Volume 33, Number 2, June 30, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 45-104

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.

- **CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION—FLORIDA CIVIL RIGHTS ACT—LIMITATION OF ACTIONS. Section 760.11(5) requires that "[a] civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission." The circuit court concluded that "determination of reasonable cause by the commission" refers to a reasonable cause determination by the Florida Commission on Human Relations, not the issuance of a right to sue letter by the Equal Employment Opportunity Commission. The court denied the employer's motion to dismiss the employee's complaint as time-barred. The court further determined that the four-year statute of limitations for statutory violations applied to the employee's action where the FCHR failed to make a reasonable cause determination within 180 days after the complaint was filed.** *WILLIAMS v. MANAGEMENT & TRAINING CORPORATION. Circuit Court, Second Judicial Circuit in and for Gadsden County. Filed April 9, 2025. Full Text at Circuit Courts-Original Section, page 51a.*

- **CRIMINAL LAW—DRIVING UNDER INFLUENCE—EVIDENCE—EXPERT—BLOOD ALCOHOL CONTENT—EXTRAPOLATION. A deputy who had no formal toxicology, medical, biomedical, or pharmacological training was not qualified to testify as an expert regarding retrograde extrapolation. The deputy was not qualified to testify as to what defendant's blood alcohol level would have been at the time she was driving based on the results of a breath test performed one and a half hours after she was detained.** *STATE v. WILLIAMS. County Court, Eleventh Judicial Circuit in and for Miami-Dade County. April 17, 2025. Full Text at County Courts Section, page 87a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Licensing—Driver's license—Suspension—Driving under influence—Due process—Licensee was accorded procedural due process where he received notice and opportunity to be heard regarding one-year license suspension based on out-of-state DUI conviction—No merit to argument that Department of Highway Safety and Motor Vehicles was not authorized to suspend license for period longer than six months in absence of evidence that licensee refused to submit to chemical test—Section 322.28(2)(a)1 affords DHSMV discretion in determining appropriate suspension within range of six months to one year—Further, where court did not specify period of license revocation, section 322.28(2)(b) required DHSMV to suspend license for maximum period of one year—Record contains competent substantial evidence to support one-year suspension despite absence of evidence of test refusal—Arguments regarding lawfulness of detention or arrest are waived where not raised below

MICHAEL DENNIS THOMPSON, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 24-000006-AP. February 17, 2025. Counsel: Lee M. Pearlman, Denmon Pearlman Law, St. Petersburg, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER AND OPINION

(**PER CURIAM.**) Petitioner, MICHAEL DENNIS THOMPSON ("Thompson") seeks review of an order issued by Respondent, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("Department") on February 1, 2024, which suspended Thompson's driver license for a period of one year. This Court has jurisdiction pursuant to Article V, Section 5(b), Florida Constitution; Florida Rule of Appellate Procedure 9.030(c)(3); and sections 322.2615(13) and 322.31, Florida Statutes (2024). We dispense with oral argument on our own motion pursuant to Florida Rule of Appellate Procedure 9.320(c).

I. Factual Background and Procedural History

The underlying facts of this case are not in dispute. "Petitioner was cited for DUI in Michigan on August 15, 2022, and pled to an allegation of DUI in Michigan with a disposition date of October 23, 2023." Am. Pet. at 7. On November 6, 2023, the Department issued an order revoking Thompson's Florida driver license effective November 27, 2023 for a period of one year. Per Thompson's request, the Department conducted a show cause hearing on January 3, 2024 wherein Thompson contested the length of his suspension. The hearing officer received evidence which included: 1) a record of Thompson's Michigan DUI conviction; and 2) Thompson's driving record, which indicated that the Michigan DUI conviction was his first DUI offense.

On February 1, 2024, the Department's hearing officer rendered her Final Order ("Order") which upheld the Department's one-year license suspension. Thompson's timely Petition for Writ of Certiorari contesting the Department's Order followed. As of May 17, 2024, the Amended Petition for Writ of Certiorari ("Amended Petition") is the effective pleading in this action. The Department filed its Response to the Amended Petition on October 3, 2024. Thompson has failed to file a timely reply despite this Court's Order dated December 10, 2024 requiring him to file a reply by December 30, 2024. Accordingly, we now consider the merits of the Amended Petition without a reply.

II. Standard of Review

A circuit court acting in its appellate capacity to review an order of the Department must conduct first-tier certiorari review of the matter. *Dep't of High. Saf. & Motor Veh. v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D552a]. Such review "is limited to determining (1) whether due process was accorded, (2) whether the essential requirements, of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dep't of High. Saf. & Motor Veh.,* 209 So. 3d 1165, 1170 (Fla. 2017) [42 Fla. L. Weekly S85a] (citations omitted).

III. Analysis

Thompson's primary contention on review is that the Department erred in suspending his license for a period of one year. He insists that the maximum penalty for his Michigan DUI conviction was a 6-month suspension because there is no evidence that he refused to submit to a chemical test. Notably, the argument section of the Amended Petition only contains a single subheading which does not specifically mention any prongs of the applicable standard of review. Vague and cursory references to each of the three prongs are scattered throughout the Amended Petition. Although Thompson has arguably failed to ground his argument in any of the standard of review prongs, we nonetheless consider each prong in turn.

A) Procedural Due Process

The entirety of Thompson's due process argument is limited to the following: "In the absence of clear and irrefutable evidence of refusal, imposing [a one-year license suspension] is not only unjust but also a violation of Petitioner's ***due process rights***." Am. Pet. at 10-11 (emphasis added). Thompson goes no further than this bare statement. He does not attempt to explain how his "due process rights" have been violated nor does he distinguish between procedural and substantive due process. Accordingly, we hold that Thompson has waived any procedural due process arguments by failing to properly brief the Court on the issue beyond a mere cursory statement. See *Bryant v. State,* 901 So. 2d 810, 827 (Fla. 2005) [30 Fla. L. Weekly S310a] (stating that cursory arguments in appellate briefs are insufficient for consideration by the court and result in waiver (citing *Duest v. Dugger,* 555 So. 2d 849, 852 (Fla. 1990)).

Even assuming *arguendo* that Thompson had validly raised a procedural due process argument, we find no error. "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade Cty.,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Here, Thompson makes no argument that the Department failed to provide notice of the hearing or an opportunity to be heard. The record includes: 1) the Notice of Administrative Hearing dated December 6, 2023, which is addressed to Thompson and contains details for the January 3, 2024 hearing; and 2) the transcript for the hearing, which demonstrates that counsel represented Thompson at the hearing. As such, Thompson received proper notice and a meaningful opportunity to be heard. Under such circumstances, the Department accorded procedural due process to Thompson.

B) Essential Requirements of the Law

Next, we consider whether the Department observed the essential requirements of the law. The nature of this inquiry is the same as second-tier certiorari review: we must assess whether the lower tribunal applied the correct law. See *Florida Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a] (stating that the second prongs of both first-tier and second-tier certiorari review "are equivalent"). Whether the lower tribunal applied the correct law is synonymous with whether it observed the essential requirements of the law. *Moore v. Dep't of High. Saf. & Motor Veh.,* 169 So. 3d 216, 219 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1520a]. "A departure from the essential requirements of the

law requires more than a simple legal error or an erroneous conclusion based on misapplication of the correct law." *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC,* 95 So. 3d 1037, 1039 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2058a].

First, Thompson argues the following: "The order to be reviewed is a final order rendered on February 1, 2024, sustaining the administrative suspension of petitioner's driver's license under Florida Statute §322.2615[,] which was improperly applied. The proper Florida Statute §322.28 was not applied." Am. Pet. at 6-7. This contention is clearly meritless. The very first sentence in the Order indicates that the Department revoked the driving privilege of Thompson "for one year for driving under the influence ***as authorized by section 322.28 and section 322.24, F.S.***"[1] The Order never cites to section 322.2615 nor does the transcript for the proceeding contain a reference to section 322.2615. Thompson's first contention is therefore entirely unfounded as the Department's determination was grounded in section 322.28.

Next, Thompson "contends that the administrative order below departs from the essential requirements of the law" arguing that the "12-month driver's license suspension was excessive and unnecessary." Am. Pet. at 7-8. Thompson argues that "[t]he proper Florida Statute to evaluate this suspension . . . is Florida Statute 322.28(2)(a)(1)." Am. Pet. at 10. Without citing any further authority, Thompson claims that the only sanction the Department is authorized to impose in the absence of a chemical test refusal is a six-month suspension.

Section 322.28(2)(a)(1), Fla. Stat. (2024) states in full: "Upon a first conviction for a violation of the provisions of s. 316.193,[2] except a violation resulting in death, the driver license or driving privilege shall be revoked for at least 180 days but not more than 1 year." The plain text of section 322.28(2)(a)(1) does not support Thompson's argument as the language affords the Department discretion in determining the appropriate penalty, which can range anywhere between six months and one year. The language makes no exception or provision for whether a chemical test refusal occurred. Thompson has altogether failed to establish by any authority that a breath test refusal is the sole factor which would authorize a one-year driver license suspension.

Moreover, the Department has persuasively argued that the statutory scheme contained in chapter 322 of the Florida Statutes ***mandated*** a one-year suspension. There is no dispute that the Department had authority pursuant to section 322.24, Fla. Stat. (2024) to suspend Thompson's license after receiving notice of his DUI conviction in Michigan. Additionally, section 322.26(2), Fla. Stat. (2024) "imposes a duty upon the Department to suspend the driver's license of any person convicted of DUI in order to protect the public from potentially dangerous drivers." *Dep't of High. Saf. & Motor Veh. v. Degrossi,* 680 So. 2d 1093, 1094 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2183a]. Lastly, section 322.28 states the following, in pertinent part:

> If the period of revocation was not specified ***by the court*** at the time of imposing sentence or within 30 days thereafter, and is not otherwise specified by law, the department shall forthwith revoke the driver license or driving privilege ***for the maximum period applicable under paragraph (a) for a first conviction***[.]

§ 322.28(2)(b), Fla. Stat. (2024) (emphasis added).

The maximum penalty provided by section 322.28(2)(a)(1) is one year. There is no dispute that the Michigan DUI conviction constituted Thompson's first DUI offense. Additionally, there is nothing in the record which reflects that the Michigan ***court*** specified a period of revocation upon conviction or within thirty days thereafter.[3] Absent such a specification, section 322.28(2)(b) ***required*** the Department to suspend Thompson's license for the maximum penalty—one year. Accordingly, the Department applied the correct law and therefore observed the essential requirements of the law.

C) Competent Substantial Evidence

Thompson insists that the one-year license suspension imposed by the Department is "also unsupported by the evidence presented" as there is "no evidence anywhere in the record, both transcripts and exhibits, that Petitioner to [sic] submit to a breathalyzer test." Am. Pet. at 10.[4] This conclusory argument relies on the assumption that evidence of a refusal to submit to a chemical test is necessary for the Department to impose a one-year license suspension. As already discussed above, the Department's one-year penalty was based on section 322.28(2)(b) and the lack of a specification from the Michigan court of the length of license suspension. Accordingly, the record below need not contain evidence of a chemical test refusal to justify the imposition of a one-year suspension.

On the other hand, the record below indisputably contains the following: 1) notice of an out-of-state DUI conviction from Michigan without specification of the length of license suspension from the convicting court; and 2) a driving record demonstrating that said conviction was Thompson's first DUI offense. These documents and the information contained therein serve as competent substantial evidence supporting the Department's decision to impose the maximum penalty of a one-year suspension of Thompson's license pursuant to sections 322.28(2)(b) and 322.28(2)(a)(1).

D) Legality of Detention/Arrest

Lastly, to the extent Thompson suggests the order on review should be quashed because of a wrongful detention or arrest, the transcript of the proceeding below contains no such argument. Accordingly, we agree with the Department's assessment that Thompson has waived any such argument by his failure to contest the legality of his detention or arrest in the proceeding below. See, e.g. *Dep't of High. Saf. & Motor Veh. v. Lankford,* 956 So. 2d 527 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a]; *Dep't of High. Saf. & Motor Veh. v. Marshall,* 848 So. 2d 482 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b]; *Scritchfield v. Dep't of High. Saf. & Motor Veh.,* 648 So. 2d 1246 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D233e].

