Court finds Defendant paid up to its limit for only the items it is liable to pay under the terms of the policy. Plaintiff has not satisfied its burden to show there is a genuine dispute of material fact.

III. Tax Reimbursement

The final remaining reimbursement item at issue from Plaintiff's invoice is tax. Plaintiff invoiced GEICO $95.45 for tax. *See* Plaintiff's Complaint, Exhibit A. Plaintiff's invoice does not display a tax rate percentage. The affidavit of Mr. Tuczynski indicates GEICO reimbursed Plaintiff $33.42 for taxes. Mr. Tuczynski testified this amount was derived by using a tax rate of 6.5%, which GEICO determined by dividing the amount of taxes Plaintiff invoiced by the pre-tax subtotal of the invoice.[3] In other words, $95.45 (Plaintiff's invoiced tax amount) divided by $1,468.00 (Plaintiff's invoiced subtotal for material and labor) rendered a tax rate of 6.5%. After reducing Plaintiff's invoice to its limit of liability, GEICO then applied the 6.5% tax rate to the reimbursable material and labor (*i.e.* pre-tax total) of $514.14, which equates to GEICO's tax reimbursement to Plaintiff of $33.42. The tax, combined with the pre-tax total, is $547.56, the total amount paid for this claim. *See* Check, Exhibit C, attached to Defendant's Motion for Summary Judgment.

Sales tax applies to both labor and materials. Florida Statutes § 212.02, requires sales tax to be applied to the full price of both services and materials used in replacing the windshield. Under Florida law, sales tax is computed on the "sales price" of goods and services. Fla. Stat. § 212.05(1)(a)(1)(a). " 'Sales price' also includes the consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust, or repair tangible personal property." *See* Fla. Stat. § 212.02(16). The value of the consideration is based on GEICO's reimbursement amount and not the amount invoiced by Plaintiff.[4] Plaintiff points to the general sales tax rate for Florida and the surtax sales rate for Osceola County (where the transaction occurred) in arguing Defendant applied the incorrect tax

rate. However, Plaintiff did *not* apply a 7.5% rate on its own invoice as they now argue is the only legally allowable rate to be applied. Further, this Court agrees it was not incumbent upon GEICO to determine the tax rate Plaintiff must remit to the State or interpret and recalculate the tax rate that Plaintiff applied on its own invoice sent to Defendant.

Accordingly, Defendant has proven entitlement to summary judgment as a matter of law. The payment for the windshield, labor, adhesive kits, molding, and tax was proper under the limit of liability. Plaintiff did not meet its burden to show that the payment amounts were incorrect or why additional line-item fees not found within the limit of liability must be paid. There are no genuine issues of material fact.

It is therefore **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgment is hereby GRANTED.

2. The Court reserves jurisdiction as to any fees and costs.

3. Final judgment is entered in favor of Defendant, GEICO Casualty Company. Plaintiff shall take nothing by this action and Defendant shall go hence without day.

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[1]Mr. Tuczynski also testified as to the tax reimbursed to Plaintiff. *See* Deposition of Bryan Tuczynski, 20:3-22:9; Affidavit of Bryan Tuczynski.

[2]E.g. "The Admin Fee relates to the administrative aspects. . .*including, but not limited to"*; assisting the insured, *if needed*"; "ordering parts. . .*including but not limited to*." (emphasis added) *See* Affidavit of Jorge Fernandez. The affidavit of Jorge Fernandez addresses only the administrative, mobile, and disposal fees. The mobile fee, according to the affidavit, incorporates the cost of gas; but Plaintiff's invoice charges for both mobile and fuel surcharge fees, which are duplicative charges. The storage fee is not addressed at all in the affidavit. The sworn affidavit refers to Renegade Recoveries as the bearer of the mobile costs. This presumably is an error as Renegade Recoveries was not involved in the claim and is not a party to the suit.

[3]Deposition of Bryan Tuczynski, 21:18-22:9

[4]Plaintiff appears to agree with the assertion that the tax rate should be applied to the reimbursement amount. "Plaintiff underpaid tax in the amount of $33.42, and should have paid Plaintiff $38.56 in tax." *See* Plaintiff's Motion for Summary Judgment. These amounts represent the difference in 6.5% and 7.5% applied to the reimbursement amount and not the difference of either tax rate applied to the invoice *or* reimbursement amount.

* * *

Insurance—Automobile—Windshield repair—Standing—Assignment of post-loss benefits for windshield repair is void and unenforceable pursuant to section 627.7289(1), which prohibits such assignments for policies issued or renewed after July 1, 2023—No merit to repair shop's assertion of standing based on policy and confidential settlement agreement

U TECH AUTO GLASS, LLC, o/b/o Cindy Buccieri, Plaintiff, v. GEICO CASUALTY COMPANY, GEICO INDEMNITY COMPANY, GEICO GENERAL INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2025-SC-023946-O. December 4, 2025. Heather G. Guarch, Judge. Counsel: William S. England, Law Office of Chad Barr, P.A., Altamonte Springs, for Plaintiff. William Austin Shaw, Law Offices of Dillon K. McLean, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on December 1, 2025, upon Defendant's Motion to Dismiss Complaint/Statement of Claim, and the Court having reviewed the Motion and otherwise being fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. This case involves a claim by Plaintiff, U Tech Auto Glass LLC o/b/o Cindy Buccieri for a purported breach of contract. The alleged breach is that the Defendant, GEICO's purported failure to pay benefits claimed under the subject automobile insurance policy (hereinafter "Policy") for labor and materials provided by Plaintiff for the insured's windshield glass replacement.

2. The subject Policy was issued after July 1, 2023.

3. Legal standing is required of any Plaintiff to bring suit in the State of Florida. Standing is defined as "a party's legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation. *DeSantis v. Fla. Educ. Ass'n*, 306 So.3d 1202, 1213 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2314a]; *Equity Res., Inc. v. Cnty. of Leon*, 643 So.2d 1112, 1117 (Fla. 1st DCA 1994).

4. Florida Statute 627.7289 prohibits the assignment of post-loss motor vehicle glass benefits for any automobile policies issued or renewed on or after July 1, 2023. Said assignment agreements are "void and unenforceable." Fla. Stat. 627.7289(1).

5. Florida Statute 627.7289(2) defines an assignment agreement. Specifically, Florida Statute 627.7289(2) states "as used in this section, the term 'assignment agreement' means any instrument, regardless of how such agreement is named or styled, by which post-loss benefits, including, but not limited to, claim payments, under a motor vehicle insurance policy, are, in whole or in part, assigned or transferred to, or acquired in any manner by, a person providing services for motor vehicle glass replacement ore repair, including but not limited to, inspecting, protecting, repairing, restoring, or replacing the motor vehicle glass or calibrating or recalibrating advanced driver assistance systems."

6. In this case, post-loss benefits under a motor vehicle insurance policy were in whole or in part, assigned, transferred to, or acquired by U Tech Auto Glass who provided services for motor vehicle glass replacement or repair, therefore rendering the assignment void and unenforceable.

7. "Void" means "of no legal effect" and any void contract lacks the ability to be enforced. *Total Care Restoration, LLC v. Citizens Prop. Ins. Corp.*, 357 So. 3d 1260, 1266 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D540a]; *Air Quality Experts Corp. v. Family Security Ins. Co.*, 351 So. 3d 32, 38 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c].

8. Plaintiff claims to have standing in this case by virtue of the insurance policy and "subsequent agreements."

9. The Court finds both of the purported bases for standing asserted in Plaintiff's Complaint are barred by Florida Statute 627.7289.

10. Plaintiff does not have standing to file suit on behalf of or pursuant to the confidential settlement agreement.

11. Therefore, Defendant, GEICO's Motion to Dismiss Complaint/Statement of Claim is **GRANTED,** and this matter is dismissed with prejudice.

* * *

Insurance—Personal injury protection—Assignee's action against insurer—Post-loss obligations—Examination under oath—Failure to appear—Medical provider's motions for summary judgment on insurer's EUO no-show defense are granted—Notice of EUO—Copies of EUO notices without proof of mailing failed to satisfy insurer's burden to establish that it provided notice of EUO to insured—Affidavit of litigation specialist, who only became responsible for claim file two years after date of alleged EUO and did not attest to any knowledge of insurer's routine mailing practices for EUO notices, was insufficient to establish that insurer provided notice to insured—Unauthenticated hearsay documents and internet tracking printouts from postal service did not establish delivery of EUO notices—Alleged "drop" letter sent to a law firm was insufficient to establish that notice to law firm could be imputed to insured—Insurer cannot maintain EUO no-show defense where it has failed to establish that it furnished insured with copy of insurance policy—Medical provider has established that insurer was not prejudiced by insured's failure to attend EUO that was set to assist investigation into whether there was covered loss and amount of any loss—Adjuster spoke to insured on two occasions, at which time insured answered all questions that were posed, and insurer was in possession of all documents and information it needed to adjust claim—Moreover, insured was not obligated to attend EUO—Although PIP statute requires insured to comply with "the terms of the policy," including submitting to EUOs, policy at issue does not contain any language requiring insured to attend EUO—Provision of policy requiring only "person seeking coverage" to submit to EUO does not apply to insured where insured was referred to as "you" throughout the policy, and policy's repeated use of disjunctive formulation "you or the person seeking coverage" demonstrates that "person seeking coverage" is not synonymous with "you"

HEALTH PROFESSIONAL SERVICES, INC., a/a/o Eberto Perez, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001835-CC-26. Section SD03. October 4, 2024. Lissette De la Rosa, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Marcella Amador-Walled, Progressive PIP House Counsel, Medley, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY FOR JUDGMENT ON DEFENDANT'S AFFIRMATIVE DEFENSE RE: EUO NO SHOW

THIS CAUSE came before the Court on September 23, 2024 at 3:30 p.m. on the parties' cross-motions for summary judgment on the Defendant's affirmative defense alleging EUO No Show—to wit, (i) Defendant's Motion for Summary Judgment with Memorandum of Law Regarding Failure to Attend an EUO (docket # 37), (ii) Plaintiff's First Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Policy Language) (docket # 208), and (iii) Plaintiff's Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Failure to Meet its Burden of Proof) (docket # 209).

The parties were represented by counsel at the hearing who presented arguments to the Court. Marcella Amador-Walled, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed both parties' motions and responses thereto, Defendant's affidavit of Kimberleen Lozada, the deposition of Ms. Lozada, the relevant legal authorities, the entire Court file, and having heard argument from counsel and being otherwise fully advised in the premises, hereby makes the following factual findings and conclusions of law, and enters this Order GRANTING Plaintiff's First Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Policy Language) and Plaintiff's Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Failure to Meet its Burden of Proof).

BACKGROUND & FACTUAL FINDINGS

On February 19, 2018 Plaintiff filed the instant breach of contract suit against Defendant for unpaid personal injury protection ("PIP") benefits (docket # 1).

On May 10, 2018 Defendant served its Answer and Affirmative Defenses to Plaintiff's Complaint (docket # 14) and raised as its sole defense an allegation that Eberto Perez failed to attend an examination under oath ("EUO").

On October 4, 2018 Defendant filed its Motion for Summary Judgment with Memorandum of Law Regarding Failure to Attend an EUO (docket # 37). Defendant's motion argues that Eberto Perez was noticed for an EUO but failed to attend same, thereby breaching a condition precedent to coverage.