IV. Conclusion

Thompson has failed to demonstrate that the Department failed to accord him procedural due process, failed to observe the essential requirements of the law, or that the Order was not supported by competent substantial evidence. Accordingly, we find no basis to quash the Order.

It is therefore,

ORDERED and ADJUDGED:

1. The Amended Petition is **DENIED**.

(THOMAS RAMSBERGER, AMY M. WILLIAMS, and STEVE D. BERLIN, JJ.)

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[1]Section 322.24 authorizes the Department to suspend or revoke the driver license of any Florida resident upon receiving notice of a DUI conviction in another state. Section 322.28 provides instructions for determining the length of the license suspension following a DUI conviction.

[2]Section 316.193 is entitled "Driving under the influence; penalties."

[3]Even if the Michigan court specified a period of revocation in a document which was inadvertently omitted from the record, Thompson failed to file a reply in this matter. Thus, he has not contested the Department's assessment of the record or the Department's construction of the statutes relevant to its decision-making.

[4]We assume that Thompson meant there is no record evidence that "he ***failed*** to submit to a breathalyzer test." The Amended Petition omits the word "failed" presumably by accident.

* * *

Counties—Utility services—Overbilling— County is required to correct billing for all overbilled charges, not merely four years' worth of overbilled charges, where it was undisputed that county overbilled respondent for more than twenty years for utility services respondent did not receive—County's argument that it was only required to correct four years' worth of overbilled charges mistakenly relies on rule language that limits time within which county may seek to collect on underbilled charges

MIAMI DADE COUNTY, Petitioner, v. ANGEL QUINAPALLO, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2024-71-AP-01. April 8, 2025. On a Writ of Certiorari from the final administrative action taken by the Miami-Dade Water and Sewer Department on November 15, 2024. Counsel: Sarah E. Davis, Assistant County Attorney, for Petitioner. Thais Hernandez, for Respondent.

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

OPINION

(ARECES, R., J.) Petitioner, Miami-Dade County, (hereinafter "Petitioner") contends the administrative hearing officer departed from the essential requirements of the law when he ordered that Respondent be credited for monies that both Parties appear to concede Respondent should never have been required to pay. Petitioner is incorrect.

This case is not complicated.

This case is governed by Rule 2.10(2) of the Miami-Dade Water and Sewer Department Rules and Regulations for Water and Sewer Service (hereinafter, "WASD Rule ___"), which plainly and broadly provides, in pertinent part, that "[t]he Department *shall* take *all* required action to correct the billing for *all* overbilled charges . . . ." *See* WASD 2.10(2) (emphasis added). In this case, it is undisputed that Respondent, who received no services from Petitioner, was overbilled by Petitioner for *decades.* It follows that the Department must take action to correct the billing for "all" of the "overbilled charges." *Id.*

Petitioner does not contest that Respondent was overbilled for 20-plus years. Petitioner, nevertheless, contends it should only have to "correct the billing" for *some* of Respondent's overbilled charges. Specifically, Petitioner argues it should only have to correct four-years'-worth of overbilled charges. In support of its argument, Petitioner mistakenly relies on language that limits the period of time within which the Department may seek to collect on *under*billed charges.[1] The language upon which the Department relies is also located within WASD Rule 2.10(2). Rule 2.10(2) reads, in full, as follows,

> **The Department shall take all required action to correct the billing for all overbilled charges and shall have the authority to correct the billing for any underbilled or unbilled charges, whether the billing inaccuracies were caused by the Department, the Customer or a third party, for a period limited to four (4) years, in accordance with Florida Statutes, Sec. 95.011.** If true readings or consumptions are not available for the period of time covered by the rebilling, the Department shall use actual consumption recorded at the service location during another time period to calculate the rebilling. If it is not possible to determine the actual consumption for any time period, the Department shall base the rebilling on the average anticipated consumption.

Id.

The Rule quite plainly does two things. First, it requires that the Department correct all overbilled charges. Second, it authorizes, but does not require, the Department to correct underbilled charges, so long as it does not seek to correct any underbilled charges that are more than four years old.[2]

The polestar of statutory interpretation is legislative intent. *See Allstate Indemnity Co. v. Gady Abramson, D.C., P.A.,* Case No. 3D23-0797, 2024 WL 4964469, at *1 (Fla. 3d DCA Dec. 4, 2024) [49 Fla. L. Weekly D2437a]. It is, in fact, a "fundamental principle of statutory construction that legislative intent and policy concerns must control our construction of statutes and that the determination as to the intent of the legislature is based upon the plain and ordinary meaning of the language in the statute itself." *Barnett Bank of South Florida v. State Dept. of Revenue*, 571 So. 2d 527, 528 (Fla. 3d DCA 1990). Moreover, a statute or rule should be interpreted to give effect to every clause and harmonize all of its parts. *Gady Abramson,* 2024 WL 4964469 at *1. "No part of a statute, *not even a single word*, should be ignored, read out of the text, or rendered meaningless, in construing the provision." *Id.* (emphasis added).

The County's legislative intent and policy concerns are self-evident. WASD Rule 2.10(2) is *pro*-Miami-Dade County resident. If you are a resident and you have been overbilled, the County *must* correct said bill. If you are a resident and you have been *under*billed, the County may choose not to correct the bill, but will not, in any event, surprise you with a corrected bill more than four years later.

Petitioner's interpretation of the Rule, by contrast, is not only in contravention of the Rule's plain and ordinary meaning, but would require the excision, or redefinition, of the term "all."

Accordingly, the Petition for Writ of Certiorari is DENIED.[4]

[Editor's note: Footnote numbers are as they appear on court document.]

[1]Worse still, the County does not contest that Respondent complained about his sewer bills on at least two occasions—including in 2010 (or *fifteen* years ago), but was informed he had to continue paying for the service.

[2]Petitioner has included a copy of WASD Rule 2.10(2) where, in support of its position, it underlines a completely irrelevant provision concerning a four-year limit on "re-bill(s) or credits" when "correcting amounts billed on the wrong meter." *See* WASD Rule 2.10(2)(a) ("In correcting amounts billed on the wrong meter. . ."); *see also* Appx. at 12. This case does not concern amounts billed to the wrong meter. If the provision underlined by Petitioner demonstrates anything remotely relevant, it demonstrates that the County knew how to clearly and unambiguously provide for a four-year limit on past credits and chose not to. It does not matter *why* the County chose to limit credits to four years when a customer was billed for the wrong meter, but it might, perhaps, have something to do with the fact that, unlike the Respondent in this case, subsection (a) envisions a scenario where service was *actually* provided to multiple "customers." The County would be forced to suffer a loss if required to give credits to one customer and yet be precluded from re-billing the other. In the instant case, the County provided *no* services and suffered *no* losses. On the contrary, the County has been the beneficiary of a windfall. The facts of this case do not involve a "wrong meter" or multiple "customers." The facts concern a single customer who was not provided any services and was, therefore, wrongly billed for decades. Rule 2.10(2)(a) is inapposite.

[4]Respondent's reliance on section 95.11 is also misguided. Respondent did not bring a civil action and, as stated above, the four-year time limit applies solely to the Department's correction of *under*billed charges.

* * *

Municipal corporations—Code enforcement—Appeals—Timeliness—Appeal of special magistrate's code enforcement order dismissed as untimely where appeal was filed 31 days after rendition of order

NCBT GLOBAL, LLC, Respondent/Appellant, v. CITY OF HALLANDALE BEACH, Petitioner/Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24012818. Division AW. April 16, 2025. Harry Hipler, Special Magistrate. Counsel: Ari Pregen, Ft. Lauderdale, for Respondent/Appellant. Jennifer Merino, City Attorney, and Bryan Roget, Deputy City Attorney, Hallandale Beach, for Petitioner/Appellee.

[Editor's note: Magistrate's final order and order denying motion to vacate in this issue: FLWSUPP 3302CITY; 33 Fla. L. Weekly Supp. 83a.]

ORDER GRANTING MOTION TO DISMISS

(JOHN BOWMAN, J.) **THIS CAUSE** came before the Court, upon the Respondent's Response and Motion to Dismiss, filed on December 9, 2024. After review of the motion, the court file, and applicable law, Respondent's Motion to Dismiss is hereby **GRANTED** .

On February 25, 2025, this Court gave the Petitioner THIRTY (30) DAYS from the date of the Order to respond to the Motion to Dismiss. As of the date of this Order the Petitioner has failed to respond to the Motion to Dismiss. Further, review of the case file reveals that

Petitioner has not filed a copy of the Final Order for which review is sought (however as Respondent provided a copy it its Response, the Court was able conduct appropriate review of the Order).

Respondent's primary basis for dismissal is the untimely filing of this proceeding. Pursuant to Florida Rules of Appellate Procedure 9.100(c), 9.110(b) and Florida Statute section 162.11 review of the type of administrative order herein (whether this case should have been filed as an appeal or writ), must be filed within 30 days of rendition of the Order. Petitioner has failed to timely file. Florida law is clear that this rule is "hard and fast", lacking (near any) judicial discretion. "Failure to file any notice within the 30-day period constitutes an irremediable jurisdictional defect." *Miami-Dade Cnty. v. Peart,* 843 So. 2d 363, 364 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1073b]; *Hunt v. Forbes,* 65 So. 3d 133, 134 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1471d]. "A timely notice of appeal must be filed within 30 days in order for this court to have jurisdiction; late filing is a defect no one can correct, not even the court." *Hawks v. Walker,* 409 So. 2d 524 (Fla. 5th DCA 1982).

Petitioner was required to file no later than 30-days from rendition of the trial court's order. Review of the Final Order and by Petitioner's own admission, the Final Order was entered on August 5, 2024. The Court file reflects a filing date of September 5, 2024 for initiation of this proceeding. Pursuant to Florida law, this case was required to be filed by no later than September 4, 2024, Petitioner's September 5, 2024 filing date occurred on the 31st day and is therefore untimely. Pursuant to Florida law, this Court lacks jurisdiction to review the Final Order.

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

* * *

SOUTH BROWARD HOSPITAL DISTRICT, Plaintiff, v. PEMBROKE 2 OWNER, LLC, et al., Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24006976. Division AW. March 28, 2025.

ORDER OF DISMISSAL WITH PREJUDICE

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the Joint Stipulation of Settlement and Dismissal of Prejudice, dated March 17, 2025. Upon review of the stipulation and Court file, this Court finds as follows:

The Joint Stipulation of Settlement and Dismissal of Prejudice is hereby **ACCEPTED** by this Court. This case is hereby **DISMISSED** with prejudice with each party to bear its own attorney's fees and costs. The Broward County Clerk of Courts is **DIRECTED** to close this case as "disposed" of by way of stipulation for voluntary dismissal.

* * *

Licensing—Driver's license—Revocation—Early reinstatement—Record is insufficient to support petition for writ of certiorari where licensee has not provided transcript or recording of hearing below or statement of evidence—Argument disputing finding that licensee's medical records indicate continued alcohol use is unavailing—Court cannot reweigh evidence to come to new finding of fact—Additionally, licensee was ineligible for early reinstatement where he failed to remain drug-free during preceding five years and was unable to fulfill requirement that he complete DUI program since he was terminated from DUI program based on positive drug test

JOHN P. KLEEMAN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 23-05-AP. March 4, 2025. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING WRIT OF CERTIORARI

(MELANIE CHASE, J.) Petitioner John Kleeman seeks certiorari review of the Florida Department of Highway Safety and Motor Vehicles' ("Department") May 8, 2023 Final Order Denying Early Reinstatement, which denied Petitioner's application for early reinstatement of his driving privileges. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). Further, on December 19, 2024, Petitioner filed his Motion to/for Continue/Clarify requesting that this Court continue this proceeding so he may dispute the Department's factual findings.