On November 16, 2022 Plaintiff took the deposition of Defendant's representative, Kimberleen Lozada, and the deposition transcript and exhibits were filed with the Court on December 16, 2022 (docket # 182 & 183).

On December 8, 2022 Defendant filed the affidavit of Kimberleen Lozada (docket # 178) in support of its motion for summary judgment.

On May 21, 2024 Plaintiff filed its First Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Policy Language) (docket # 208). Plaintiff's motion argues that the PIP statute requires an insured to comply with the terms of the policy including a requirement to attend an EUO, but the Defendant's insurance policy is devoid of any language requiring Eberto Perez to attend an EUO.

On May 24, 2024 Plaintiff filed its Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Failure to Meet its Burden of Proof) (docket # 209). Plaintiff's motion argues that, despite the past six (6) years of litigation and discovery, Defendant has failed to come forth with admissible evidence sufficient to meet its burden of proof as to Defendant's EUO No Show affirmative defense.

Specifically, Plaintiff argues that Defendant has failed to establish that it provided notice to Eberto Perez of any alleged EUO appointments (i.e. the notice element of Defendant's EUO No Show defense); that Defendant's entire defense rests on inadmissible hearsay evidence entitling Plaintiff to judgment as a matter of law; and that the defense fails since Defendant has not proffered any evidence that it provided a copy of the subject insurance policy to Eberto Perez. Finally, Plaintiff argues that even if Defendant were to establish a material breach of the EUO provision of its policy, the defense nonetheless fails as Plaintiff has met its burden of proving that Defendant was not prejudiced by any alleged failure on the part of Eberto Perez to attend an EUO.

A hearing on both parties' cross-motions for summary judgment on the Defendant's affirmative defense alleging EUO No Show was noticed to occur on September 23, 2024 (docket # 210).

On August 30, 2024 Plaintiff filed its Response and Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment Re: "EUO No Show" Affirmative Defense (docket # 215).

On September 3, 2024 Defendant filed its Response to Plaintiff's First Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Policy Language) (docket # 216) and Response to Plaintiff's Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Failure to Meet its Burden of Proof) (docket # 217).

LEGAL ANALYSIS

Federal Summary Judgment Standard Adopted in Florida

Florida has adopted the federal summary judgment standard within amended Fla. R. Civ. P. 1.510. *See*, *In re: Amendments to Florida*

Rule of Civil Procedure 1.510, 317 So.3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a]. Summary judgment is not a "disfavored procedural shortcut" but rather "an integral part" of the Rules. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

The moving party is entitled to entry of summary judgment if it "shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." *Fla. R. Civ. P. 1.510(a).*

As stated in the seminal case of *Celotex,* "the plain language of [the Rule] *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since *a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.* The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." 477 U.S. at 322-23 (emphasis added).

The nonmoving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment". *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986). A "scintilla" of evidence is "insufficient" to avoid summary judgment and " if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted". *Id*. at 249-52.

"Summary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has" in support of its claim. *Steen v. Myers,* 486 F.3d 1017, 1022 (7th Cir. 2007); *see also Forsythe v. Ticor Title Ins. Co.,* Case No. 2:08 cv 337, Dist. Court, ND Indiana, June 28, 2010).

DEFENDANT HAS FAILED TO ESTABLISH THE NOTICE ELEMENT OF ITS EUO NO SHOW DEFENSE

Plaintiff's Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Failure to Meet its Burden of Proof)

As contemplated by *Celotex,* Plaintiff's Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Failure to Meet its Burden of Proof) sets forth that despite more than adequate time for discovery (some six (6) years of litigation), including narrowly tailored discovery requests directed to the Defendant's defense, Defendant has failed to present evidence sufficient to establish the notice element of its EUO No Show defense.

Plaintiff's motion specifically cites to Plaintiff's previously propounded (i) Affirmative Defense Request for Production (docket # 24) and Defendant's responses thereto (docket # 44) attaching documents, (ii) First "EUO" Supplemental Request to Produce (Re: Certified Mail) (docket # 103) and Defendant's responses thereto (docket # 124), and (iii) Second "EUO" Supplemental Request to Produce (Re: Regular U.S. Mail and Proof of Mail) (docket # 104) and Defendant's responses thereto (docket # 128).

These discovery requests sought production of any envelopes, certified mail slips, certified mail return receipts, or any other evidence of mailing of the Defendant's alleged EUO notice letters. However, Plaintiff's motion sets forth that the Defendant conceded in discovery that it is not in possession of any envelopes, certified mail slips, certified mail return receipts, or any other admissible evidence sufficient to establish notice to Eberto Perez of the alleged EUO appointments.[1]

To defeat Plaintiff's Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show and avoid the entry of summary judgment against it, Defendant was required to establish the existence of the notice element of its defense by proffering admissible summary judgment evidence. *Fla. R. Civ. P. 1.510(c)(4)* ("[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be *admissible in evidence*. . .") (emphasis added); *see also*, *Macuba v. Deboer,* 193 F.3d 1316 (11th Cir. 1999) (holding that a court cannot consider inadmissible hearsay when ruling on a motion for summary judgment); *Winskunas v. Birnbaum,* 23 F.3d 1264 (7th Cir. 1994) (affirming entry of summary judgment against party whose supporting affidavit was premised upon inadmissible hearsay).

The law is clear that any factual assertions made or relied upon by the Defendant that are not supported by admissible summary judgment evidence within the record before the Court, do not create a material issue of fact. *Weinstock v. Columbia University,* 224 F.3d 33, 41 (2d Cir. 2000) ("unsupported allegations do not create a material issue of fact"); *see also*, *State v. Thompson,* 852 So.2d 877, 888 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1807b] ("argument of counsel is not evidence").

Defendant attempts to create a material issue of fact through the affidavit of Kimberleen Lozada (docket # 178) which attached several documents. For the reasons set forth below, the Court finds that neither the affidavit of Ms. Lozada, nor her deposition testimony, creates a material issue of fact and, accordingly, Plaintiff is entitled to entry of summary judgment on Defendant's EUO No Show affirmative defense as a matter of law.

Documents Produced by Defendant in Support of its EUO No Show Defense and Attached to Defendant's Affidavits

The parties do not dispute that the only documents in Defendant's possession pertaining to its EUO No Show Defense, produced by the Defendant in discovery, and relied upon by Defendant at the summary judgment hearing are as follows:

(i) correspondence purporting to be a "drop" letter dated March 16, 2016 from Law Office of Pilar De Jesus (Defendant did not attach this document to its adjuster affidavit);

(ii) Defendant's correspondence and/or EUO notice letter dated March 18, 2016 for an alleged April 21, 2016 EUO appointment ("Defendant's 1st EUO Notice Letter");

(iii) Defendant's correspondence and/or EUO notice letter dated April 22, 2016 for an alleged May 5, 2016 EUO appointment ("Defendant's 2nd EUO Notice Letter");

(iii) a document and/or internet tracking printout allegedly from USPS referencing a tracking # 9171999991703592109891;

(vi) (a document and/or or internet tracking printout allegedly from USPS referencing a tracking # 9171999991703592109884 (Defendant did not attach this document to its adjuster affidavit);

(vii) document titled Certificate of Non-Appearance for an alleged April 21, 2016 EUO appointment; and

(viii) document titled Certificate of Non-Appearance for an alleged May 5, 2016 EUO appointment.

Some, but not all, of these documents were attached to Ms. Lozada's affidavit that was filed with the Court. Specifically, The Defendant did not attach either the purported "drop" letter dated 03/16/16 or the alleged USPS document referencing tracking # 9171999991703592109884 to Ms. Lozada's affidavit. *See*, *Bifulco v. State Farm Mut. Auto. Ins. Co.,* 693 So. 2d 707 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1325a] (holding that only sworn or certified documents attached to an appropriate affidavit can be considered at summary judgment).

Defendant's Affidavit of Kimberleen Lozada

The affidavit of Kimberleen Lozada (docket # 178) avers that she is Defendant's Litigation Specialist/Claims Adjuster, who also serves as the custodian of the claim file, and generally that she has "personal

knowledge of all of the facts contained herein" (¶¶1, 2). Ms. Lozada recites the "magic words" mandated by *Fla. Stat. 90.803(6)(a)* to establish the business records exception as to the documents attached to her affidavit (¶ 3).[2] Ms. Lozada then discusses the EUO-related documents referenced above and attached to her affidavit, averring that Defendant's EUO notice letters were "mailed" (¶¶ 7, 8, 9, 10, 11, 12, 13, 14). Ms. Lozada concludes that Eberto Perez failed to attend the alleged EUO of April 21, 2016 and May 5, 2016 resulting in Defendant's denial of the Plaintiff's claim for benefits (¶¶17, 18).

Ms. Lozada does not aver that she has personal knowledge of the Defendant's routine business practices for the mailing of EUO letters, nor does she ever state what those routine business practices are. Moreover, Ms. Lozada's deposition makes clear that she only became responsible for this file *after* suit was filed in year 2018 (some 2 years *after* the date of the alleged EUO in this case) and that any knowledge she has comes from her review of internal notes of the Defendant which have not been admitted into evidence [docket # 183, p. 8, lines 1 through 15]. Accordingly, it is undisputed that, despite her conclusory assertion of "personal knowledge", Ms. Lozada did not in fact handle or have anything whatsoever to do with the alleged mailing of the Defendant's EUO notice letters.

Defendant has Failed to Establish that it Mailed Any of its EUO Notice Letters (Defendant's EUO Notice Letters)

Although the Defendant's EUO notice letters themselves are admissible as a business record under *Fla. Stat. 90.803(6),* it is rudimentary that these letters alone are insufficient to establish that they were mailed. *Roesch v. U.S. Bank,* 294 So.3d 429, 431 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D846a], rev. den., 2020 WL 3568334 (2020) ("[t]he fact that a document is drafted is insufficient in itself to establish that it was mailed"); *see also Allen v. Wilmington Tr. N.A.,* 216 So.3d 685 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D691b]; *Edmonds v. U.S. Bank National Assoc.,* 215 So.3d 628 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D774a]; *First Protective Ins. Co. v. Ahern,* 278 So.3d 87 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2126a].[3]

Accordingly, Defendant must offer more than the EUO notice letters themselves to create an issue of fact as to the notice element of its EUO No Show defense.

Binding decisional precedent provides that there are three (3) potential methods through which the Defendant could have met its burden of establishing the mailing of its EUO notice letters: (i) testimony from someone with personal knowledge of the mailing, such as the person who handled the mailing, (ii) evidence of routine mailing practices as recognized under *Fla. Stat. 90.406,* or (iii) documentary records of mailing, such as a mail log or return receipt. *Savoy v. American Platinum Prop. & Cas.,* 363 So.3d 1102, 1107 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1241a]:

> [T]he corporate representative's statements that various letters were mailed required additional proof. The mere fact that a letter was drafted "is not enough to allow a trial court to infer that the letter was mailed." *Mace v. M&T Bank,* 292 So. 3d 1215, 1219 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D719a]. Instead, a witness generally must: (1) have personal knowledge of the mailing, (2) provide evidence of routine mailing practices, or (3) provide records of the mailing, such as a log or return receipt. *Id.* at 1219-20. The corporate representative's affidavit in this case did not come close to providing such evidence.

See also, *Mace v. M&T Bank,* 292 So.3d 1215 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D719a] (analyzing in detail the three manners in which a party can prove mailing).

As in *Savoy* and *Mace,* the Court finds that Ms. Lozada's affidavit fails to provide admissible evidence establishing any of the three (3) potential methods of proving mailing available to the Defendant under Florida law.

(Method # 1: No Testimony from Someone with Personal Knowledge of Mailing)

As discussed above, Ms. Lozada was not involved in the mailing of Defendant's EUO notice letters and does not have personal knowledge of same. Accordingly, Ms. Lozada's conclusory assertion within her affidavit that the EUO letters were "mailed" is plainly inadmissible. This point was made abundantly clear in *Mace,* 292 So.3d at 1220, which addressed a nearly identical issue:

> First, the Bank did not present any testimony by a witness with personal knowledge that the letter was mailed. Although Ms. Andreas said that she was personally involved in the mailing of the letter, it quickly became clear that (1) she had no personal knowledge whatsoever of whether the default notice was mailed and (2) any information she did have came from conversations she had with someone at McCalla Raymer and her review of Bank records that were not offered or admitted into evidence. It should go without saying (1) that testimony by a witness without personal knowledge is inadmissible, see § 90.604, Fla. Stat. (2016), and (2) that testimony based on what other people or documents say, when offered for the truth of the matter, is hearsay and, when unaccompanied by any showing that an exception to the hearsay rule applies, is inadmissible, see § 90.801(1)(c); *Sas v. Fed. Nat'l Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1090b] (holding that a trial court erred "in allowing Greenlee to testify over objection about the contents of Fannie Mae's business records . . . without having first admitted those business records").

(Method # 2: No Evidence of What Defendant's Routine Mailing Practice Is)

Ms. Lozada's affidavit is devoid of any mention of the Defendant's routine business practice for mailing. Without such evidence, this Court "is left in the dark as to what the [Defendant] routinely does with [EUO] notices" and therefore cannot find a presumption that same were mailed. *See*, *Mace,* 292 So.3d at 1220-21:

> Second, the Bank did not establish its routine practice for mailing default letters. Under section 90.406, "[e]vidence of the routine practice of an organization . . . is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice." Thus, we have held that an organization's legally sufficient proof of its routine business practices for mailing default letters is legally sufficient to prove that a default letter was mailed in a specific case. See *Thorlton,* 257 So. 3d at 601-02; *Spencer,* 242 So. 3d at 1191 (quoting *Allen,* 216 So. 3d at 688). Generally, this requires that a witness testify based on personal knowledge as to what the organization's routine practice for mailing default letters is.
>
> . . .
>
> That evidence is entirely missing here. Assuming without deciding that Ms. Andreas's testimony about her training was sufficient to establish some awareness that the Bank had a routine practice for mailing —a debatable proposition—she never testified as to what that practice was. ... The trial court was, as a result, in the dark as to what the Bank routinely does with default notices . . . And without that evidence, the trial court had no legally sufficient basis to infer that the Bank mailed the Maces' default letter in this case on account of it having a routine practice for mailing them.

See also, *Eig v. Ins. Co. of North America,* 447 So. 2d 377 (Fla. 3d DCA 1984) (to obtain the presumption "the party [has] to prove by competent evidence *what its routine practice is*").

(Method # 3: No Documentary Records or Evidence of Mailing)

Ms. Lozada's affidavit also does not attach any envelopes, certified mail slips, certified mail return receipts, or any other mailing records. Plaintiff's motion cites to various discovery propounded by Plaintiff

seeking production of any envelopes, certified mail slips, certified mail return receipts, or any other evidence of mailing of the Defendant's alleged EUO notice letters. However, it is undisputed that the Defendant is not in possession of any envelopes, certified mail slips, certified mail return receipts, or any other direct evidence of mailing of the Defendant's EUO notice letters. That is, the record before this Court is devoid of any documentary records to establish mailing of the Defendant's EUO notice letters.

Accordingly, as in *Mace,* "[w]hen Ms. [Lozada]'s hearsay testimony that the [EUO] letter was mailed is excluded, there is no evidence left that shows that the [Defendant] mailed [an EUO] letter" in this case. *Id*. at 1222.

At the hearing, Defendant attempted to avoid this result by arguing that, as a corporation, it is permitted to designate a representative who can testify as to all to matters known or reasonably available to the corporation and that representative need not possess personal knowledge. Defendant further argued that their representative's *testimony* concerning the contents of documents or internal notes is admissible under *Fla. Stat. 90.803(6*), despite the fact that the underlying documents or notes have neither been produced to the Plaintiff nor admitted into evidence.

Defendant's argument is foreclosed by well-established binding decisional precedent. *See*, *Thompson v. State,* 705 So.2d 1046 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D449b] ("While the business-records exception to the hearsay rule allows the admission of '[a] memorandum, report, record, or data compilation,' . . . it does not authorize hearsay *testimony* concerning the contents of business records which have not been admitted into evidence" (emphasis in original)); *Savoy,* 363 So.3d at 1106-07 ("When a supporting summary judgment affidavit fails to establish its basis in the affiant's personal knowledge, the affidavit should be found legally insufficient to support the entry of summary judgment in favor of the moving party . . . This is true regardless of whether the witness is a corporate representative . . . In other words, corporate representative affidavits in support of summary judgment are not excepted from the personal knowledge requirement").

For the same reasons delineated in *Thompson* and *Savoy,* defense counsel's argument that the Defendant can rely at summary judgment upon Ms. Lozada's deposition testimony relaying the contents of what Defendant's internal notes purportedly say (e.g., about statements allegedly made by Eberto Perez during a telephone conversation with some other adjuster back in March 2016 or that a prior adjuster allegedly looked up tracking information on a website to confirm delivery of Defendant's EUO notice letters) is entirely without merit and rejected. Those purported statements are plainly inadmissible hearsay, and this Court cannot consider them at summary judgment.

Since the Defendant has failed to establish mailing of its EUO notice letters through the presentation of admissible evidence, Plaintiff is entitled to summary judgment in its favor on the Defendant's EUO No Show Affirmative Defense, as a matter of law.

(Unauthenticated, Hearsay Documents and/or Internet Tracking Printouts from USPS)

Since it is not in possession of any admissible evidence sufficient to establish mailing, Defendant instead attempts to rely upon unauthenticated[4] documents and/or internet tracking printouts allegedly from USPS in an effort to establish delivery of Defendant's 1st EUO notice letter.[5]

Courts have routinely found that unauthenticated internet and/or website printouts constitute inadmissible hearsay that cannot be considered at summary judgment. *See e.g., Philip Morris USA, Inc. v. Pollari,* 228 So. 3d 115 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1896a]; *United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000); *Nationwide Mut. Fire Ins. Co. v. Darragh,* 95 So. 3d 897 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1355a]; *DiGiovanni v. Deutsche Bank Nat. Trust Co.,* 226 So. 3d 984 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D772a]; *Whitley v. State,* 1 So.3d 414 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D359b].

Further, the documents and/or internet tracking printouts were created by a third-party (USPS) and are clearly not the Defendant's business record. Accordingly, the Defendant cannot lay the requisite predicate for admission of these documents under the business records exception of *Fla. Stat. 90.803(6*) since the documents are that of a third-party and *not* the Defendant's documents. *See e.g., Landmark American Ins. Co. v. Pin-Pon Corp.,* 155 So.3d 432, 442 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D191a].

Accordingly, this Court is precluded from considering the unauthenticated, hearsay USPS documents and/or internet tracking printouts relied upon by the Defendant at summary judgment.[6]

Defendant has Failed to Establish that Any Notice Provided to Law Offices of Pilar De Jesus can be Imputed to Eberto Perez

Defendant's 1st EUO Notice Letter is addressed to Law Offices of Pilar De Jesus. As such, under the facts of this case, Defendant is attempting to establish notice of its first EUO appointment set for April 21, 2016 by imputing notice allegedly sent to a law firm to Eberto Perez. *See e.g., Reizen v. Fla. Nat'l Bank at Gainesville,* 237 So. 2d 30, 32 (Fla. 1st DCA 1970) (recognizing that notice provided to an attorney can be imputed to the attorney's client).

The only potential "evidence" offered by Defendant to establish that Eberto Perez was represented by Law Offices of Pilar De Jesus is an alleged "drop" letter dated March 16, 2016.[7] Defendant neither made the "drop" letter nor is it the Defendant's regular practice to make such documents as same was created by a third-party. As such, just like the USPS tracking documents discussed above, Defendant simply cannot satisfy the business records exception of Fla. Stat. 90.803(6) for the purported "drop" letter from Law Offices of Pilar De Jesus.

In *Health and Wellness Evolution Co. (Earl Esperon) v. Infinity Auto Ins. Co.,* 3D22-1865 (Fla. 3d DCA, June 19, 2024) [49 Fla. L. Weekly D1324b], the Third District Court of Appeal addressed the very same issue before this Court as same pertains to an attorney's letter in connection with a PIP insurer's EUO No Show defense. On rehearing, the Third District Court of Appeal phrased the issue before the Court as follows:

> The dispositive issue raised on appeal is whether the trial court reversibly erred in admitting a letter of representation into evidence in the absence of an established hearsay exception. Concluding it did, we reverse.

In *Health and Wellness,* the sole issue at trial was the insurer's EUO No Show defense. The only testimony offered at trial was from the insurer's adjuster / corporate representative (the plaintiff medical provider did not proffer any evidence or testimony). Relying upon a representation letter that was admitted into evidence over the plaintiff's objection, the insurer argued that it had established notice of its EUO appointment since the law firm to which the EUO notice was allegedly sent represented their insured. The jury returned a verdict for the insurer.

On appeal, the Third District Court of Appeal reversed. Specifically, the Third District Court of Appeal held that the insurance company had failed to establish that its insured was in fact represented by the law firm reflected in the representation letter. The Court held that since no hearsay exception was satisfied to admit the representation letter and there was no independent evidentiary support to corroborate the insurer's contention of representation, the judgment

in favor of the insurer necessarily rested upon inadmissible hearsay requiring reversal.

Here, as in *Health and Wellness,* the only "evidence" offered by Defendant to establish that Eberto Perez was represented by the law firm is an alleged letter from Law Offices of Pilar De Jesus. Since this document is not the Defendant's business record and no hearsay exception has been satisfied by the Defendant for its admission into evidence, the purported "drop" letter is inadmissible hearsay. Without the "drop" letter, the record before the Court is devoid of any admissible evidence establishing a representative and/or agency relationship between Eberto Perez and Law Offices of Pilar De Jesus. As a result, even if Defendant were able to establish notice to Law Offices of Pilar De Jesus, such notice cannot be imputed to Eberto Perez as a matter of law. *Id*.[8]

Since it has Failed to Establish the Notice Element, Defendant's EUO No Show Defense Fails as a Matter of Law

In sum, Defendant has failed to present any admissible summary judgment evidence establishing the mailing of its EUO notice letters. The EUO notice letters themselves are insufficient to prove notice and Defendant has not come forward with any envelopes, certified mail slips, certified mail return receipts, or any other direct evidence of mailing. Ms. Lozada's conclusory statements within her affidavit that the letters were mailed is inadmissible due to her lack of personal knowledge and, further, her affidavit fails to set forth any affirmative evidence delineating what Defendant's routine business practice for mailing EUO notice letters is.

Likewise, the USPS documents and/or internet tracking printouts relied upon by Defendant are unauthenticated, inadmissible hearsay that cannot be considered by the Court. Finally, binding decisional precedent from the Third District Court of Appeal makes clear that since Defendant has failed to establish that Law Offices of Pilar De Jesus represented Eberto Perez, this Court cannot impute any notice allegedly provided to the law firm to Eberto Perez.