BACKGROUND

Petitioner's driver's license was permanently revoked on September 5, 2002, after receiving at least four convictions for driving under the influence ("DUI"). Petitioner entered Florida's Special Supervision Services Program ("SSS Program"), which allows people with a suspended or revoked license because of DUI convictions to apply for a license with limited driving privileges. However, in 2014, Petitioner was terminated from the SSS Program for testing positive for cocaine metabolite. Petitioner admitted using cocaine while in the program. Petitioner applied again for the SSS Program and was denied acceptance in 2022 due to statutory ineligibility for being cancelled from the program in 2014 for substance use. Petitioner applied a second time for the SSS Program, and, on May 4, 2023, the Florida Safety Council denied his application again due to statutory ineligibility, citing Florida Administrative Code Rule 15A-10.029(5), which states, "No person shall be eligible for reinstatement in the Special Supervision Services who has previously been reinstated and had that reinstatement cancelled due to current substance abuse. In such a situation, the entire statutory revocation period must be served." The Florida Safety Council stated that Petitioner was not eligible to reapply for the program because of continued alcohol use indicated in his medical records and prior cancellation from the program in 2014 due to substance use. On May 8, 2023, the Department issued its Final Order Denying Early Reinstatement ("Final Order") based on Petitioner's driving record, the Florida Safety Council's denial of Petitioner's application for the SSS Program, and Petitioner's continued use of alcohol.

STANDARD OF REVIEW

The Court's review of the Final Order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D552a] (internal citation omitted).

ANALYSIS

Petitioner argues that the hearing officer departed from the essential requirements of law in denying the reinstatement of his driving privileges. He claims that contrary to the Florida Safety Council's denial letter stating his medical records indicate the use of alcohol during his eligibility period, he has no records of any doctors' visits indicating the use of alcohol.

A person whose driving privilege has been permanently revoked because he has been convicted four or more times of a DUI may, after five years from the date of his last conviction, petition the Department for early reinstatement of his driving privileges. § 322.271(5), Fla. Stat. (2024). The Department is required to hold a hearing at which the petitioner must demonstrate that he: (1) has not been arrested for a drug-related offense for at least five years; (2) has not driven a motor vehicle without a license for at least five years; (3) has been drug-free for at least five years; and (4) has completed a DUI program licensed by the Department. § 322.271(5)(a), Fla. Stat. (2024). At such hearing, the petitioner may show that the revocation of his driver's license causes a serious hardship and precludes him from carrying out his normal business occupation, trade, or employment and that his license is necessary to the proper support of himself or his family. § 322.271(2), Fla. Stat. (2024). The Department is required to determine the petitioner's "qualification, fitness, and need to drive." § 322.271(5)(b), Fla. Stat. (2024).

First, Petitioner did not provide this Court with a transcript of the Department's hearing. Although he alleges that he obtained an audio copy of the hearing which was of such poor quality that three different professional transcript service companies were unable to provide a transcript, he did not provide the Court with the recording, nor did he provide a "statement of the evidence or proceedings from the best available means, including the party's recollection." *See* Fla. R. App. P. 9.200(b)(5). Without a transcript, the Court cannot determine whether the hearing officer's findings departed from the essential requirements of law or whether those findings are supported by competent, substantial evidence. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979) (noting that in appellate proceedings the decision of a trial court has the presumption of correctness and, without a record of the trial proceedings, the appellate court cannot properly resolve the factual issues so as to conclude that the trial court's judgment is not supported by the evidence); *Encarnacion v. Encarnacion,* 877 So. 2d 960, 963 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1742a] (holding that without a transcript, the appellate court is unable to provide a remedy "because it has nothing to review and the presumption is there was competent evidence to support the trial court's rulings"); *Arthur v. Gibson,* 654 So. 2d 983, 984 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1041c] (citing *Hudson Pest Control, Inc. v. Westford Asset Management, Inc.,* 622 So. 2d 546 (Fla. 5th DCA 1993) (explaining that where there is no transcript of the trial court proceeding, the appellate court will give utmost credence to the trial court's fact findings). Thus, the hearing officer's decision has the presumption of correctness, and the record is insufficient to quash that decision.

Second, Petitioner essentially disputes the Florida Safety Council's finding and, in turn, the Department's finding regarding his continued use of alcohol. However, this Court cannot reweigh the evidence to come to new findings of fact. *Henley v. City of N. Miami,* 29 Fla. L. Weekly Supp. 749a (Fla. 11th Cir. Ct. Jan 21, 2022), *cert. denied,* 346 So. 3d 683 (Fla. 3d DCA 2022) ("In reviewing a decision of an administrative body, a circuit court in its appellate capacity cannot reweigh the evidence where there may be conflicts in the evidence nor substitute its judgment about what should have been done for that of the administrative body."); *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (citing *Broward County v. G.B.V. Intl, Ltd.,* 787 So. 2d 838, 845 (Fla. 2001) [26 Fla. L. Weekly S389a] ("If the circuit court reweighs the evidence, it has applied an improper standard of review, which 'is tantamount to departing from the essential requirements of law[.]' ").

Further, to be eligible for early reinstatement of his driving privileges, Petitioner was required to demonstrate that he had been "drug-free" for at least five years, and alcohol is considered a drug for purposes of section 322.271, Florida Statutes. *Dep't of Highway Safety & Motor Vehicles v. Walsh,* 204 So. 3d 169, 172 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2648b] ("[T]he Department's view that alcohol is a drug for purposes of determining the scope of what 'drug-free' means under section 322.271(4) is wholly reasonable."); *Dep't of Highway Safety & Motor Vehicles v. Abbey,* 745 So. 2d 1024, 1025 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2413a] (finding that including alcohol in the term "drug-free" for purposes of section 322.271 comports with legislative intent to "provide maximum safety for all persons who travel or otherwise use the public highways of the state").

Additionally, it is clear from the Florida Safety Council's letter, provided by Petitioner, finding Petitioner's continued use of alcohol and denial of entrance into the SSS Program, that Petitioner was unable to fulfill the statutory requirement that he be supervised by a DUI program licensed by the Department. *See* § 322.271(5)(b)(2), Fla. Stat. (2024).

Based upon the foregoing, the Court finds that Petitioner has failed to establish that the hearing officer departed from the essential requirements of law in denying the reinstatement of his driving privileges. Therefore, it is hereby **ORDERED** and **ADJUDGED** that Petitioner's Motion to/for Continue/Clarify is **DENIED** and the Petition for Writ of Certiorari is **DENIED**. (SOUTO and RECKSIEDLER, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Civil rights—Employment discrimination—Florida Civil Rights Act—Limitation of actions—Section 760.11(5)'s requirement that complaint be filed within one year of receipt of determination of reasonable cause by "the commission," refers to determination by Florida Commission on Human Relations, not issuance of Equal Employment Opportunity Commission right to sue letter—Where FCHR failed to determine whether there was reasonable cause within 180 days of filing of complaint, four-year statute of limitations for statutory violations applies

GARY WILLIAMS, Plaintiff, v. MANAGEMENT & TRAINING CORPORATION, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 24-CA-417. April 9, 2025. David Frank, Judge. Counsel: Katherine L. Viker and Marie A. Mattox, Tallahassee, for Plaintiff. Lindsay D. Swiger, Jackson Lewis, P.C., Jacksonville, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This cause came before the Court on March 24, 2025 for hearing on defendant's motion to dismiss on statute of limitations grounds, and the Court having reviewed the motion and response, heard argument of counsel, and being otherwise fully advised in the premises, finds

The plaintiff filed his complaint more than a year after receiving a federal Equal Employment Opportunity Commission ("EEOC") right to sue letter.

Defendant argues that this means the plaintiff's claim is outside the one-year statute of limitations pursuant to *Aleu v. Nova Se. Univ., Inc.*, 357 So.3d 134 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D357a], review denied, No. SC2023-0609, 2023 WL 4837683 (Fla. July 28, 2023).

In *Aleu*, the employer filed a summary judgment motion arguing the employee's action was time-barred under the Florida Civil Rights Act of 1992 because the employee had failed to commence the action no later than one year after the date when the EEOC issued the right-to-sue notice. § 760.11(5), Fla. Stat. (2015) ("A civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause ***by the commission*** (emphasis added)."). The current applicable version of the statute reads the same.

Important to the defendant and the *Aleu* court's rationale is that a right to sue letter is reasonable cause and that "the commission" includes the federal EEOC. If this were true, then plaintiff's EEOC right to sue letter would have triggered the one-year limitation period and his claim would be extinguished.

So we start here:

> *When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument. As Justinian's Digest put it: A verbis legis non est recedendum ("Do not depart from the words of the law").*

Reading Law: The Interpretation of Legal Texts, Antonin Scalia and Bryan Garner, Thomson/West, 2012.

Florida Statute 760.02(2) says, " 'Commission' means the Florida Commission on Human Relations" ("FCHR").

This Court will not depart from the words of the law. "The commission" is not the EEOC, it is the FCHR according to the express, uncomplicated, unambiguous, and seamless wording of the statute. The right to sue letter from the EEOC did not trigger the one-year limitation period.

Since the EEOC right to sue letter does not count, we logically turn to the action taken by the operative "commission," the FCHR. The FCHR did nothing.

Since the FCHR did nothing, we again look to the express wording of the statute to tell us what that means in terms of options for a claimant. Here is what is supposed to happen:

> If the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days after the filing of the complaint:
>
> (a) An aggrieved person may proceed under subsection (4) as if the commission determined that there was reasonable cause.
>
> (b) The commission shall promptly notify the aggrieved person of the failure to conciliate or determine whether there is reasonable cause. The notice shall provide the options available to the aggrieved person under subsection (4) and inform the aggrieved person that he or she must file a civil action within 1 year after the date the commission certifies that the notice was mailed.
>
> (c) A civil action brought by an aggrieved person under this section must be commenced within 1 year after the date the commission certifies that the notice was mailed pursuant to paragraph (b).

§ 760.11(8)(b), Fla. Stat. (2024).

The prior version of this subsection consisted of (a) only; (b) and (c) were added in 2020. That means the earlier court opinions discussed in this order had concluded, and the Legislature did not alter, that telling a claimant he may proceed as if reasonable cause had been determined was insufficient.

In fact, the added language supports the conclusion that the one-year limitation period only applies when specified notice is provided to a claimant—notice of options to proceed and certified notice of the specific limitation period. That, however, did not happen. Mr. Williams was never told he had a one-year limitation period.[1]

Contrary to defendant's improvident use of the word "binding," *Aleu* is anything but. Our First District and other District Courts of Appeal have disagreed with all or part of the rationale in *Aleu*.

Here are the most important two sentences of the opinion: "We certify conflict with *Hines v. Whataburger Restaurants, LLC*, 301 So. 3d 473 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1995c]. In *Hines*, the First District held that, pursuant to *Joshua*, section 95.11(3)(f)'s four-year limitation period, rather than section 760.11(5)'s one-year limitation period, applied to an employee's statutory civil rights action, even though the employee had received a notice of dismissal stating that the employee was provided a right-to-sue notice." *Id.* at 141.

This Court follows the guidance and holdings of the First District Court of Appeal. Why would this Court rely upon a district court case that expressly acknowledges conflict with the First District? The answer is—it will not.

The *Aleu* court attempted to explain the First District's *Hines* decision by implying that the First District either failed to consider or misinterpreted *Woodham v. Blue Cross & Blue Shield of Fla. Inc.*, 829 So.2d 891, 897 (Fla. 2002) [27 Fla. L. Weekly S834a].

Not so. U.S. District Court Judge T. Kent Wetherell, II tells us why the *Aleu* court missed the mark, not the First District:

> Aleu found *Woodham v. Blue Cross and Blue Shield of Florida, Inc.*, 829 So.2d 891 (Fla. 2002) [27 Fla. L. Weekly S834a], "controlling," but the issue decided by the Florida Supreme Court in that case was not whether an EEOC right-to-sue letter could trigger the one-year statute of limitations in § 760.11(5). Rather, the only issue decided in *Woodham* was that an EEOC right-to-sue letter was not equivalent to a no-cause determination by the FCHR for purposes of triggering the 35-day period for requesting an administrative hearing under

§ 760.11(7). See 829 So. 2d at 897. However, in reaching its decision in *Woodham*, the Florida Supreme Court pointed out that the right-to-sue letter "d[id] not comply with the notice requirement in subsection (3), which requires the FCHR to 'promptly notify the aggrieved person . . . of the options available under this section.' " *Id*. (quoting § 760.11(3), Fla. Stat.); see also *Joshua v. City of Gainesville*, 768 So. 2d 432, 437 (Fla. 2000) [25 Fla. L. Weekly S641a] (rejecting argument that one-year statute of limitations applies when FCHR does not issue a cause or no-cause determination within 180 days because it would be contrary to the statutory scheme "to require a person to proceed to court without any indication from the Commission [i.e., FCHR] of the progress, or lack thereof, in investigating the complaint filed with that body" (emphasis added)). Thus, if anything, *Woodham* provides additional support for Judge Hinkle's conclusion in *Marbury* (and this Court's conclusion in *McCarty*) that an EEOC right-to-sue letter is not a substitute for an FCHR notice. Accord *Willis*, 357 So.3d at 1269, 2023 WL, at *1 (relying on *Woodham* to hold that an EEOC right-to-sue letter "was not the equivalent of a reasonable cause finding by the [FCHR]").

Ruffin v. Open Door Corp., No. 3:23CV3136-TKW-ZCB, 2023 WL 3018433, at *2 (N.D. Fla. Apr. 20, 2023).

This Court agrees, as it must, with the rational and holding of our First District, and also the Northern District of Florida and the other district courts of appeal who strenuously decline to follow *Aleu*.

Accordingly, it is ORDERED and ADJUDGED that defendant's motion is DENIED.

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[1]This is not the first time the Court has seen a case for which the FCHR has taken no action even though statutorily required to do so. One must wonder why the situation has not been rectified.

* * *

Criminal law—Manslaughter—Evidence—Expert testimony—Confrontation clause—Defense motion to exclude substitute medical examiner who state intends to call to testify about autopsy results in lieu of unavailable medical examiner who conducted autopsy is denied in substantial part—Substitute medical examiner may testify to opinions and conclusions that are her personal and original work product based upon her review of autopsy notes and photos and the application of her training and experience to what she reviewed—Before substitute medical examiner may testify, state must call witness who can authenticate and sponsor into evidence any photos or other evidentiary artifacts upon which substitute medical examiner's opinion rests—Court can imagine no circumstance in which original medical examiner's autopsy report would be admissible

STATE OF FLORIDA, Plaintiff, v. EPHRAIM ARMANI CASADO, Defendant. Circuit Court. 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F22-11042. April 7, 2025. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S MOTION TO EXCLUDE SUBSTITUTE MEDICAL EXAMINER

Thieves are not judged but they are by to hear,
Although apparent guilt be seen in them
—Wm. Shakespeare, *Richard II* Act IV, sc. 1

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. Although the jurisprudence of the Confrontation Clause may seem "confound[ing]," even to justices of the Supreme Court, *see infra* at 12 (discussing *Franklin v. New York*, 604 U.S. ___ (2025) [30 Fla. L. Weekly Fed. S773a]), the actual language of that clause seems straightforward enough. Certainly it seemed that way to Dean Wigmore:

It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and subordinate one. (1) The main and essential purpose of confrontation is *to secure the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers.

. . .

(2) There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a *witness's deportment while testifying*, and a certain subjective moral effect is produced upon the witness.

John Henry Wigmore, II *A Treatise on the System of Evidence in Trials at Common Law* § 1395 at 1749-51 (1st ed. 1904) (hereinafter "Wigmore at ___").

To the general rule thus stated, the law (and Wigmore) recognized exceptions.

[T]his right of cross-examination thus secured was not a right devoid of exceptions. The right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination . . . . Now the Hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to be developed in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not care to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended.

Wigmore at § 1397 at 1754-55.[1]

The motion at bar is concerned, not with the application of any of the exceptions,[2] but with the application of the general rule. The witness contemplated by the Sixth Amendment is someone who has seen, heard, or done, something bearing upon the merits of the case. It is such a witness whom a criminal defendant has the right to confront and cross-examine. Someone who can do no more than retail what someone else has seen, heard, or done, is not, under the general rule, a witness. Absent an exception, cross-examination of such a person would not vindicate a defendant's Confrontation-Clause right. "It is important to appreciate this, the true interpretation of the constitutional provisions, because the erroneous answer has occasionally been advanced, the 'witness' who is to be brought face to face is merely the person now reporting another's former testimony." Wigmore at § 1397 at 1756.

In connection with a homicide that occurred in 2022, Defendant Ephraim Armani Casado is charged with manslaughter with a deadly weapon. The autopsy of the decedent was performed by Dr. Mark Schuman, then employed at the Office of the Miami-Dade County Medical Examiner. In the intervening years, however, Dr. Schuman has left that office. The prosecution has listed a substitute medical examiner, Dr. Emma Lew, as the expert who will testify at the trial of this cause. The substitution of one medical examiner for another is and has long been common enough, and would be unremarkable but for the recent decision of the United States Supreme Court in *Smith v. Arizona*, 602 U.S. 779 (2024) [30 Fla. L. Weekly Fed. S349a]. Citing *Smith*, the defense moves *in limine* to exclude the testimony of Dr. Lew[3] at trial on the grounds that such testimony would violate Mr. Casado's Sixth Amendment right to confront the witnesses against him. *See also* Fla. Const. Art. I § 16(a).

The opinion of the Third District in *Banmah v. State*, 87 So. 3d 101 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D992b] antedates *Smith* by a dozen years, and summarizes the state of the law as it then, and had long, existed. As it happens, Dr. Lew was the medical examiner who

was unavailable in *Banmah*; a Dr. Hyma was substituted as the prosecution's trial witness. *Banmah*, 87 So. 3d at 102. Over the defendant's Confrontation Clause objection, the appellate court ruled that, "it is proper to permit a substitute medical expert to testify as to cause of death despite the fact that the expert did not perform the autopsy, when the substitute medical expert relies on the autopsy report." *Id*. at 103 (collecting cases). *Banmah* appears to justify the admission of the testimony of the substitute medical examiner on three grounds.

First, many of the cases relied upon by *Banmah*, such as *Capehart v. State*, 583 So. 2d 1009 (Fla. 1991) and *Bender v. State*, 472 So. 2d 1370 (Fla. 3d DCA 1985), hold that the testimony of a substitute medical examiner is not inadmissible hearsay, although such testimony is based in substantial part on the findings of the original medical examiner. "*Capehart* relied on § 90.704, Florida Statutes, which provided that an expert may, in forming an opinion, rely on facts and data not in evidence if those facts are of a type reasonably relied on by experts in the subject to support the opinion expressed." *Banmah*, 87 So. 3d at 103 (quoting *Capehart*, 583 So. 2d at 1012). Section 90.802, Florida Statutes, renders hearsay inadmissible except as provided by statute. Section 90.704 is the statute that makes admissible an expert opinion that subsumes hearsay. But statutory exceptions to the rule against hearsay do not overrule constitutional principles regarding confrontation.[4] If the testimony of a substitute medical examiner violates the Confrontation Clause, then it is inadmissible without regard to § 90.704 and the law of hearsay. "Just because evidence is admissible under § 90.704 . . . does not mean that the evidence does not violate the Confrontation Clause." *Rosario v. State*, 175 So. 3d 843, 861 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2015a].

As a second ground for admitting the testimony of the substitute medical examiner, the *Banmah* court noted that, "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution." *Banmah*, 87 So. 3d at 103. Here the court speaks the language of Confrontation Clause jurisprudence and not of hearsay. Unconfronted statements are inadmissible only if they are testimonial in nature, *i.e.*, only if they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) [21 Fla. L. Weekly Fed. S990a]. Thus the "threshold question" in Confrontation-Clause cases "is whether the challenged statement is testimonial." *United States v. Figueroa-Cartagena*, 612 F. 3d 69, 85 (1st Cir. 2010). "If it is not, the Confrontation Clause 'has no application.' " *Figueroa-Cartagena*, 612 F. 3d at 85 (quoting *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) [20 Fla. L. Weekly Fed. S99a]). Although *Banmah* is not alone in holding that autopsy reports are non-testimonial, *see, e.g., United States v. James*, 712 F. 3d 79, 99 (2d Cir. 2013), there is widespread support, in Florida and elsewhere, for the contrary proposition, *see, e.g., United States v. Ignasiak*, 667 F. 3d 1217, 1231 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C701a]; *Commonwealth v. Avila*, 912 N.E. 2d 1014, 1029, 1030 n.20 (Mass. 2009). The issues before the Fifth District in *Rosario v. State*, *supra*, were whether the autopsy report prepared by an unavailable medical examiner was admissible (an issue not raised by the motion at bar); and whether a substitute medical examiner who did not perform or participate in the autopsy could testify as to the cause of death (the precise issue in *Banmah*, and in the present case).

The *Rosario* court read *Melendez-Diaz*, *supra*, and other Supreme Court precedents for the proposition that, "the United States Supreme Court has recognized that autopsy reports have historically been treated in early America as testimonial." *Rosario*, 175 So. 3d at 854. The court also consulted, "the circumstances under which the [autopsy] report was prepared, the primary purpose of the report, and the solemnity of the report." *Id*. at 855. Having canvassed these factors, the court:

> conclude[d] that an autopsy report . . . is testimonial hearsay under the Confrontation Clause. With respect to the broad statement in *Banmah* that autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution, we respectfully disagree. . . . Regardless of whether the report is actually used at trial, it is reasonably foreseeable to believe that it may be used prosecutorially, especially when the medical examiner concludes that the cause of death was a homicide, as in this case.

Id. at 858 (internal quotations and citations omitted).

But the issue raised by the motion at bar is not whether the autopsy report itself is admissible at trial; it is whether the testimony of a medical examiner who did not perform the autopsy, but who has reviewed the autopsy report, notes, photos, *etc.*, prepared by the medical examiner who did perform the autopsy, may testify at trial. That issue "involves concern over whether the surrogate medical examiner is serving as an improper conduit for what would otherwise be inadmissible evidence." *Id*. at 860. *See State v. Stanfield*, 347 P. 3d 175, 186 (Id. 2015) ("A defendant's right to confrontation is violated when 'an expert acts merely as a well-credentialed conduit' and does not provide any independent expert opinion") (quoting *United States v. Ramos-Gonzalez*, 664 F. 3d 1, 5-6 (1st Cir. 2011)). *See also Linn v. Fossum*, 946 So. 2d 1032, 1037-38 (Fla. 2006) [31 Fla. L. Weekly S741a] ("Florida courts have routinely recognized that an expert's testimony 'may not merely be used as a conduit for the introduction of . . . otherwise inadmissible evidence' ") (quoting *Erwin v. Todd*, 699 So. 2d 275, 277 (Fla. 5th DCA 1977)).

"[T]his is not to say that a surrogate medical examiner may never testify as to the cause and manner of death of a victim after reviewing another medical examiner's report." *Rosario*, 175 So. 3d at 861. In *Rosario*, the substitute medical examiner "did not rely on [her predecessor's] conclusion as to [the victim's] cause of death. She formed her own independent conclusion that [the victim's] death was a homicide." *Id*. at 862. Such testimony was admissible, in the view of the *Rosario* court.

The third and final ground upon which the *Banmah* court concluded that the testimony of the substitute medical examiner was admissible was that of practicality. "[O]bviously, the victims died because they were shot; this is the basis of the charges against the defendant and there is no evidence to contradict this. The autopsy photos were admitted without objection, and show gunshot wounds." *Banmah*, 87 So. 3d at 103-04. This, of course, is the language of harmless error jurisprudence, not of Confrontation Clause jurisprudence. It is the language of common sense. It tells us that, even if the constitutional niceties were not complied with, the outcome was unaltered. It tells us that no advanced degree in pathology is needed to look at a dead man shot full of holes and conclude that he didn't die of old age.[5] The doctrine of harmless error tells us these things. But it tells us nothing about whether the testimony of the substitute medical examiner was, conformably to the Confrontation Clause of the Sixth Amendment, admissible in the first place.

The *Rosario* court certified conflict with *Banmah*. *Rosario*, 175 So. 3d at 862. The Florida Supreme Court has not addressed that conflict. In 2017, however, it decided *Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) [42 Fla. L. Weekly S45a].