Accordingly, the Court finds that Defendant has failed to create a material issue of fact as to the notice element of its EUO No Show affirmative defense and Plaintiff is entitled to summary judgment in its favor, as a matter of law.

DEFENDANT HAS FAILED TO ESTABLISH THAT IT FURNISHED EBERTO PEREZ WITH A COPY OF THE INSURANCE POLICY

Under Florida law, an insurer alleging a failure to comply with conditions precedent under an insurance policy must present evidence establishing that a copy of the policy was furnished to its insured. *See e.g., Alexander v. Allstate Ins. Co.,* 388 So. 2d 592 (Fla. 5th DCA 1980) (where evidence fails to establish insured received policy setting out requirements that accident be reported within 24 hrs, insured is not required to comply with such requirement in order to recover under the policy); *United Auto. Ins. Co. v. Rousseau,* 682 So. 2d 1229 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2477a] (insurer's failure to provide copy of the policy excused any failure by insured to comply with policy's conditions precedent); *Hialeah Wellness & Rehab Center (Maria Clark) v. United Auto.,* 15 Fla. L. Weekly Supp. 723a (Fla. 11th Cir., Miami-Dade Cty. Ct., J. Gonzalez-Meyer, Mar. 28, 2008) (same).

The record before this Court is devoid of any evidence establishing that the Defendant provided a copy of the subject insurance policy to Eberto Perez prior to allegedly requesting an EUO.

Accordingly, the Court finds that Defendant cannot maintain its EUO No Show affirmative defense and same fails as a matter of law.

PLAINTIFF HAS ESTABLISHED THAT DEFENDANT WAS NOT PREJUDICED

Under Florida law, an insurer's request for their insured to submit to an EUO is a post-loss obligation, which arises after the policy is in effect, and after there has been a loss and a claim for policy benefits. *See, Nunez v. Universal Prop. & Cas. Ins. Co*., 325 So. 3d 267 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1747b]; *American Integrity Ins. Co. v. Estrada,* 276 So. 3d 905 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a].

In *Estrada,* the Third District Court of Appeal held that:

> for an insurer to successfully establish a coverage defense based upon an insured's failure to satisfy post-loss obligations such that an insured forfeits coverage under a policy, the insurer must plead and prove that the insured has materially breached a post-loss policy provision. If the insurer establishes such a material breach by the insured. the burden then shifts to the insured to prove that any breach did not prejudice the insurer.

The Third District Court of Appeal subsequently acknowledged that the holding of *Estrada* as same concerns prejudice applies in the context of PIP. *See, United Auto. Ins. Co. v. LFC Med. Center, Inc.,* 3D22-1547, note # 2 (Fla. 3d DCA, June 5, 2024) [49 Fla. L. Weekly D1181b]. As such, even if the Defendant had successfully established a material breach of the EUO provision of its policy, the burden would then shift to Plaintiff to prove that any such breach did not result in prejudice to the Defendant.

While it is true that prejudice is not an element of Defendant's defense since it does not bear the burden of proving same, *Estrada* and *LFC Med.* make clear that Plaintiff can nonetheless defeat the defense by establishing that Defendant was not prejudiced by the insured's failure to comply with the post-loss obligation.

The record before this Court reflects that Plaintiff has met its burden of establishing that Defendant was not prejudiced under the facts of this case.

Both of the Defendant's EUO notice letters, on their face, state that the reason Defendant was seeking an EUO was to assist in their "investigation to determine if this is a *covered* loss under the terms of your policy and, if so, the *amount* of that loss", as also acknowledged by Ms. Lozada at her deposition [docket # 183, p. 78, line 13 through p. 79, line 15; p. 81, line 5-13].

Ms. Lozada testified that as part of its investigation Defendant did in fact speak with Eberto Perez on no less than two separate occasions (on March 24, 2016 and March 29, 2016), that Defendant asked Mr. Perez numerous questions (including questions regarding coverage, his injuries, medical providers and treatment, the amount of the loss, etc.), that Mr. Perez answered all questions asked by the Defendant, that Mr. Perez did not refuse to answer any questions, and that Defendant was not in any way prevented from asking any and all questions that it may have had for Mr. Perez [docket # 183, p. 98, line 1 through p. 104, line 25].

Further, Ms. Lozada repeatedly testified that the Defendant was in possession of all the documents, medical records, bills, and other information it needed to properly adjust the subject insurance claim, that Defendant was not missing any necessary documentation, and seemingly acknowledged that the Defendant was not prejudiced [docket # 183, p. 81, line 14 through 110, line 18].

Based on the record before it, the Court finds that the Defendant was not, and could not have possibly been, prejudiced by any alleged failure on the part of Eberto Perez to attend an EUO. Defendant spoke with its insured on no less than two separate occasions, the insured answered all questions of the Defendant, and nothing precluded the Defendant to contact its insured for any further questioning, if warranted. Moreover, the Defendant received any and all documents necessary so as to investigate the claim, and was fully able to determine both that the subject loss was in fact covered under its insurance policy as well as the amount of the loss incurred.

Accordingly, the Court finds that Plaintiff is entitled to entry of

summary judgment in its favor as a matter of law since the record reflects that Defendant was not prejudiced by any alleged failure on the part of Eberto Perez to attend any EUO.

THE PIP STATUTE PERMITS AN EUO IN ACCORDANCE WITH "THE TERMS OF THE POLICY", BUT DEFENDANT'S POLICY IS DEVOID OF ANY LANGUAGE REQUIRING EBERTO PEREZ TO ATTEND AN EUO

Plaintiff's First Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Policy Language)

For the reasons set forth below, the Court grants summary judgment in favor of Plaintiff on Defendant's EUO No Show affirmative defense on the additional grounds that the language of Defendant's policy of insurance does not permit it to request or take the EUO of Eberto Perez under the facts of this case.

Fla. Stat. 627.736(6)(g)

The Court will begin its analysis, as it must, with the statutory text. *Fla. Stat. 627.736(6)(g)* pertaining to EUO's provides, in pertinent part, as follows:

> An insured seeking benefits under ss. *627.730*-627.7405, including an omnibus insured, *must comply with the terms of the policy,* which include, but are not limited to, submitting to an examination under oath. ... Compliance with this paragraph is a condition precedent to receiving benefits.

Pursuant to the statutory text, the "*terms of the policy*" are paramount and govern an insured's obligation to comply with any "condition[s] precedent to receiving benefits".

Canons of Interpretation

It is well-established that Florida law abhors forfeiture of insurance coverage. *Am. Integrity Ins. Co. v. Estrada,* 276 So.3d 905, 914 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a]. This is true "especially where, as here, a forfeiture is sought after the happening of the event giving rise to the insurer's liability." *Johnson v. Life Ins. Co. of Ga.,* 52 So.2d 813, 815 (Fla. 1951); *see also*, *Boca Raton Cmty. Hosp., Inc. v. Brucker,* 695 So.2d 911, 912 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1527b]; *Anchor Prop. & Cas. Ins. Co. v. Trif,* 322 So.3d 663 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1267a].

As such, "[p]olicy provisions that tend to limit or avoid liability are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy". *Flores v. Allstate Ins. Co.,* 819 So.2d 740, 744 (Fla. 2002) [27 Fla. L. Weekly S499a]; *see also*, *Washington Nat'l Ins., Corp. v. Ruderman,* 117 So. 3d 943 (Fla. 2013) [38 Fla. L. Weekly S511a] ("It has long been a tenet of Florida insurance law that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer. Thus, where one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted.").

Where the language in an insurance contract is clear and unambiguous, it must be interpreted in accordance with the plain meaning so as to give effect to the policy as written. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]); *see also*, *Sugar Cane Growers Coop. of Fla., Inc. v. Pinnock,* 735 So.2d 530, 535 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1214b] (holding contracts should be interpreted to give effect to all provisions and reserving trial court since its interpretation "*leaves out several words and phrases*").

Florida courts may not "rewrite contracts, add meaning that is not present" from the plain text. *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.,* 133 So. 3d 494,497 (Fla. 2014) [39 Fla. L. Weekly S75a] (quoting *State Farm Mut. Auto Ins. Co. v. Pridgen,* 498 So. 2d 1245, 1248 (Fla. 1986)).

Defendant's Policy Language

Defendant's policy of insurance, under GENERAL DEFINITIONS, defines the boldened term **"you"** when used in the policy as follows:

> 14. **"You"** and **"your"** mean:
>
> a. a person shown as a named insured on the **declarations page**; . . .
>
> b. the spouse of a named insured if residing in the same household at the time of the loss.

The record before this Court is undisputed that **"you",** as defined under Defendant's policy, refers to EBERTO PEREZ since he is "a person shown as a named insured on the declarations page" [docket # 183, p. 23, lines 8-18].

The PIP section of Defendant's policy, titled PART II(A)—PERSONAL INJURY PROTECTION COVERAGE, includes the following EUO provision:

> **Provider Examination under Oath**. **We** may require representatives of any entity or person who is claiming benefits under this contract pursuant to an assignment of benefits under this Part II(A) to submit to examinations under oath, as often as **we** may reasonably require. **We** may choose any representative that **we** require to sit for examinations under oath, including but not limited to the person who actually rendered the treatment. **We** may refuse payment:
>
> 1. to any entity or person holding an assignment; or
>
> 2. for services rendered by any entity or person holding an assignment;
>
> who does not comply with this provision.

The parties agree that this provision of the policy, by its plain language, would only apply to person or medical provider holding an assignment of benefits and does not apply to Eberto Perez. Indeed, this portion of the policy never once mentions the defined term **"you",** which refers to Defendant's insured, Eberto Perez.

Where the parties disagree is whether the EUO provision found in the general duties section of Defendant's policy, titled PART VI—DUTIES IN CASE OF AN ACCIDENT OR LOSS, is applicable to Eberto Perez.

This section of Defendant's policy of insurance consists of three (3) paragraphs[9] setting forth various post-loss obligations, including provisions related to an EUO:

> **[Paragraph # 1]**
>
> For coverage to apply under this policy, **you** or the person seeking coverage must promptly report each accident or loss even if **you** or the person seeking coverage is not at fault. **You** or the person seeking coverage must provide **us** with all accident/loss information including time, place, and how the accident or loss happened. **You** or the person seeking coverage must also obtain and provide **us** the names and addresses of all persons involved in the accident or loss, the names and addresses of any witnesses, and the license plate numbers of the vehicles involved.
>
> **[Paragraph # 2]**
>
> If **you** or the person seeking coverage cannot identify the owner or operator of a vehicle involved in the accident, or if theft or vandalism has occurred, **you** or the person seeking coverage must notify the police within 24 hours or as soon as practicable.
>
> **[Paragraph # 3]**
>
> A person seeking coverage must:
>
> . . .
>
> 3. allow **us** to take signed and recorded statements, including sworn statements and examinations under oath, which **we** may conduct outside the presence of **you** or any other person claiming coverage, and answer all reasonable questions **we** may ask and provide any

documents, records, or other tangible items that **we** request, when, where, and as often as **we** may reasonably require;

. . .