Calloway was a reprise of the same fact-pattern: one medical examiner performed the autopsy, but another medical examiner testified at trial. The Supreme Court "conclude[d] that the surrogate testimony of [the substitute medical examiner] did not violate Calloway's rights under the Confrontation Clause." *Calloway*, 210

So. 3d at 1195. The substitute medical examiner was subjected to confrontation and plenary cross-examination. He did not sponsor the autopsy report (which he had not written) into evidence, and so far as appears from the reported opinion, it was never received at all. "Instead, [the substitute medical examiner] clearly explained to the jury that his independent opinion was derived from the photographs taken by investigators at the scene and from [the original medical examiner's] autopsy reports. It was this independent opinion that was available during trial and subject to cross-examination." *Id*.

Calloway settled the law in Florida regarding the use by the prosecution of a substitute medical examiner. The trial court must satisfy itself that the testimony to be offered by the substitute witness is the product of his or her own review of the facts, and consists of his or her own expert opinions and conclusions. "The Sixth Amendment [is] not satisfied by [the testimony of] a surrogate witness . . . who ha[s] formed no independent opinion concerning the forensic examination results." *United States v. Soto*, 720 F. 3d 51, 58 (1st Cir. 2013) (internal quotation marks and citation omitted). If evidentiary artifacts of the autopsy—photographs, for example—are to be received in evidence, the better practice would be for someone who was present when the photographs were taken, and can testify that they fairly and accurately depict that which they purport to depict, to sponsor them into evidence. That sponsoring witness will not be the substitute medical examiner, except in the extremely unlikely event that he or she was present when the photos were taken. The autopsy protocol itself is almost certainly inadmissible. If the substitute medical examiner has prepared his or her own diagrams or other visual aids, they would be admissible if the necessary evidentiary foundation is laid.[6]

It is the thesis of the motion at bar, however, that the foregoing analysis has been entirely deracinated by the recent opinion of the United States Supreme Court in *Smith v. Arizona*, ___ U.S. ___, 144 S.Ct. 1785 (2024) [30 Fla. L. Weekly Fed. S349a]. *Smith* involved, not the testimony of a substitute medical examiner to explain cause and manner of death, but the testimony of a substitute lab analyst to explain that a substance was contraband. That in itself is an important distinction. If an analyst at the police crime lab dies or leaves his employment, it is the simplest thing in the world to have another analyst re-test the suspected drugs. But if a medical examiner dies or leaves his employment, is the prosecution obliged to obtain an Order of Exhumation and arrange for a second autopsy? In the case at bar, the mortal remains of the decedent have lain in Florida's warm, moist, creature-infested soil for nearly three years. Would a second autopsy even be possible at this late date? Could it be expected to produce reliable, admissible conclusions as to cause and manner of death? The United States Supreme Court has identified "autopsies as an example of a forensic test that cannot be repeated." *Hensley v. Roden*, 755 F. 3d 724, 732 (1st Cir. 2014) (citing *Melendez-Diaz*, 557 U.S. at 318 & n. 5 and *id*. at 337 (Kennedy, J., dissenting)). Thus the facts in *Smith* may offer a poor analogy for the facts at bar.

In any event, *Smith* decided very little. *Smith* holds that the testimony of a substitute lab analyst—and, as the defense reads *Smith*, that of a substitute medical examiner—is offered for its truth, and is therefore hearsay. Whether it is *testimonial* hearsay is something as to which the *Smith* court offered some thoughts but no ruling. "To implicate the Confrontation Clause, a statement must be hearsay . . . and it must be testimonial—and those two issues are separate from each other." *Smith*, 144 S.Ct at 1801. "But that issue"—*i.e.*, whether the statements in question are testimonial for purposes of Confrontation Clause analysis—"is not now fit for our resolution. The question presented in Smith's petition for *certiorari* did not ask whether [the original lab analyst's] out-of-court statements were testimonial. . . . That dispute is best addressed by a state court. So we return the testimonial issue . . . to the Arizona Court of Appeals." *Id*.

For present purposes, the issue whether the original medical examiner's autopsy protocol is testimonial has been "addressed by a state court." It has been addressed by the highest court of this state. In *Calloway, supra*, the Florida Supreme Court determined that autopsy protocols are testimonial for Confrontation Clause purposes. For that and other reasons, they are inadmissible when a substitute medical examiner testifies at trial. After *Smith*, as before it, a substitute medical examiner can, as noted *supra* at 9-10, offer testimony as to cause and manner of death if the trial court is satisfied that the testimony thus offered is the product of the substitute witness's own review of the facts, and consists of his or her own expert opinions and conclusions.

In any event, the shelf-life of *Smith*, and indeed of the entire present jurisprudence of confrontation, may be short. In *Franklin v. New York*, 604 U.S. ___ (2025) [30 Fla. L. Weekly Fed. S773a], the Supreme Court denied a petition for *certiorari*. Justices Alito and Gorsuch, in separate statements respecting the denial, expressed their views that (as Justice Alito put it), "in an appropriate case we should reconsider the interpretation of the Confrontation Clause that the Court" presently employs. *Franklin*, 604 U.S. at ___. This is so because, "Despite repeated attempts to explain what [the Court's Confrontation Clause jurisprudence] meant by 'testimonial statements,' our Confrontation Clause jurisprudence continues to confound courts, attorneys, and commentators." *Id*. *See also id*. at ___ (statement of Gorsuch, J.) ("we may need to rethink our course sometime soon").

But that is matter for another day. The jurisprudence of confrontation may be a work in progress, but it is sufficiently well-settled for me to adjudicate the motion at bar. The prosecution may call Dr. Lew at trial. Prior to her offering any opinions and conclusions, however, the prosecution must lay a sufficient foundation to satisfy me that those opinions and conclusions are her personal and original work product, *i.e.*, that they are the fruits of her own review of photos, notes, *etc.*; and of her application of her training and experience to what she has reviewed. Pursuant to Fla. Stat. § 90.705(2), the defense will be afforded ample latitude in *voir dire* on this issue.[7]

Prior to Dr. Lew's testimony, the prosecution will be obliged to call a witness who can authenticate and sponsor into evidence any photos or other evidentiary artifacts upon which Dr. Lew's opinion rests. Presumably the logical witness for this purpose is the autopsy photographer, but that is for the prosecution to decide. If Dr. Lew has prepared any demonstrative exhibits or illustrative aids, they must be authenticated in the customary fashion, *see* n. 6, *supra*. I can at present imagine no circumstance in which Dr. Schuman's autopsy report would be admissible.

The court in *United States v. Williams*, 740 F. Supp. 2d 4 (D.D.C. 2010) (Paul L. Friedman, J.), proceeded in the same fashion. There, the substitute medical examiner was permitted to "testify as to his own independent opinion concerning the cause or manner of [the decedent's] death, even if that opinion is based in part on the inadmissible autopsy report." *Williams*, 740 F.Supp.2d at 9. "So long as [the substitute medical examiner] does not disclose any of the testimonial hearsay underlying his opinion on direct examination and has a sound basis for his opinions and conclusions, his testimony would not offend the Confrontation Clause." *Id*. Judge Friedman concluded by admonishing the prosecution

> that [the substitute medical examiner] may testify only as to his 'independent judgment,' reached by application of his training and experience to the sources before him—not merely by adoption of [the original medical examiner's] opinions. . . . [The substitute medical examiner] would appear to have several pieces of evidence from which to draw his own conclusions regarding [the decedent's] death. For example, [the decedent's] autopsy yielded not only [the original

> medical examiner's] report, but also a set of photographs of the decedent's body and microscopic slides of bodily tissue. . . . Those items, in combination with [the original medical examiner's] report and any other appropriate evidence, might well provide an adequate basis for the formation of an expert opinion. Furthermore, the photographs and/or slides, unlike the autopsy report, presumably would be admissible in evidence, assuming they can be authenticated . . . . The government and [the substitute medical examiner] must take care to ensure that [the substitute medical examiner] is in no way reduced to parroting [the original medical examiner's] findings. . . . The Court certainly will be alert to such a risk.

Id. at 10 (internal citations, quotation marks, and brackets omitted).

I, too, conclude by offering that admonition. I, too, will be alert to that risk.

Defendant Ephraim Casado's *Motion in Limine to Exclude Substitute Medical Examiner's Testimony* is denied in substantial part as more fully set forth hereinabove.

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[1]The constitutional guarantees of confrontation appearing in both the U.S. and most state constitutions were, in Wigmore's view, nothing more than codifications of those common-law principles of evidence, and specifically of hearsay, from which they derived. These constitutional guarantees were not intended to, and did not, "affect the common-law requirement of confrontation, otherwise than by putting it beyond the possibility of abolition by an ordinary legislative body." Wigmore at § 1397 at 1754.

[2]At common law, and at the time the U.S. and early state constitutions were adopted,

> The exceptions to this rule [we]re of cases which are excluded from its reasons by their peculiar circumstances; but they [we]re far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party. So, also, if a person is on trial for homicide, the declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide, which passed under his own observation, may be given in evidence against the accused.

Thomas M. Cooley, *A Treatise on Constitutional Limitations* 451-52 (7th ed. 1903).

[3]The defense motion is specific on this point: It is a motion to exclude nothing but Dr. Lew's *testimony*. *See Defense Motion In Limine to Exclude Substitute Medical Examiner's Testimony* at 1 (defense "moves this Court for an order *in limine* excluding the testimony of [the] substitute medical examiner"); 6 (defense "respectfully moves this Court to exclude Dr. Lew's testimony"). The motion at bar is not directed to other evidentiary artifacts of the autopsy, such as photographs.

[4]Perhaps Wigmore takes the contrary view, *viz*., the view that hearsay exceptions are, simply by virtue of their status as hearsay exceptions, also exceptions to the requirement of confrontation. *See supra* at 1-2, esp. n. 1. If so, present-day Confrontation Clause jurisprudence departs from Wigmore's view.

[5]Centuries before the development of modern pathology, Shakespeare provided, in a case in which murder was suspected, a post-mortem examination that would surely have satisfied *Banmah's* desire for practicality and common sense:

> See, how the blood is settled in his face!
> Oft have I seen a timely-parted ghost,
> Of ashy semblance, meagre, pale, and bloodless,
> Being all descended to the labouring heart;
> Who in the conflict that it holds with death,
> Attracts the same for aidance 'gainst the enemy;
> Which with the heart there cools, and ne'er returneth
> To blush and beautify the cheek again.
> But see, his face is black and full of blood;
> His eye-balls further out than when he liv'd,
> Staring full ghastly like a strangled man:
> His hair uprear'd, his nostrils stretch'd with struggling;
> His hands abroad display'd, as one that grasp'd
> And tugg'd for life, and was by strength subdu'd.
> Look on the sheets, his hair, you see, is sticking;
> His well-proportion'd beard made rough and rugged,
> Like to the summer's corn by tempest lodg'd.
> It cannot be but he was murdered here;
> The least of all these signs were probable.

Wm. Shakespeare, *The Second Part of Henry VI*, Act III, sc. 2.

[6]If such diagrams, or the like, are offered as demonstrative evidence, they must be shown to fairly and accurately depict that which they purport to depict. *See* Fla. Stat. § 90.901. If they are to be used solely as illustrative aids, the substitute medical examiner must testify that they would assist him or her in the giving of testimony; in which case they can be used during testimony, but will not be received as evidence and will not go back to the jury room with the deliberating jury. *See gen'ly Pierce v. State*, 718 So. 2d 806 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1146a].

[7]For her opinions and conclusions about the cause and manner of death to be admissible at trial, Dr. Lew must be able to testify that she holds those opinions and conclusions to a reasonable medical probability. *Williams v. State*, 253 So. 3d 1211, 1214 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1950a] (citing *Delap v. State*, 440 So. 2d 1242, 1253 (Fla. 1983)). No doubt she will be pressed in *voir dire* as to her ability to assert the requisite degree of confidence in her opinions and conclusions without ever having seen the body of the decedent.