This Court must consider all three (3) of these paragraphs in interpreting the meaning of Defendant's insurance policy as same concerns a requirement to attend an EUO. *See e.g., Fitness Int'l, LLC v. 93 FLRPT, LLC,* 361 So. 3d 914 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D947a] ("A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts."); *Lab. Corp. of Am. v. Davis,* 339 So. 3d 318, 324 (Fla. 2022) [47 Fla. L. Weekly S134a] ("Under the whole-text canon, proper interpretation requires consideration of `the entire text, in view of its structure and of the physical and logical relation of its many parts.' ").

Both Paragraph # 1 and # 2 under the DUTIES IN CASE OF AN ACCIDENT OR LOSS section of the Defendant's policy, repeatedly use the phrase **"you** or the person seeking coverage" in delineating to whom various post-loss obligations apply. This phrase, on its face, contemplates that both a named insured, such as Eberto Perez (**"you"**), as well as any other "person seeking coverage" (that is, someone other than **"you"**) must comply with the listed requirements.

For instance, Paragraph # 1 provides that **"you** or the person seeking coverage" must comply with the post-loss obligations pertaining to reporting of accidents, losses, and providing certain information to the Defendant. In turn, Paragraph # 2 provides that **"you** or the person seeking coverage" must comply with the requirement to notify the policy in the event of theft or vandalism.

It is undisputed that the post-loss obligations set forth in Paragraphs # 1 and # 2 apply to Eberto Perez since these paragraphs both use the term **"you"**, which expressly refers to Eberto Perez. However, neither of these paragraphs include a requirement to attend an EUO.

Instead, the EUO requirement is found in Paragraph # 3 which very conspicuously does *not* use the phrase **"you** or the person seeking coverage" when delineating to whom its various post-loss obligations apply. Unlike Paragraphs # 1 and # 2, Paragraph # 3 *omits* the defined term **"you"** and only states that its requirements apply to a "person seeking coverage". Accordingly, Paragraph # 3, by its plain language, does not apply to a named insured, such as Eberto Perez. Indeed, the only time Paragraph # 3 uses the defined term **"you"** is to state that the Defendant may take an EUO without Eberto Perez being present ("*outside of the presence of* ***you***").

In opposition to the plain text of its own insurance contract, the Defendant argued that the phrase a "person seeking coverage" can be interpreted to also refer to Eberto Perez, despite Paragraph # 3's omission of the defined term **"you"**. That is, the Defendant argues that Eberto Perez is *both* **"you"** as well as a "person seeking coverage". However, Defendant's interpretation would not only lead to an absurd result, but same is contradicted by clear Florida law.

When statutory or contractual language uses the disjunctive "*or*" it demonstrates that "the two terms are *not* synonymous" because a party "does not ordinarily use different words to mean the same thing". *Burgess v. State,* 198 So. 3d 1151 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2038a]:

> More fundamentally, however, *Carroll*'s conclusion that the term "driver's license" in section 322.34 means the same thing as "driving privilege" in section 322.271 is itself unsound. Section 322.34 in particular, and chapter 322 in general, commonly refer to the terms "driver's license" and "driving privilege" disjunctively as "driver's license or driving privilege." . . . The legislature's repeated use of the disjunctive formulation "driver's license or driving privilege" demonstrates that the two terms are not synonyms because the legislature does not ordinarily use different words to mean the same thing. *See Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not."); *see also Maddox v. State,* 923 So.2d 442, 446 (Fla. 2006) [31 Fla. L. Weekly S24a] ("Another principle of statutory construction that compels our conclusion . . . is the rule which recognizes that `[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.' " (alteration in the original) (quoting *State v. Mark Marks, P.A.,* 698 So.2d 533, 541 (Fla. 1997) [22 Fla. L. Weekly S439a])).

The subject insurance policy's repeated use of the disjunctive formulation **"you** *or* the person seeking coverage" demonstrates that the term "person seeking coverage" is *not* synonymous with **"you"** and that same must be given a different meaning. *Id*. Therefore, as it is undisputed that **"you"** refers to Eberto Perez, the phrase a "person seeking coverage" cannot be interpreted to also refer to Mr. Perez.

Further, the general rule of construction is that where a party either omits or alters previously used terms, it is presumed that this change in language was intended to have a different meaning. *See, People's Trust Ins. Co. v. Gunsser,* 373 So.3d 422 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D2172d], citing *Ahearn v. Mayo Clinic,* 180 So. 3d 165, 171 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2502d] ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 25, at 170 (2012)).[10]

The subject policy's use of different terms and phrases to delineate to whom its various post-loss obligations apply must be held to connote different meanings. Indeed, in the context of Defendant's insurance policy, "synonymous interpretation" of the terms **"you"** and a "person seeking coverage" does not make logical sense and is patently unreasonable. *People's Trust,* 373 So. 3d at 430 ("In context [of the insurance policy] synonymous interpretation" of the terms "act of nature" and "Act of God" is unreasonable).

To accept Defendant's argument that this Court ought to read the terms **"you"** as well as a "person seeking coverage" to both refer to Eberto Perez would lead to an absurd interpretation. Indeed, "a person seeking coverage" as used in Paragraph # 3 cannot possibly refer to Eberto Perez since the very same provision states that any EUO may be conducted "outside the presence of **you"**—that is, outside the presence of Eberto Perez. Stated otherwise, reading the policy as urged by the Defendant would lead to the absurd result of permitting the Defendant to take Mr. Perez's EUO "outside the presence" of Mr. Perez himself, an obvious impossibility.

If the phrase a "person seeking coverage" was held to also refer to Eberto Perez, then, necessarily, the policy's repeated inclusion of the term **"you"** in Paragraphs # 1 and # 2 within the DUTIES IN CASE OF AN ACCIDENT OR LOSS section would be rendered meaningless, superfluous, and mere surplusage. *See, TRG Columbus Dev. Venture, Ltd. v. Sifontes,* 163 So. 3d 548 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D796a] ("a court may not interpret a contract so as to render a portion of its language meaningless or useless"). That is, if the phrase a "person seeking coverage" also refers to Eberto Perez, then Defendant's inclusion of the term **"you"** in Paragraphs # 1 and # 2 makes no sense and serves no purpose, a result this Court cannot permit. *Id*.

The Court finds that the only reasonable interpretation which gives full effect and meaning to all the provisions of the Defendant's policy, is that the term **"you"** refers to a named insured (as expressly defined in the policy) and that a "person seeking coverage" refers to anyone else seeking benefits who is not listed on the policy, commonly referred to as an "omnibus insured".

Moreover, the language used in Paragraphs # 1 and # 2 (**"you** or the person seeking coverage") makes it abundantly clear that the Defendant knew how to draft a policy provision imposing a post-loss obligation applicable to its named insured, Eberto Perez.[11] Despite having previously done so in the directly proceeding paragraphs of the very same portion of the policy, Defendant did not use parallel construction and identical wording to impart the same meaning in Paragraph # 3. Having failed to do so, this Court cannot now, by judicial fiat, "amend" the insurance contract to include terms which the Defendant elected to omit. *See, Leisure Resorts, Inc. v. City of W. Palm Beach,* 864 So.2d 1163 (Fla. 4th DCA 2003) [29 Fla. L. Weekly D112a] ("[S]ophisticated lawyers . . . must be presumed to know how to use parallel construction and identical wording to impart identical meaning when they intend to do so."); *State v. Bradford,* 787 So. 2d 811 (Fla. 2001) [26 Fla. L. Weekly S369a] ("It is evident that the Legislature knew how to include intent to defraud as an element, and it could have easily done so with respect to subsection (8) if it so wished"); *Aleman v. Gervas,* 314 So. 3d 350, 353 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2387a] (where party used different language to impose individual liability in another portion of a contract, it plainly "knew how to draft a provision imposing individual liability" but did not do so).[12]

Eberto Perez was Not Obligated to Attend an EUO Under the Defendant's Policy and Facts of this Case

Accordingly, since the plain language of the EUO provision of Defendant's insurance policy does not, and cannot, be applied to Eberto Perez, the Defendant's EUO No Show Affirmative Defense fails as a matter of law.

Defendant attempts to extract and/or sever the contractual language it chose to include in its insurance policy by arguing that the EUO provision of the PIP statute found in *Fla. Stat. 627.736(6)(g)* is automatically incorporated as a part of the policy pursuant to *Fla. Stat. 627.7311*, and that the policy's conformity clause requires any inconsistent provisions to be deemed amended to conform to the statute. However, neither of these arguments affords the Defendant an avenue to escape its chosen contractual language.

As discussed above, the plain text of *Fla. Stat. 627.736(6)(g)* makes clear that the "*terms of the policy*" govern an insured's obligation to comply with any "condition[s] precedent to receiving benefits". This is consistent with long-standing precedent holding that, since Florida statutes provide only for the minimum coverage required, insurers are not constrained by minimum mandates and are permitted to contract for broader coverage within their policies. *See e.g., Sturgis v. Fortune Ins. Co*., 475 So. 2d 1272-73 (Fla. 1985); *Wright v. Auto-Owners Ins. Co.,* 739 So. 2d 180-81 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2033a]. Accordingly, the fact that *Fla. Stat. 627.736(6)(g)* is automatically incorporated as a part of the Defendant's policy does not alter the Court's interpretation of the policy's terms. The policy's terms, as noted above, do not impose an EUO requirement on Eberto Perez.

For similar reasons, the Court also rejects the Defendant's conformity clause argument as there is no direct conflict between the Defendant's policy language and *Fla. Stat. 627.736(6)(g). See, Zipes v. Progressive American Ins. Co.,* 673 F. Supp 3d 1313 (US Dist. Ct., S.D. Fla., May 18, 2023) (addressing and rejecting Defendant's arguments regarding the very same conformity clause).

Based on the foregoing, and pursuant to the plain text of the insurance contract as applied to the facts of this case, Defendant's EUO No Show affirmative defense fails as a matter of law and Plaintiff is entitled to summary judgment in its favor on same.

CONCLUSION

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's First Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Policy Language) and Plaintiff's Second Motion for Summary Judgment on Defendant's Affirmative Defense Re: EUO No Show (Re: Defendant's Failure to Meet its Burden of Proof) are hereby GRANTED.

The parties have previously stipulated (docket # 222) and this Court has entered an Order (docket # 224) as to the issues of reasonableness, relatedness, and medical necessity, and same provides that the payable amounts for services rendered by Plaintiff are governed by Defendant's valid fee schedule election pursuant to Fla. Stat. 627.736(5)(a)(1-5) within its policy. Accordingly, the Plaintiff is hereby instructed to confer with defense counsel and submit a proposed Final Judgment in Favor of Plaintiff reflecting the fee schedule amounts owed Plaintiff for the Court's consideration, reserving jurisdiction to determine and award counsel for Plaintiff's attorney's fees and costs.

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[1]Defendant's discovery responses stated "*None*" as to the documents requested by Plaintiff. The fact that Defendant is not in possession of any envelopes, certified mail slips, or certified mail return receipts for its alleged EUO notice letters was also confirmed by Ms. Lozada at her deposition [docket # 183, p. 54 through 75].

[2]Although Ms. Lozada's affidavit contains the "magic words" mandated by *Fla. Stat. 90.803(6)*, this is not the end of the inquiry for the Court in determining whether those documents are admissible in evidence. *Landmark American Ins. Co. v. Pin-Pon Corp.,* 155 So.3d 432 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D191a] ("the fact that a witness employed all the '*magic words*' of the exception does not necessarily mean that the document is admissible as a business record"). Indeed, "the fact that a document is incorporated into a business's records does not automatically bring the document within the business records exception to the hearsay rule . . . Otherwise, every letter which [a party] received in connection with the operation of [its] business and which was subsequently retained as part of [its] business records ipso facto would be fully competent to prove the truth of its contents." *Id*. at 442.