* * *

Insurance—Uninsured/underinsured motorist—Coverage—Motorized scooter—There is no UM/UIM coverage for insured who was injured while operating motorized scooter where insured rejected stacked coverage, policies excluded coverage for bodily injury sustained while occupying vehicle owned by insured that was not one of vehicles listed on declarations page or a newly-acquired car, and scooter was not among enumerated vehicles or a newly acquired car

JEFFREY COSGROVE, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a Foreign Profit Company, Defendant. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case No. 2023 CA 005432AX. February 27, 2025. Edward Nichols, Judge.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on for hearing pursuant to the Defendant's Motion for Summary Judgment, said motion having been filed on October 14, 2024, and the Court having reviewed and considered said motion, having reviewed and considered, as well, the Plaintiff's response, entitled Plaintiff's Response in Opposition to Motion for Summary Judgment, said response having been filed on January 14, 2025, having reviewed and considered the affidavit filed in advance of the hearing, more specifically, the affidavit of Jonathan Owen, having reviewed and considered the deposition transcript of the Plaintiff Jeffrey Cosgrove, having reviewed and considered, of course, the applicable policies, having considered the argument of counsel and the case law provided, and being otherwise fully advised in the premises, finds as follows:

Standard of Review

In May of 2021, the Florida Supreme Court revised Florida Rule of Civil Procedure 1.510, saying, in effect, that Florida's summary judgment standard should be construed and applied in accordance with the Federal summary judgment standard as spelled out in *Celotex Corporation v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The Florida Supreme Court indicated that it agreed with the Supreme Court saying that "[s]ummary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole." *Celotex,* 477 U.S. at 327. The Florida Court explained that "embracing the Celotex trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state". *See In re: Amends to Fla. Rule of Civ. Pro. 1.510*, 2021 WL 1684095 at 2 (Fla. April 29, 2021) [46 Fla. L. Weekly S95a]. The Court found the Supreme Court's reasoning compelling, saying, "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose". *Id.* at 323-324.

"Under the amended rule. . . summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law' ".[1] "Looking to the

federal summary judgment standard, an issue of fact is 'genuine" only if 'a reasonable jury could return a verdict for the nonmoving party.' "[2] "A fact is 'material' if the fact could affect the outcome of the lawsuit under the governing law."[3] "The moving party bears the initial burden of identifying those portions of the record demonstrating the lack of a genuinely disputed issue of material fact."[4] "If the movant does so, then the burden shifts to the non-moving party to demonstrate that there are genuine factual disputes that preclude the judgment as a matter of law."[5] "To satisfy its burden, the non-moving party 'must do more than simply show that there is some metaphysical doubt as to the material fact.' "[6] As indicated, "[O]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses" *Celotex*, supra at 323-324.

Analysis

Applying the above-referenced standard, while certainly recognizing the high burden that attaches to a motion of this nature, and with a clear understanding that summary judgment is not a substitute for the trial of disputed facts, the Court has come to the conclusion that the motorized scooter that Mr. Cosgrove was operating at the time of his injury was not identified as one of the expressly enumerated vehicles pursuant to his policies, and was, in fact, specifically not covered by virtue of the policies' exclusions. Said another way, there is no coverage here, there are no genuine disputes as to the facts and the motion for summary judgment is well taken and must be granted. As will be explained herein, simply put, Exclusion 2 excludes coverage for the Sanyang 49 cc two wheeled motorized bike that the Plaintiff was riding.

The Plaintiff's complaint alleges that he was injured by an uninsured or underinsured motorist while riding his Sanyang 49 cc two-wheeled motorized bike on January 26, 2023. He alleges that his State Farm policy provided him with uninsured/underinsured motorist coverage, which was in effect at the time of the accident, in the event that he was injured by an uninsured or underinsured motorist. The complaint indicates that "due to the fact that the Plaintiff, Jeffrey Cosgrove, was not operating a motor vehicle or a vehicle as defined by the Defendant State Farm policy of automobile insurance, he is in a similar position as a pedestrian, a skateboarder or a bicyclist and uninsured/underinsured motorist coverage applies to his unpaid and yet uncompensated for damages" (see complaint)

State Farm argues that it is entitled to judgment as a matter of law because the Plaintiff's four policies covered four different vehicles, none of which are the motorized scooter that Mr. Cosgrove was riding at the time of the accident, and because the non-stacking provisions in each of the policies excludes the Sanyang scooter he was operating. The Defendant argues that the Sanyang 49cc two-wheeled motorized bike is not a "motor vehicle" as defined by Florida law and is not a "vehicle" or "car" as defined by his policies.

The Plaintiff counters that the Defendant is not entitled to summary judgment on Plaintiff's UM/UIM coverage because the Sanyang 49 cc two-wheeled motorized bike he was operating on the day of the crash is not a vehicle, a motor vehicle, a car or any other of the descriptions cited to by the Defendant is State Farm's 'Exclusion 2' as a basis for exclusion of coverage" (see response). The Plaintiff argues that "the Defendant's own policy language and the language of its selection/rejection forms supports granting UM/UIM coverage" (again, see response).

It is undisputed that the motorized scooter that the Plaintiff was operating at the time of the crash was not named as one of the expressly identified vehicles pursuant to his four policies. It is also undisputed that the Plaintiff and his wife rejected non-stacked coverage. The question, then, is whether the exclusion, specifically Exclusion 2, allows for coverage for the injuries the Plaintiff sustained while operating the motorized scooter. The answer to that question, unfortunately for Mr. Cosgrove, is "no". As will be explained herein, Mr. Cosgrove's policy excludes uninsured/underinsured coverage for vehicles that are not listed on his policy's Declaration Page and that are not a "newly acquired car". The Sanyang scooter is not a "newly acquired car".

Exclusion 2 of the Plaintiff's policies state:

THERE IS NO COVERAGE FOR AN INURED WHO SUSTAINS BODILY INJURY: a. WHILE OCCUPYING A VEHICLE OWNED BY YOU IF IT IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR. . .

The policies define "Your car" as one of the specifically enumerated vehicles shown on the Declaration page. The policy also defines "newly acquired car" as a "land motor vehicle with four or more wheels, designed for use primarily on public roads". Clearly, the motorized scooter is not a "newly acquired car".

Interestingly, the policy exclusion at issue here is virtually identical to the language addressed in the policy addressed in *State Farm Fire and Casualty Insurance Company v. Wilson*, found at 330 So. 3d 67 (Fla. 2nd DCA 2021) [46 Fla. L. Weekly D1183a]. The Wilson policy stated:

THERE IS NO COVERAGE: . . . 2. FOR AN INSURED WHO SUSTAINS BOLIDY INJURY: WHILE OCCUPYING A VEHICLE OWNED BY YOU OR ANY RELATIVE IF IT IS NOT YOUR CAR.

Addressing virtually the same policy language, the Second District, in finding that the exclusion barred coverage, found that it was unambiguous, and that the same exclusion had been found to be unambiguous in *State Farm Automobile Insurance Company v. Lyde*, 267 So. 3d 453 (Fla. 2nd DCA 2018) [43 Fla. L. Weekly D2267e], *id.* at 76.

As indicated, it is undisputed that Mr. and Mrs. Cosgrove signed the Office of Insurance Regulation form, rejecting non-stacked coverage that excluded coverage for the injuries Mr. Cosgrove sustained while operating the motorized scooter. "The reason the legislature authorized the conclusive presumption only where the insured has signed an OIR approved form is to prevent litigation that has the goal of second-guessing the substantive validity and legal sufficiency of the form's content", *id.* at 76. "The question of whether an OIR-approved form is consistent with the UM statute or with a UM policy is not one for the judiciary", *id.* at 77. Like Mr. Wilson, the Cosgroves signed the selection/rejection forms rejecting the stacked form of uninsured motorist coverage and accepting the non-stacking limitations and exclusions. Unfortunately, by rejecting that stacked coverage, Exclusion 2 of his policy specifically excludes the uninsured motorist coverage at the heart of this case.

This Court certainly recognizes that, by entry of this Order, Mr. Cosgrove is unable to seek redress for the damages he sustained on January 26, 2023. As indicated, however, his policy precludes that recovery. This is not a close call.

Conclusion

Ultimately, revised, Rule 1.510 indicates that summary judgment may be granted "if the pleadings and summary judgment evidence on file shows that there is no genuine [dispute] as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fla. R. Civ. P. 1.510(c); *In re: Amendments to Fla. Rule of Civil Procedure 1.510*, No. SC20-1490, 2020 WL 7778179 at *4, 309 So.3d 192 (Fla. 31, 2020) [46 Fla. L. Weekly S6a] (*amending language to replace "genuine issue" with "genuine dispute"). There are no genuine issues of material fact here and summary judgment is GRANTED.

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[1] *Brevard County v. Waters Mark Development Enterprises, LC,* 350 So. 3d 395, 398 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1863c] (quoting Fla. R. Civ. P.

1.510(a)).

[2]*Brevard County v. Waters Mark Development Enterprises, LC,* 350 So. 3d at 398 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

[3]*Brevard County v. Waters Mark Development Enterprises, LC,* 350 So. 3d at 398.

[4]*Id.*

[5]*Id.*

[6]*Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)).

* * *

Insurance—Property—Coverage—Post-loss obligations—Supplemental claim—Motion for summary judgment arguing that there is no dispute as to actual cash value is denied where insured submitted report of supplemental damages—Report of supplemental damages was not insufficient for failing to break out claim for ACV of additional items where there is no evidence that insurer tendered ACV or accepted responsibility for additional items—Motion for summary judgment based on failure of plaintiff's counsel to provide notice of intent to initiate litigation to claimant is denied where evidence indicates that copy of notice was provided to claimant

BRIAN SULLIVAN, as Personal Representative of SUSAN S. SULLIVAN, Plaintiff, v. CYPRESS PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2023 CA 008418 NC. Division C Circuit. April 7, 2025. [Motion for Reconsideration and Rehearing Denied. April 21, 2025.] Hunter W. Carroll, Judge. Counsel: Juan C. Arias, Arias & Abbass Your Attorneys, Doral, for Plaintiff. AlaEldean A. Elmunaier, Salmon & Salmon, P.A., Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendant's motion for final summary judgment due to no presuit dispute as to cash value [DIN 99]. Plaintiff filed an opposition with summary judgment evidence [DIN 144].

Defendant seeks summary judgment on two bases: (1) there was no dispute as to actual cash value; and (2) failure to provide claimant a copy of the notice of intent under section 627.70152. The Court denies on both bases.

As to the first issue, the Court notes that Plaintiff included a report with damage claims greater than then 4 tile and 7 ridge caps. This was provided to the Defendant before suit was filed. Defendant contends that report was insufficient because it did not break out a claim for actual cash value for those additional items referenced on the report. There is no evidence, though, that Defendant either tendered the actual cash value for those additional items or otherwise advised Plaintiff that Defendant accepted responsibility for those additional items and the amount was within the deductible. Under these circumstances, the *Goldberg v. Universal Property and Casualty Ins. Co.*, 302 So. 3d 919, 925 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2118b], rule does not apply.

As to the second issue, the Court denies as there is a disputed issued of material fact. Defendant contends that section 627.70152(3)(a)3., Florida Statutes, requires Plaintiff's counsel to provide a copy of the notice of intent to initiate litigation to the actual claimant. Defendant included deposition testimony that was equivocal as to whether claimant actually received it. Plaintiff then presented evidence that the email address on the notice of intent to initiate litigation was, in fact claimant's email address. Plaintiff's affidavit also indicated that after reviewing his email "I was able to recollect the Notice and a copy of Cypress response to the same" with respect to the notice. Regardless of whether claimant initially recalled receipt, the evidence demonstrates that, at a minimum, "a copy of the notice was provided to the claimant", which is the statutory requirement in section 627.70152(3)(a)3.

The Court denies the motion.

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND REHEARING REGARDING COURT'S ORDER DENYING DEFENDANT'S SUMMARY JUDGMENT MOTION

BEFORE THE COURT is Defendant's Motion for Reconsideration and Rehearing Regarding Court's Order on Defendant's Motion for Summary Judgment that was Filed on April 7, 2025 [DIN 190].