[3]The fact that Defendant's EUO notice letters have tracking numbers printed on them does not alter the rule requiring additional proof to establish mailing. *See*, *Torres v. Deutsche Bank,* 256 So. 3d 903, 906 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2439a] (holding that a request for a return receipt with a barcode at top of a letter "establishes only that the letter was created and printed," not that it was mailed).

[4]The Defendant has not proffered any testimony from a representative or custodian of USPS, nor do the documents and/or internet tracking printouts meet any of the criteria for self-authentication under *Fla. Stat. 90.902*.

[5]As it pertains to Defendant's 2nd EUO Notice Letter, it is undisputed that Defendant is not in possession of any alleged tracking documents for same although the face of this letter reflects a "Fedex Overnight" tracking # 776170997721.

[6]The Court further notes that even if the Defendant had established a hearsay exception and also authenticated the USPS tracking documents so that same could be considered at summary judgment, there are myriad other issues that would have precluded the entry of judgment in favor of Defendant. For instance, the zip code for the law firm stated on Defendant's 1st EUO Notice Letter is "32126" and *does not match* the zip code of "33126" stated on the USPS tracking document referencing certified mail # 9171999991703592109891. Additionally, the USPS tracking document referencing certified mail # 9171999991703592109884 is *not* even attached to Ms. Lozada's affidavit, does *not* reflect Eberto Perez's name, his full street address or apartment number, and the signature does *not* match Eberto Perez's signature as conceded by Ms. Lozada at her deposition [docket # 183, p. 66, line 10 through p. 72, line 18].

[7]As previously noted, this purported "drop" letter was not even attached to Ms. Lozada's affidavit, although she made reference to same. *See, Bifulco v. State Farm Mut. Auto. Ins. Co.,* 693 So. 2d 707 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1325a] (holding that only sworn or certified documents attached to an appropriate affidavit can be considered at summary judgment).

[8]The Court further notes that even if the Defendant had established a hearsay exception and also authenticated the "drop" letter so that same could be considered at summary judgment, the face of the letter would establish that as of March 16, 2016 the law firm *no longer represented Eberto Perez.* Since Defendant's 1st EUO Notice Letter is dated March 18, 2016, and *after* the date of the "drop" letter, any notice allegedly provided to the law firm could still not be imputed to Eberto Perez under Florida law.

[9]The three (3) paragraphs are not numbered within the policy, but the Court has numbered them for purposes of ease of reference.

[10]*See also*, *Priority Medical Centers, LLC v. Allstate Ins. Co.,* 319 So. 3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], *citing Aetna Cas. & Sur. Co. v. Buck,* 594 So. 2d 280, 283 (Fla. 1992) ("[w]hen the legislature amends a statute by omitting words, the general rule of construction is to presume that the legislature intended the statute to have a different meaning from that accorded it before the amendment); *J.S. v. C. M.,* 135 So. 3d 312 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D2374a] ("when the

Legislature used the phrase 'to the petitioner' in one of the attorney's fees provisions of paragraph (b), but deleted it in paragraph (a) of the same statute, we will not imply it where the Legislature excluded it"); *Campbell v. Campbell,* 489 So. 2d 774 (Fla. 3d DCA 1986) ("[j]ust as it is recognized that the same words used in two parts of an instrument are deemed to mean the same thing in both places . . . so, as in this case, the use of different language strongly implies that a different meaning was intended"); *Kel Homes, LLC v. Burris,* 933 So. 2d 699 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2133a] ("[a]s a general proposition, the use of different language in different contractual provisions strongly implies that a different meaning was intended"); *Davis v. Sheridan Healthcare, Inc.,* 281 So. 3d 1259 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2535a] ("use of different terms in different portions of the same statute is strong evidence that different meanings were intended"); *Dep't of Prof. Reg. v. Durrani,* 455 So. 2d 515 (Fla. 1st DCA 1984) ("use of different terms in different portions of the same statute is strong evidence that different meanings were intended"); *Pershing Industries, Inc. v. StoneMor Fla. Subsidiary, LLC,* No. 3D21-2367 (Fla. 3d DCA, Feb. 22, 2023) [48 Fla. L. Weekly D413d].

[11]As noted above, by including the defined term **"you"** in Paragraphs # 1 and # 2, it is undisputed that Defendant's policy applied those post-loss obligations to Eberto Perez.

[12]The Court further notes that far less significant differences in language have been held to nonetheless have critical legal ramifications. *See e.g., Cochran v. State Farm Mut. Auto. Ins. Co.,* 298 So. 2d 173 (Fla. 4th DCA 1974) (holding that term "insured" in definitions section of policy had a different meaning than "the insured" as stated in exclusions); *Fowler v. Gartner,* 89 So. 3d 1047 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1293a] (marital settlement agreement which included both terms of "day" and "business day" in different provisions did not mean the same thing).

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations on application—Failure to disclose prior accident that resulted in PIP claim—Insurer is deemed to have had knowledge of facts material to risk at time of application where insured served insurer with technical requests for admission that she had disclosed this information to insurer's agent at the time she applied for insurance and that agent had knowledge of this disclosure at the time he prepared the application, and insurer took no action to remedy this technical admission—Further, insurer did not respond to insured's motion for summary judgment on this issue—Summary judgment granted in favor of provider on insurer's material misrepresentation defense—Plaintiff entitled to summary judgment on issue of reasonableness of charges where insurer did not file response to motion or opposing evidence

LAKE MEDICAL GROUP, LLC., a/a/o Dalay Perez, Plaintiff v. THE RESPONSIVE AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-006677-CC-26. Section SD03. January 17, 2025. Lissette De la Rosa, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Rebecca Beaudoin, Vaccaro Law Firm, Davie, for Defendant.

ORDER ON PLAINTIFF'S MOTION(S) FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on 01/08/25 at 9:15 a.m. on (i) Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment (docket # 86), (ii) Plaintiff's Motion for Summary Judgment as to Reasonableness of Plaintiff's Charges (docket # 87), and (iii) Plaintiff's First Motion for Summary Judgment on Defendant's Affirmative Defense Re: Material Misrepresentation and Count I of Plaintiff's Complaint (docket # 176).

The parties were represented by counsel at the hearing who presented arguments to the Court. Rebecca Beaudoin, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed the matter, the relevant legal authorities, the entire Court file, and having heard argument from counsel and being otherwise fully advised in the premises, makes the following factual findings and conclusions of law, and enters this Order GRANTING Plaintiff's Motion(s) for Summary Judgment.

Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment

In a PIP case, the plaintiff medical provider's prima facie case for recovery of benefits is established with proof that its treatment is related to the motor vehicle accident, medically necessary, and that its charges are reasonable in price. *Derius v. Allstate Indemnity Co.*, 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a].

On 04/10/20 Plaintiff filed the affidavit of Jason Morris Levine, D.C. (docket # 85) who opined that Plaintiff's treatment rendered to Dalay Perez was medically necessary and related to the subject motor vehicle accident.

On 05/10/20 Plaintiff filed its Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment (docket # 86) in reliance upon Dr. Levine's affidavit.

The Court finds that Plaintiff has met its burden of proof as to the issues of relatedness and medically necessary. As the Defendant neither filed any evidence in opposition nor a response as mandated by Fla. R. Civ. P. 1.510(c)(5), the Court considers these issues to be undisputed and Plaintiff is entitled to entry of summary judgment in its favor.

Accordingly, Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment is hereby GRANTED.

Plaintiff's Motion for Summary Judgment as to Reasonableness of Plaintiff's Charges

As it pertains to the issue of reasonableness of Plaintiff's charges, on 03/30/20 Plaintiff filed the affidavit of Craig Dempsey (docket # 82) who opined that Plaintiff's charges for the treatment rendered to Dalay Perez are reasonable charges within the range of usual and customary charges for similar care in the Miami-Dade County geographical area.

On 05/20/20 Plaintiff filed its Plaintiff's Motion for Summary Judgment as to Reasonableness of Plaintiff's Charges (docket # 87) in reliance upon Mr. Dempsey's affidavit.

The Court finds that Plaintiff has met its burden of proof as to the issue of reasonableness of charges. As the Defendant neither filed any evidence in opposition nor a response as mandated by Fla. R. Civ. P. 1.510(c)(5), the Court considers this issue to be undisputed and Plaintiff is entitled to entry of summary judgment in its favor.

Accordingly, Plaintiff's Motion for Summary Judgment as to Reasonableness of Plaintiff's Charges is hereby GRANTED.

Plaintiff's First Motion for Summary Judgment on Defendant's Affirmative Defense Re: Material Misrepresentation and Count I of Plaintiff's Complaint

Having disposed of the Plaintiff's burden in this action, the Court must now address the "material misrepresentation" affirmative defense raised by the Defendant as an avoidance to payment of the Plaintiff's claim.

Specifically, Defendant's "material misrepresentation" defense alleges that the named insured under its insurance policy, Eliese Perez Barberia, "failed to list a prior accident which occurred on 12/17/11 . . . which resulted in a PIP claim being submitted". Defendant further alleged that had this information been listed on the insurance application it would not have issued the subject insurance policy and that same was rescinded and/or void *ab initio.*

On 05/05/23 Plaintiff filed its Motion for Summary Judgment on the Issue of Agency (docket # 116). Said motion argued that the insurance agent who prepared the insurance application at issue, Jorge Alonso, was the agent of the Defendant and, accordingly, the actions, omissions, knowledge, and/or statements of this agent are imputed to Defendant. *See*, *Hardy v. American S. Life Ins. Co.*, 211 So.2d 559, 560-61 (Fla. 1968) ("knowledge of an insurer's agent. . .is imputable to the insurer"); *Johnson v. Life Ins. Co. of Georgia*, 52 So.2d 813, 815 (Fla. 1951) (same); *Russell v. Eckert*, 195 So.2d 617, 621-22 (Fla. 2d DCA 1967) ("[a]cts of an insurance agent within the scope of his real or apparent authority are binding upon his principal"); *Almerico v.*

RLI Ins. Co., 716 So.2d 774 (Fla. 1998) [23 Fla. L. Weekly S431a] ("an insurer may be held accountable for the actions of those whom it cloaks with apparent agency").

On 10/25/24 this Court entered its Order Granting Plaintiff's Motion for Summary Judgment on the Issue of Agency (docket # 167). Accordingly, the existence of an agency relationship between the insurance agent, Jorge Alonso, and the Defendant is established as a matter of law.

On 10/07/24, and in support of its position that there was no "material misrepresentation", Plaintiff served its Third Supplemental Request for Admissions (docket # 163) on the Defendant. Relevant here, request for admission # 6 sought an admission that at the time she applied for insurance with Defendant, the named insured had disclosed to the agent, Jorge Alonso, that she had a prior automobile accident that resulted in the submission of a PIP claim. Similarly, request for admission # 7 sought an admission that at the time he prepared the insurance application, Jorge Alonso had knowledge that the named insured had a prior automobile accident that resulted in the submission of a PIP claim.

Defendant failed to respond or object to Plaintiff's Third Supplemental Request for Admissions and, accordingly, same are deemed admitted by operation of Fla. R. Civ. P. 1.370(a).