The Defendant's effort to take issue with the Court's generic use of the word "report" for the estimate provided by Providential Roofing & Construction is unavailing. Defendant misses the point that there was evidence in the record that Plaintiff tendered to Defendant presuit for damage greater than Defendant accepted. That differential is important here, as Defendant neither tendered actual cash value for that differential in damage nor otherwise told Plaintiff if Defendant accepted responsibility for the differential. That factual distinction is important as those facts distinguish this case from the cases cited by Defendant. If in the current case that differential evidence was not in the record, and if the case involved only the actual cash value of replacing four tiles, seven ridge caps, and fixing some gutters, then the story would be different. But that is not the case here, and the Court is not permitted to evaluate the quality of the summary judgment evidence other than to recognize it exists and the party with this evidence could survive a directed verdict motion along the lines of Defendant's summary judgment motion.

The motion is denied.

* * *

Mortgage foreclosure—Appeals—Attorney's fees—Amount—Trial and appellate attorney's fees are awarded to prevailing borrower in FHA-loan foreclosure case—Contingency risk multiplier—HB 837, amending section 57.104 to provide strong presumption that lodestar fee is sufficient and reasonable, is not retroactively applicable to case that was filed prior to effective date of statute—Multiplier of 1.5 is appropriate where relevant market requires contingency risk multiplier to obtain competent counsel, law firm was not able to mitigate risk of loss given borrower's financial situation at time counsel was retained, borrower's residence was at risk, result obtained was as good as possible, attorneys represented borrower on pure contingency basis, and success was unlikely at outset of case

PENNYMAC LOAN SERVICES, LLC, Plaintiff, v. EDDY E. USTAREZ, a/k/a EDDY USTAREZ, et al., Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2019CA001667. March 21, 2025. Gregory M. Keyser, Judge. Counsel: Eric M. Levine, ATLAS | SOLOMON, PLLC, Stuart, for Plaintiff. Malcolm E. Harrison, Law Office of Malcolm E. Harrison, P.A., Wellington, for Defendant.

ORDER TAXING PREVAILING PARTY ATTORNEY'S FEES AND EXPERT ATTORNEY'S FEES

THIS CAUSE came before the Court for an evidentiary hearing on Defendants/Appellees' Motion for Evidentiary Hearing to Determine Amount of Appellate Attorney's Fees and Costs and to Enter Judgment Awarding Appellate Attorney's Fees (D.E. #192) and Defendant/Appellees' Motion for Evidentiary Hearing to Determine Amount of Attorney's Fees and Costs and to Enter Judgment Awarding Trial Attorney's Fees (D.E. #193) ("Defendant's Motions"). The Court having reviewed and considered Defendant's Motions, Defendant's earlier Motion for Attorney's Fees and Costs (D.E. #164), Defendant's Memorandum of Law in Support of Defendant's Motion to Tax Prevailing Party Attorney's Fees and Costs (D.E. #224), Defendant's Notice of Filing Exhibits to Memorandum of Law in Support of Motion to Tax Prevailing Party Attorney's Fees and Costs (D.E. #226), Defendant's Notice of Filing Exhibits in Support of Motion (D.E. #s 227 and 228), PennyMac's Memorandum on Attorney's Fees (D.E. #229), PennyMac's Closing

Arguments on Attorney's Fees (D.E. #236), Defendant's Written Closing Argument (D.E. #237), Defendant's Notice of Filing Supplemental Authority (D.E. #238), Defendant's Second Notice of Filing Supplemental Authority (D.E. #239), all evidence presented including testimony of witnesses Eddy Ustarez, Attorney Malcolm E. Harrison, Attorney Michelle Moore, Attorney Michelle Feinzig, Attorney Scott J Lee, Attorney Jonathan Kline, Attorney Scott Edwards and Attorney Tim Quinones, all documentary evidence received in evidence including Defendant's Exhibits A, B and D and Plaintiffs' Exhibits 1 through 8, all legal authority submitted on behalf of the parties, argument of counsel, the court file, and being otherwise fully advised in the premises, the Court makes findings of fact and conclusions of law as follows:

THE UNDERLYING CASE

The Plaintiff filed the instant action to foreclose Defendant Eddy Ustarez' FHA-insured mortgage on February 6, 2019.

At the hearing, Mr. Ustarez testified that after he was served with the Plaintiff's foreclosure Complaint, he received 15-20 solicitation letters from lawyers offering him their legal services. He called four to five of those lawyers, but Mr. Ustarez testified that none of the lawyers he contacted offered to take his case on contingency, and he did not have any money to pay them a retainer or hourly fee. However, Mr. Ustarez also testified that he wanted to try pay some money and get caught up on his loan, and there was evidence that he was both working and made significant payments of $3,000, $1,600 and $2,000 in an effort to get caught up on the loan.

At the time that he was served with the Complaint, Mr. Ustarez had recently been diagnosed with a potentially life-threatening illness. In addition, his rotator cuffs had been torn, his son was in deportation proceedings, and he was getting divorced. Mr. Ustarez explained that he turned to the Legal Aid Society of Palm Beach County looking for help. Legal Aid could not assist him, but they referred him to the Law Office of Malcolm E. Harrison P.A.

Mr. Ustarez testified to meeting with Mr. Harrison and his associate attorney, Michelle Moore, in their office on March 14, 2019. During the initial consultation, Mr. Ustarez informed Mr. Harrison that he had recently been diagnosed with a serious illness, that he was going through a divorce, that his son was in deportation proceedings, that he had been hurt at work, and that he was not working a full schedule. He testified during the hearing that he told Mr. Harrison he could not afford to pay his office for its services, and based on this representation, Mr. Harrison offered to take this case on a full contingency basis. Mr. Ustarez testified that he has never paid Mr. Harrison any money for legal fees or costs in this matter.

Mr. Harrison testified that the only reason that he took this case on a full contingency basis was because he had the hope and expectation that he could receive a contingency fee multiplier if he were able to win the case. He further testified that his office would not have been willing to take this case without the possibility of being awarded a contingency fee multiplier because he has lost so many of these cases in the past. Mr. Harrison testified that it is simply too risky for him to take on FHA mortgage foreclosures without the possibility of a multiplier.

As explained by the Fourth District Court of Appeal in *Bank of Am., N.A. v. Jones*, 294 So.3d 341, 342 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D699a], "[a]s a Federal Housing Administration ('FHA') backed loan, the Bank's right to foreclose the mortgage was conditioned upon compliance with 24 C.F.R. § 203.604(b) which requires face-to-face counseling before borrowers are three months delinquent on their loans to provide an alternative to foreclosure."

Here, Judge Colton at the first foreclosure trial found the Plaintiff did not conduct the requisite pre-foreclosure face-to-face counseling with Mr. Ustarez. The Court found instead, the Plaintiff alleged that it made a "reasonable effort" to arrange such a meeting. As part of the statutory definition of "reasonable effort" set forth in 24 CFR 203.604(d), the Plaintiff was required to make a trip to the property to coordinate the meeting with the Defendant.

As proof of its trip to the property to coordinate the meeting, the Plaintiff offered into evidence the Field Call Results of JM Adjustment Services ("JMA"), the third-party vendor that it hired to go to the property to coordinate the pre-foreclosure hearing. Liz Mills, the JMA field agent who went to the property, also testified at the underlying trial. The Field Call Results stated that when Ms. Mills visited Mr. Ustarez' home it appeared no one was home and there were no cars in the driveway, so she taped a letter to the borrower's front door.

However, at the underlying trial, Mr. Ustarez testified that he was home on the day of the alleged visit. Mr. Ustarez' testimony was corroborated by a picture that Ms. Mills took of his car in the driveway right in front of his front door, which picture she attached to the Field Call Results. Ms. Mills' picture contradicted her claim in the Field Call Results that no cars were visible at the property. At trial, Mr. Ustarez further testified that no one knocked on his door or rang his doorbell, and he found nothing taped to his front door. Further, the Bank's records showed that Ms. Mills actually went to the property the day before she said she did.

At the end of the trial, Judge Colton issued an involuntary dismissal in favor of Mr. Ustarez.

The Plaintiff hired Eric Levine of the Akerman law firm to handle the first appeal following that trial and the later post-remand trial court proceedings. The Fourth District Court of Appeal reversed Judge Colton's *sua sponte* involuntary dismissal because the Appellate Court determined that the Plaintiff had introduced into evidence sufficient proof to make a *prima facie* case of foreclosure, that should not have been decided as an involuntary dismissal. *See Pennymac Loan Servs. LLC v. Ustarez*, 303 So.3d 578 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2174a].

As the Involuntary Dismissal was overturned, Mr. Harrison's office is not seeking compensation for the time it worked on the first appeal.

After remand, the Plaintiff injected a multitude of procedural and substantive issues into the case such as:

- the scope of remand,
- the law of the case,
- whether the 200-mile exemption should be measured by radius or driving distance,
- the law for reopening cases,
- substantial compliance, and
- how prejudice is measured in an FHA-insured loan.

These legal issues required Mr. Harrison and Ms. Moore to research and respond in successfully litigating these claims and obtain a favorable result for Mr. Ustarez. After five post-remand hearings, on June 29, 2022 Judge Colton entered a Final Judgment Denying Foreclosure in favor of Mr. Ustarez. Judge Colton also awarded Mr. Ustarez prevailing party attorney's fees as part of the Final Judgment Denying Foreclosure.

The Plaintiff hired Mr. Levine to appeal for a second time. Mr. Harrison's office hired Attorney Michele Feinzig to provide appellate support during the second appeal. The scope of Ms. Feinzig's employment was to review documents, discuss strategy with Mr. Harrison and Ms. Moore, review and edit draft briefs, and provide advice on compliance with the appellate rules.

Ms. Feinzig was retained by Mr. Ustarez even though she was paid by Mr. Harrison. Ms. Feinzig was unwilling to take this case on full contingency because she had a lot of doubts about whether Mr. Harrison could win the appeal. Ms. Feinzig entered into a partial contingency fee agreement with Mr. Ustarez. Per the agreement, she

is entitled to $525 an hour. Of that amount, Mr. Harrison paid the first $250 per hour totaling $18,000. The remaining $275 per hour was contingent on winning the case.

The Fourth District Court of Appeal *per curiam* affirmed Judge Colton's ruling in favor of Mr. Ustarez. *See Pennymac Loan Servs. v. Ustarez*, 4D22-2021 (Fla. 4th DCA, Jul 13, 2023) The Appellate Court also granted entitlement to Mr. Ustarez for his appellate attorney's fees.

DETERMINING REASONABLE AMOUNT OF ATTORNEY'S FEES

When considering an award of reasonable attorney's fees to be taxed against the opposing party, the Court must begin its analysis by examining the factors set forth in Rule 4-1.5 of the Rules Regulating the Florida Bar and in *Florida Patient's Compensation Fund v. Rowe*, (472 So.2d 1145 (Fla. 1985). *Rowe* and its progeny hold that the trial court must determine the appropriate "lodestar" fee by determining the reasonable hours expended on a matter, determining the reasonable hourly rate, and multiplying the two figures together. *See id.* at 1150-1151. After arriving at a lodestar fee, if the attorney took the case on a contingency fee basis, the trial court "may add or subtract from the fee based upon a 'contingency risk' factor and the 'results obtained.' " *Id. at 1151.* In *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) the Florida Supreme Court set forth the following 12 factors to be considered when determining a reasonable attorney's fee:

(1) **THE TIME AND LABOR REQUIRED**

The parties have viewed this case in three distinct phases.

- The first phase ("Phase 1") went from March 14, 2019, the date that Mr. Harrison's law firm was retained, up to the appeal of the Order of Involuntary Dismissal. As the Defendant lost the first appeal, Mr. Harrison's office is not seeking compensation for those hours.
- The second phase ("Phase 2") of the case was from the period after remand until Judge Colton issued the Final Judgment Denying foreclosure.
- The third phase ("Phase 3") of the case is the second appeal, in which the Plaintiff tried and failed to get the Fourth DCA to overturn Judge Colton's Final Judgment Denying Foreclosure.

In *Rowe*, the Supreme Court held that when determining what hours have been "reasonably expended," this Court "must consider the number of hours that should reasonably have been expended in that particular case. . . .In this respect, the magnitude of the case should be a consideration." *Rowe*, 472 So.2d at 1150-51.