On 11/08/24 Plaintiff served its Notice of Technical Admissions & Plaintiff's Reliance upon Technical Admissions (docket # 177). Although this document placed the Defendant on notice of its failure to respond or object to Plaintiff's Third Supplemental Request for Admissions and that Plaintiff intended to rely upon the technical admissions, Defendant took no action.

On 11/08/24 Plaintiff also served the subject Motion for Summary Judgment on Defendant's Affirmative Defense Re: Material Misrepresentation and Count I of Plaintiff's Complaint (docket # 176). Despite being in receipt of a dispositive summary judgment motion relying upon the technical admissions, Defendant took no action.

On 12/05/24 the Court held an in-person Case Management Conference wherein the Plaintiff's pending motion(s) for summary judgment were specifically addressed by the Court and discussed with counsel for both parties (the same counsel who likewise appeared for the 01/08/25 summary judgment hearings). At the Case Management Conference, the Court entered an Order setting Plaintiff's motion(s) for summary judgment for hearing to occur on 01/08/25 (docket # 189).

Thereafter, both the Court, as well as the Plaintiff, filed Notice(s) of Hearing again placing the Defendant on notice of the upcoming dispositive summary judgment hearings (docket # 191 & 193).

Despite the foregoing, Defendant never took any action whatsoever to remedy its technical admissions. Defendant neither responded to the admissions nor filed a motion for relief from the technical admissions. Even at the hearing, Defendant did not attempt to make an *ore tenus* motion for relief from the technical admissions.

Under these facts, the Court deems it proper to enforce the admissions as well as the mandate of Fla. R. Civ. P. 1.370(b) providing that "[a]ny matter admitted under this rule is *conclusively established*". *See*, *Farish v. Lum's Inc.*, 267 So.2d 325 (Fla. 1972) (no abuse of discretion in trial court granting summary judgment in reliance on technical admissions obtained under R. 1.370); *Morgan v. Thomson*, 427 So.2d 1134 (Fla. 5th DCA 1983) ("a motion must be made for relief from the admissions automatically resulting from a failure to timely answer a request for admissions. In this regard a trial judge cannot err until he rules on a proper motion for relief. No motion, no relief, no error"); *West v. West*, 436 So.2d 1010 (Fla. 5th DCA 1983) ("we hold the trial court does err in granting relief from admissions in the absence of a motion"); *Asset Mgmt. v. City of Tamarac*, 913 So.2d 1179 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2415a] (affirming trial court's grant of summary judgment premised solely on technical admissions where nonmoving party did not seek leave to file late responses until date of the summary judgment hearing).

Indeed, the record before this Court establishes that the Defendant's conduct in failing to timely respond to Plaintiff's Third Supplemental Request for Admissions or take any action to remedy the technical admissions prior to the hearing could not have resulted from mere inadvertence. Defendant was furnished with repeated and ample notice of the admissions, time and again, but remarkably elected to take no action whatsoever. Defendant also failed to establish any reasonable excuse for its complete failure to act and, accordingly, the Court finds the Defendant's conduct constitutes *inexcusable* neglect resulting from a lack of due diligence on the part of Defendant.

The Court further finds that the Plaintiff would be prejudiced should the admissions not be enforced. This is an eight (8) year old PIP case. The parties have conducted extensive discovery and the matter has been set and reset for trial no less than six (6) times (docket # 115, 121, 124, 136, 141, 179). Notwithstanding the length of this litigation and having previously been afforded every opportunity to prosecute its case, Defendant has nonetheless failed to proffer *any* affidavits or other evidence whatsoever that would serve to *contradict* the admissions relied upon by the Plaintiff. At this very late stage of the proceedings, it would be prejudicial for the Defendant to be afforded yet another opportunity and would serve only to subvert the intended function of the federal summary judgment standard adopted in Florida.

Compounding the Defendant's failure to act on the admissions, Fla. R. Civ. P. 1.150(c)(5) expressly *required* the Defendant to file a response to Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defense Re: Material Misrepresentation and Count I of Plaintiff's Complaint ("the nonmovant *must* serve a response").

As made clear from the plain text, the requirement to file a response is mandatory. *State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc.*, 368 So.3d 1049 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1555a] (finding "party cannot evade the requirement to timely file [its response]" and noting that the rule is "not advisory and [is] meant to provide time limits to raise arguments and present evidence in order to prevent gamesmanship, unfair surprise and prejudice"); *Guess v. Aberdeen Golf*, 358 So.3d 449 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D656b] ("the requirement of filing a response [to summary judgment] is mandatory").

As such, if it wanted to contradict the admissions, Defendant was mandated by Fla. R. Civ. P. 1.510(c)(5) to file a response setting forth its factual position and delineating its evidence in opposition. Defendant, again, failed to do so.

Having failed to file any affidavits, evidence, or a response pursuant to Fla. R. Civ. P. 1.510(c)(5), the Court considers Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defense Re: Material Misrepresentation and Count I of Plaintiff's Complaint to be undisputed. *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So.3d 1131 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a] ("Because the defendants failed to file a response with their supporting factual position, as required under the amended rule, the trial court was permitted to consider the facts set forth in the plaintiff's motion for summary judgment as 'undisputed for purposes of the motion.' Fla. R. Civ. P. 1.510(e)(2)").

Since the record before the Court is undisputed that Defendant's agent had knowledge of the grounds purportedly constituting a "material misrepresentation" and that same was disclosed by the named insured at the time she applied for insurance, binding decisional precedent provides that Defendant is deemed to have had

knowledge of the facts material to the risk at the time of the application and is barred from now seeking a forfeiture. *See*, *Columbian Nat. Life Ins. Co. v. Lanigan*, 154 Fla. 760, 766-67 (Fla. 1944) ("if the insured gives truthful answers to questions contained in the application for . . . insurance, and the company's agent, either through fraud or mistake, inserts answers in the application which do not accord with the information given, the insurer cannot insist on breach of warranty, but is estopped from making such a defense"); *Fresh Supermarket Foods, Inc. v. Allstate Ins.*, 829 So.2d 1000 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2477c] ("notice to the agent at the time of the application for insurance of facts material to the risk is notice to the insurer, and will prevent the insurer from insisting upon a forfeiture for cause within the knowledge of the agent").[1]

Based on the foregoing, Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defense Re: Material Misrepresentation and Count I of Plaintiff's Complaint is hereby GRANTED.

Conclusion

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Motion(s) for Summary Judgment are hereby GRANTED as set forth above.

There being no other issues for the Court's disposition, Plaintiff is hereby instructed to confer with defense counsel and submit a proposed Final Judgment in Favor of Plaintiff reflecting the fee schedule amounts[2] owed Plaintiff for the Court's consideration, reserving jurisdiction to determine and award counsel for Plaintiff's attorney's fees and costs.

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[1]*See also*, *Direct Gen. Ins. Co. v. Daniel Laine*, FLWSUPP3009DIRE, No. 2019-CA-11488-O (Fla. 9th Cir., J. Chiu, Oct. 27, 2022) [30 Fla. L. Weekly Supp. 553a]; *Direct Gen. Ins. Co. v. Nydreka Williams*, FLWSUPP 3003DIRE, No. 20-CC-028749 (Fla. 13th Cir., J. Bagge-Hernandez, June 12, 2022) [30 Fla. L. Weekly Supp. 298b]; *Murphy Med. Center, Inc. v. Victoria Select Ins. Co.*, 25 Fla. L. Weekly Supp. 193a (Fla. 13th Cir., J. Williams, Apr. 10, 2017); *Imperial Fire & Cas. Ins. Co. v. Juana Alvardo*, FLWSUPP 3005ALVA, No. 21-CA-000447 (Fla. 6th Cir., J. Boyd, July 22, 2022) [30 Fla. L. Weekly Supp. 281a].

[2]Plaintiff does not contest that Defendant's policy has a valid fee schedule election pursuant to Fla. Stat. 627.736(5)(a)(1-5) that governs the payable amounts owed.

* * *

Consumer law—Florida Consumer Collection Practices Act—Attorney's fees—Prevailing defendant—Defendant who prevailed in suit brought under FCCPA by asserting litigation privilege is not entitled to attorney's fees and costs in instant case—Court cannot rule that suit, which raised several issues of first impression that required extensive briefing, failed to raise justiciable issues of law or fact

KAC 2021-1, LLC, a/a/o Johnny Smith, Plaintiff, v. AMERICAN HOMES 4 RENT PROPERTIES ONE, LLC, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2022-SC-94477. December 3, 2025. Jessica G. Costello, Judge. Counsel: Daniel W. Bialczak and Brian K. Korte, Korte & Associates, PLLC, Palm Beach Gardens, for Plaintiff. Gary A. Sanoba and Meghan C. McDonough, The Sanoba Law Firm, Lakeland, for Defendant.

[PROPOSED] ORDER DENYING ENTITLEMENT TO ATTORNEY'S FEES & COSTS

THIS CAUSE came before the Court on Defendant's Motion for Attorney's Fees & Costs per Fla. Stat. § 559.77(2) [Docket No: 38] (filed June 28, 2023), and Plaintiff's opposition to same [Docket No: 62], which the Court heard on August 28, 2025 [Docket Nos: 61, 63]. Section 559.77(2) authorizes Defendants be awarded fees & costs in cases brought under Florida's Consumer Collection Practices Act ("FCCPA") ***only*** when "the suit fails to raise a justiciable issue of law or fact, [is] the plaintiff . . . liable for court costs and reasonable attorney's fees incurred by the Defendant." FLA. STAT. § 559.77(2) (2025).

Having considered the parties' written and oral arguments, the Court agrees, as it must, with *Dish Network Serv., LLC v. Myers*, 87 So.3d 72, 76 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D975a], where the Second DCA held that only the "rare case" warrants Defendants be awarded fees & costs under § 559.77(2). That said, few Florida appellate decisions directly address when a suit does (or does not) "raise justiciable issue[s] of law or fact" to entitle Defendants to fees & costs under § 559.77(2).

Section 559.77(2) appears to have borrowed language from Fla. Stat. § 57.105 before the Legislature amended § 57.105 in 1999. To that apparent end, § 559.77(2) and pre-1999 § 57.105 use nearly identical language. *Compare* FLA. STAT. § 559.77(2) (2023) with FLA. STAT. § 57.105 (1997) (both using failure to raise justiciable issue of law or fact as standard for fees award). Because that is so the Court will heed Judge Thomas's concurrence in *Morrison v. United States*, 73 So.3d 336 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2375a] (recommending courts apply pre-1999 § 57.105 caselaw to decide when suits fail to raise justiciable issues of law or fact) (citing *Langford v. Ferrera*, 823 So. 2d 795 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2740a] (discussing similar standard for determining fees under previous version of section 57.105, Florida Statutes)).

In this case, although the Defendant ultimately prevailed by asserting Florida's litigation privilege, that alone does not suffice to rule plaintiff's suit failed to raise justiciable issues of fact or law so to place this case within *Dish Network*'s category of "rare case[s]," where § 559.77(2) would entitle Defendant to fees & costs. As a prerequisite to an award of attorney's fees pursuant to section 57.105,

> the trial court must find a complete absence of a justiciable issue of law or fact raised by the losing party. [citation omitted]. The suit must be so clearly devoid of merit both on the facts and law as to be completely untenable. [citation omitted]. ***Even if a portion of the complaint is frivolous, an award of attorney's fees is not appropriate so long as the complaint alleges some justiciable issues***. *See Muckenfuss v. Deltona Corp.*, 508 So. 2d 340 (Fla. 1987); *Boyce v. Cluett*, 672 So. 2d 858 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D811a]. Furthermore, dismissal of a suit does not necessarily justify an attorney's fee award if the suit can be considered to have been non-frivolous at its inception.

Lanford, 823 So.2d 795-76 (emphasis added). *Wood v. Price*, 546 So.2d 88 (Fla. 2nd DCA 1989) defined the standard like this:

> [A] complete absence of a justiciable issue of either law or fact is tantamount one that is so readily recognizable as devoid of merit on the face of the record that ***its character may be determined without argument or research.***

Price, 546 So.2d at 90 (emphasis added).

As Plaintiff argued in its brief opposing Defendant's motion for fees & costs, the suit here raised no less than five (5) issues of first impression, *see* [Docket No: 62] (Plt's Opp'n Br., at pp.4-5). Where, as here, a suit raises issues of first impression, the Court cannot rule that plaintiff's suit here failed to raise justiciable issues of law or fact. To so rule would present reversible error. *See, e.g., Russel v. State*, 417 So.2d 1119, 1121 (Fla. 5th DCA 1982) ("[T]he statute should not be so construed that it will have a chilling effect on parties who, for example, may unsuccessfully attempt to raise questions of first impression, nor should it be construed in a manner that will deter the future growth of the law by exacting a price for today's unavailing efforts to change it."); *Carnival Leisure Indust. v. Holzman*, 660 So.2d 410, 412-13 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2156b] (complaint not frivolous where, as here, no appellate decision had addressed the issues raised when plaintiff first filed suit).[1]

Finally, the Court notes that granting Defendant's motion to dismiss required extensive briefing—that is, Defendant moved to dismiss [Docket No: 31]; plaintiff opposed [Docket No: 33]; then, Defendant supplemented its initial motion to dismiss [Docket No: 34],

and Plaintiff responded [Docket No: 35]. Where, as here, substantial brief and argument are required to resolve legal or factual issues, no one can credibly claim the suit was frivolous or failed to raise justiciable issues. That's been the law in Floria for over forty years. *See Whitten v. Progressive Cas. Ins.*, 410 So.2d 501, 505 (Fla. 1982) (claim cannot qualify as frivolous or raising no justiciable issue where, as here, substantial briefing and argument required to resolve said claim).

Therefore, having considered the parties' briefs and arguments on Defendant's entitlement to fees & costs per Fla. Stat. § 559.77(2), IT IS HEREBY ORDERED & ADJUDGED that:

1. Defendant's Motion for fees & costs [Docket No: 38] is DENIED.

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[1]*See also*; *Fairview Properties v. Pate Const't*, 638 So.2d 998, 1000 (Fla 4th DCA 1994) ("good faith attempt to change the law does not render an action frivolous"); *Muckersom v. Burris*, 553 So. 2d 1300 (Fla. 3rd DCA 1989), *rev. denied* 567 So. 2d 435 (Fla. 1990) (holding that it was wrong to assess attorney's fees against an attorney for the unsuccessful plaintiff where the plaintiff was engaged in a good faith, soundly based, non-frivolous but unsuccessful attempt to change an existing law).

* * *

Insurance—Discovery—Failure to respond or request protective order—Waiver of all objections except those based on privilege

ALEXANDER TRUJILLO, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 25-CC-006276. December 12, 2025. Jessica G. Costello, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Marsha Moses, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL DISCOVERY

THIS MATTER having come before the court on December 9, 2025 on Plaintiff's Motion to Compel Discovery. (Docket #69). Having reviewed and considered the motion, the supporting memoranda, the relevant materials in the file, the arguments presented by counsel, and the applicable law, and being otherwise fully advised, the Court finds as follows:

1. It is undisputed that Defendant did not timely respond nor file a Motion for Protective Order in response to Plaintiff's Second Request to Produce, as well as Plaintiff's Third Request to Produce.

2. Under Florida Rule of Civil Procedure 1.380(d), the failure of a party to comply with discovery requests may not be excused on the ground that the discovery sought is objectionable unless that party has applied for a protective order as provided by Florida Rule of Civil Procedure 1.280(c). As such, based upon Defendant's failure to timely respond, Defendant has waived all objections, except those based upon privilege. *American Funding Ltd. v. Hill*, (Fla. 1st DCA 1981).

3. Plaintiff's Motion to Compel Discovery is **HEREBY GRANTED**.

* * *

Creditors' rights—Garnishment—Exemptions—Head of household—Claim for exemption filed within 20 days of receipt of notice to defendant is timely—Defendant's sworn testimony that he is primary income earner and provides majority of financial support for multiple dependents established that he is head of household and that money qualifies as protected earnings

PARTNER'S FEDERAL CREDIT UNION, Plaintiff, v. AARON T. COLBURN AND SARINA H. COLBURN, Defendant, and REEDY CREEK PROFESSIONAL FIREFIGHTER'S ASSOCIATION LOCAL 2117, Garnishee. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2025-CC-1861. December 16, 2025. Sylvia Grunor, Judge. Counsel: Jeffrey Mouch, Kass Shuler, P.A., for Plaintiff. Bryan A. Dangler, 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 December 3, 2025, on the *Defendant's Verified Claim of Exemption from Garnishment*, and the Court having reviewed the court file, heard argument from counsel, and being otherwise fully advised in the premises, finds as follows:

On August 21, 2025, a Continuing Writ of Garnishment was issued by the Clerk.[1] On September 5, 2025, Plaintiff filed a Notice to Defendant, which included a copy of the Notice to Defendant of Right Against Garnishment of Wages, Money, and Other Property ("Notice to Defendant").[2] The certificate of service states that a copy of the Notice to Defendant was furnished by U.S. Mail to the Defendant on September 5, 2025. On October 28, 2025, Defendant filed his Verified Claim of Exemption from Garnishment.[3] In his claim, Defendant stated that he received a copy of the Notice to Defendant on October 8, 2025. On November 4, 2025, Plaintiff submitted its Reply to Defendant's claim, denying that allegations in Defendant's claim, and stating that (i) the retained funds are not exempt property, and (ii) Defendant's claim was untimely under Florida Statute §77.041(1).[4]

Defendant's claim was filed within 20 days of receiving the Notice to Defendant and is therefore timely. *See* 77.041(1), Fla. Stat. ("If you have a valid exemption, you must file the form with the Clerk's office within 20 days after the date you receive this notice or you may lose important rights."). Additionally, Defendant's sworn testimony that he is the primary income earner and provides a majority of financial support for multiple dependents established that he is Head of Household and that the money being claimed as exempt qualifies as protected earnings. §222.11, Fla. Stat.

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

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

2. The Garnishee, Reedy Creek Professional Firefighter's Association Local 2117, shall immediately cease any further garnishment of Defendant's wages and/or property.

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[1]DIN #22.
[2]DIN #23.
[3]DIN #27.
[4]DIN #28.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Fundraising—Donations—A judge may not donate to a meal train and/or online crowdfunding platform for benefit of sick spouse of an attorney that appears before judge—Donations would create reasonable perception that judge's impartiality is compromised and would undermine public confidence in integrity of judiciary

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-16. Date of Issue: December 16, 2025.

ISSUES

May a judge donate money to a meal train and/or GoFundMe account for the benefit of the sick spouse of an attorney that appears before the judge?

ANSWER: No. Such a donation would create a reasonable perception that the judge's impartiality is compromised and would undermine public confidence in the integrity of the judiciary.

FACTS

The inquiring judge received a request to contribute to a meal train or GoFundMe campaign established for an individual undergoing cancer treatment. The individual is married to an attorney who regularly practices before the judge. Although the judge wishes to contribute out of compassion, the judge is concerned about the appearance of impropriety.

DISCUSSION

This Committee has addressed judicial charitable donations on several occasions. Canons 2, 3, and 5 of the Code of Judicial Conduct provide the relevant framework.

Canon 2A of the Florida Code of Judicial Conduct requires a judge to act at all times in a manner that promotes public confidence in the judiciary. Canon 3A provides that a judge's judicial duties must take precedence over all other activities. Lastly, Canon 5A requires that a judge's judicial activities not cast reasonable doubt on the judge's capacity to act impartially or undermine the judge's independence, integrity, or impartiality.

In JEAC Op. 2010-17 [18 Fla. L. Weekly Supp. 118a], the Committee advised that a traffic hearing officer could donate money to a legal aid organization so long as attorneys from that organization did not appear before the hearing officer. The Committee reasoned that if the organization's attorneys litigated before the officer, a donation could convey partiality and violate Canon 2A.

In JEAC Op. 2014-26 [22 Fla. L. Weekly Supp. 767b], the Committee clarified that a judge may donate to a legal aid organization even if its lawyers appear before the judge, because Canon 4B and its Commentary specifically encourage judicial support for pro bono legal services. The Committee concluded that such support—whether direct or through an umbrella charitable organization—generally does not create a perception that the judge's impartiality is impaired. Nevertheless, the Committee cautioned judges to consider any specific circumstances that could give rise to a contrary perception. Specifically, we reasoned that if the organization's attorneys engaged in litigation before the judicial officer, then the judicial officer's donation of money to the legal aid organization would violate Code of Judicial Conduct Canon 2A by conveying the appearance of the judicial officer's partiality for the attorneys in that organization.[1]

The Committee believed that Canon 4B and its Commentary, which more specifically encourage judges to support pro bono legal services, can be reconciled with Canons 2A, 4A(1), and 4A(2), which more generally encourage judges to conduct themselves in a manner which promotes integrity and impartiality. In the Committee's view, as a general proposition, a judge's donation of money to a legal aid organization would not create, in reasonable minds, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired where an attorney from the legal aid organization, or a party assisted by the legal aid organization, appears before the judge.

In sum, the Committee believed that, as a general proposition, a contribution to a legal aid organization by a judge is permissible even if the organization's lawyers appear before the judge, but that the judge should be aware of specific circumstances surrounding the contribution which might cause a reasonable person to conclude that the judge's impartiality is impaired.

Today's inquiry is materially different. Here, a judge seeks to donate not to a broad charitable or public-interest organization, but directly to a fund created for the immediate family member of a lawyer who regularly appears before the judge.

While the desire to help is commendable, such a donation would violate Canons 2, 3, and 5. Judges serve "24 hours a day and seven days a week," and even well-intentioned personal acts cannot override the obligation to remain, and appear, fair and impartial.

A reasonable member of the public, knowing that a judge donated money to support the spouse of an attorney who practices before that judge, could readily question the judge's neutrality. Likewise, opposing counsel or parties could perceive an uneven playing field. This would undermine confidence in the integrity and impartiality of the judiciary.

After analyzing the applicable canons and prior opinions, the Committee concludes that the judge may not donate to a meal train or GoFundMe account benefiting the ill spouse of an attorney who regularly appears before the judge. The judge's obligation to avoid the appearance of impropriety must govern, even when the judge's motives are entirely compassionate.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A, 3A, 4A, 4B, 5A, and 5D.
Fla. JEAC Ops. 2014-26 [22 Fla. L. Weekly Supp. 767b] and 2010-17 [18 Fla. L. Weekly Supp. 118a].

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[1]Canon 2A provides that "A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The Commentary to Canon 2A provides that "A judge must avoid all impropriety and appearance of impropriety. . . . The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

* * *