Applying *Rowe* to this case, the Court notes that this was not the typical foreclosure of a conventional loan, but of an FHA-insured loan. Therefore, compliance with the Federal regulations for the servicing of Federally-insured loans was a central issue in this litigation.

Further, the Court finds that case became even more complex after remand when the Plaintiff injected additional substantive and procedural issues in the case. Mr. Harrison testified that this was the most complex foreclosure case that he has ever litigated in 18 years as a foreclosure defense attorney. One of the Defendant's attorney's fee experts, Mr. Scott Lee, testified that "they had very good lawyers on their side writing good stuff, good product."

Regarding the second appeal, Mr. Scott Edwards, the Plaintiff's appellate level fee expert, testified that "there were some good, solid issues on appeal." Mr. Edwards further testified that the appeal had "merit". He further testified that "I thought it was a top notch brief and it raised a number of arguments, and I felt that they needed to be responded to in a top notch way to have a shot at winning."

Therefore, when considering how many hours would be reasonable for Defendant to incur regarding the appeal, the Court has taken into account that this case was litigated vigorously at both the trial court and the appellate level, and that some of the issues were more complex than the run-of-the-mill issues found in the foreclosure of a conventional mortgage.

The Court has conducted a line-by-line analysis of the Defendant's attorney's fee sheets and time records. During this evidentiary hearing, Mr. Lee, the Defendant's trial court level fee expert, made opinions as to a reduction in the fees sought by Mr. Harrison's firm, which this Court has adopted. Accordingly:

- .5 hour sought by Mr. Harrison for discussing summary judgment times on May 24, 2019 is reduced to 0 because it is administrative;
- 2.9 hours by Mr. Harrison spent conversing with Ms. Moore on June 21, 2019 is reduced to .8 because it is excessive and duplicative;
- 1.3 hours spent by Ms. Moore for final review of a memorandum on October 15, 2019 is reduced to .5 because it is excessive, vague, and duplicative
- .1 hours spent by Mr. Harrison on August 2, 2021 for reviewing a hearing date is reduced to 0 because it is administrative;
- 2.3 hours spent by Mr. Harrison on November 26, 2021 to read the transcript of the trial is reduced to 1.3 hours as excessive;
- 2.2 hours spent by Ms. Moore on December 5, 2021 to read the script and perform legal research on prejudice is reduced to 1 hour because it is excessive and duplicative;
- .8 hours sought by Mr. Harrison on June 23, 2022 for reviewing a settlement email is reduced to .4 because it is block billing;
- .9 hours spent by Ms. Moore for drafting a motion for attorney's fees and costs on July 12, 2022 is reduced to .5 as excessive.

Mr. Kline, the Defendant's appellate court fee expert, did not suggest that any time be deducted. However, the Court did review all three (3) timekeepers time participating in the appellate process, and the time of Mr. Harrison and Ms. Moore at the trial court level, and made some deductions in time when considering the required factors, including evaluation of any secretarial or administrative functions, any duplication of effort among the attorneys, any entry vague and unclear, and the reasonable time to be allowed as compensable when taxing attorney's fees to the prevailing party.

Based on the above, Mr. Ustarez seeks the following prevailing party attorney's fees:

- For time billed during the Phase 1 of this case, including the first trial, Malcolm Harrison is seeking an award for 123.9 hours billed on this case and Michelle Moore is seeking an award for 33.7 hours billed on the case.
- For time billed during Phase 2 of this case, including the second trial and Motion for Rehearing issues, Malcolm Harrison is seeking an award for 162.9 hours billed on this case and Michelle Moore is seeking an award for 63.5 hours billed on this case.
- For time billed during Phase 3, including the second appeal, Malcolm Harrison is seeking an award for 143.3 hours billed on this case, Michelle Moore is seeking an award of 35.7 hours billed on this case, and Michele Feinzig is seeking an award of 70.7 hours billed on this case.

(2) THE NOVELTY AND DIFFICULTY OF THE QUESTIONS

There was testimony presented how FHA litigation is different from the typical foreclosure of a conventional loan. It was indicated there are only a handful of reported Florida appellate decisions (roughly 14) addressing these Federal regulations in Florida. Hence, an argument for the Defendant that the terrain here is new and many of the theories are untested. To prevail, Mr. Ustarez' lawyers were required to have a thorough understanding of the HUD regulations for servicing FHA-insured loans and the case law interpreting those regulations.

It was argued that the complexity of this case is shown by the trial

judge's conflicting orders. After the initial trial, Judge Colton made detailed findings of fact in his Order of Involuntary Dismissal establishing that the Plaintiff had not tried to coordinate the pre-foreclosure meeting with Mr. Ustarez as required by Federal law. However, on September 29, 2021 during the post remand period, Judge Colton reversed his findings of fact in the Order of Involuntary Dismissal and signed an Order containing detailed findings that the Plaintiff had proven that it made a trip to the property by a preponderance of the evidence and that Mr. Ustarez's claim of prejudice was speculative. Although less than a month after signing that September 29, 2021 Order, Judge Colton granted the Defendant's Motion for Rehearing, and in December of 2021 Judge Colton vacated the September 29, 2021 Order. In the end, Judge Colton then reverted to his original findings of fact in the Final Judgment Denying Foreclosure in June of 2022 and found that the Plaintiff did not prove Plaintiff or its representative visited the property and that Mr. Ustarez was indeed prejudiced by the Plaintiff's failure to comply with the face-to-face requirement of 24 CFR 203.604. Defendant argues these orders going back and forth on the dispositive issues in this case are an indication of the complexity of this five-year litigation, although Judge Colton may have been weighing the credibility of witnesses—weighing whether he believed the Plaintiff's witness went to Mr. Ustarez property and tried to contact him for the required meeting.

(3) THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICES PROPERLY

The Court finds that the issues presented in this case were relatively novel in the sense that are not raised in most of the litigated foreclosure cases, and required counsel to obtain a thorough understanding of HUD's regulations for servicing FHA-insured loans, the evidence rules, and administrative law. Counsel obtained the knowledge and preparation necessary. However, the Court also notes that a primary issue whether the Plaintiff followed the requirements of Federal law in having a face-to-face conference with the Defendant and discussing options to help him remain in the property before foreclosing on the property is a straightforward legal concept. There was conflicting testimony from key witnesses, and counsel prepared for that testimony and applying the law to that testimony. However, it appears the deciding factor may well have been the believability of those witnesses as Judge Colton weighed their testimony.

(4) PRECLUSION OF OTHER EMPLOYMENT DUE TO ACCEPTANCE OF CASE

The Court finds that this factor is not applicable.

(5) THE CUSTOMARY FEE

The Plaintiff has stipulated the hourly rates for Mr. Harrison. Therefore, the Court also accepts and finds that Mr. Harrison's reasonable hourly rate was $450 during the first phase, $500 during the second phase period after remand, and $550 during the third phase involving the appeal

By the greater weight of the evidence, the Court finds that a reasonable hourly rate for Ms. Moore is $400 during all phases of this litigation. Mr. Lee opined that Ms. Moore's initial hourly rate of $400 was reasonable given that she has been an attorney for 25 years and has a great deal of experience in foreclosure work. The Court agrees. Mr. Lee opined a $50 per hour increase to $450 during the remand period to also be reasonable. However, the Court agrees with the position of Plaintiff that because Ms. Moore was not the lead counsel and was providing support services, and considering her experience, a $400 hourly rate throughout the litigation is reasonable and appropriate. Plaintiff's attorney fee expert, Tim Quinones, opined that under these circumstances $375 per hour should be the hourly rate to apply as on the high end of similarly educated and experience attorneys for this type of case. The Court finds $400 per hour is appropriate for Ms. Moore throughout the case. When reaching its conclusion, the Court did consider that former Judge Peter Blanc found an hourly fee of $375 for Ms. Moore to be reasonable in 2018—six years ago—in the case of *SCR Capital Partners LLC v. Veronica Ponder*, Case No: 502012CA012782 (15th Jud. Cir., February 23, 2018).

The Court finds that a reasonable hourly rate for Ms. Feinzig during the second appeal is $425 per hour. Appellate attorney fee expert Mr. Edwards for the Plaintiff offered his opinion that $375 per hour would be reasonable for Ms. Feinzig based on his experience and knowledge, and the nature of her involvement in the appeal with the two other Defendant's lawyers. Defendant appellate attorney fee expert Mr. Kline testified that he surveyed attorneys Adam Skolnik, Ricard Corona, Evan Rosen, Josh Bleil, and Joseph Altschul and all of them informed him that they charge at least $700 an hour for appellate work. Based on these survey results, Mr. Kline testified that the hourly rates sought by Ms. Moore of $500 and Ms. Feinzig of $525 for the work they did on the second appeal are reasonable. The Court finds that the hourly rates ordered of $400 for Ms. Moore and $425 for Ms. Feinzig related to their involvement with the second appeal are reasonable, when considering their involvement as support for Mr. Harrison. As Mr. Edwards opined, and Ms. Feinzig testified, Ms. Feinzig was not lead counsel on the appeal with the responsibility of lead counsel, and she provided help behind the scene as a consultant. However, the Court has awarded Ms. Feinzig more hours as her reasonable involvement in the appeal then the Plaintiff argued is reasonable. From Ms. Feinzig's testimony, she found the initial effort of the first draft of a Answer Brief "a mess. But good legal arguments." Ms. Feinzig testified to assisting Mr. Harrison with several important aspects of finalizing the appellate filing, including to write differently for an appellate brief then other legal writing, and a lot of work had to be done to fix how the brief was presented, that were important to the representation of Mr. Ustarez. The Court had to evaluate the interaction and contributions of all three attorneys involved in the appeal in deciding the reasonable hours to be awarded to each, understanding that considerable time was spent revising drafts and the form and manner of presentation, and what amount of this combined time was reasonable to be awarded to the prevailing party.

(6) WHETHER THE FEE IS FIXED OR CONTINGENT

The Court finds that Mr. Harrison's fee agreement with Mr. Ustarez is a pure contingency fee agreement.

The Court finds that Ms. Feinzig's agreement with Mr. Ustarez is a partial contingency fee agreement. Ms. Feinzig's hourly rate in her Agreement to Provide Legal Services is $525 per hour. Mr. Harrison paid Ms. Feinzig $250 per hour of her hourly rate. The remaining $275 per hour was contingent on recovery.

(7) TIME LIMITATIONS IMPOSED BY THE CLIENT OR THE CIRCUMSTANCES

Mr. Harrison's law firm began to work on this case on March 14, 2019—over five years ago.

(8) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED

The Plaintiff sought a judgment of $181,160 plus interest from August 1, 2018. In addition, the Plaintiff sought to recover its attorneys' fees and costs related to this suit. A final judgment in favor of the Defendant was granted after remand and upheld on appeal.

If the Plaintiff had succeeded in its foreclosure action, Mr. Ustarez would have lost his residence along with the rights to enjoy the property. Under these circumstances, Mr. Ustarez had a high risk of financial loss because he would have lost his residence along with the rights to enjoy the property.

When asked about the results obtained, Defendant's expert Mr.

Lee testified "[y]ou could not have done any better." The fact that a subsequent foreclosure can be filed against Mr. Ustarez did not dim Mr. Lee's evaluation of Mr. Harrison's success in this case, because he feels defending Mr. Ustarez in this case and saving him from losing his home is worth the time, energy and effort of his attorneys.

Mr. Quinones, the Plaintiff's expert witness, also agreed that the undersigned law office did a good job in this case. As to the appeal, Defendant's expert Mr. Kline testified that "you did a fantastic job on this case, and you did a great job on the appeal." The Plaintiff's appellate expert Mr. Edwards likewise testified that "the final product of your brief was very good. Absolutely."

The Court finds that here the results obtained for Mr. Ustarez are as favorable an outcome as possible for a defendant in a mortgage foreclosure case. Mr. Ustarez is the prevailing party.

(9) THE EXPERIENCE, REPUTATION, AND ABILITY OF THE ATTORNEYS

Malcolm Harrison graduated from Harvard College in 1990 and Harvard Law School in 1993. He received his master's degree in real estate law from the University of Miami in 2006. He has 31 years of legal experience, including 18 spent defending foreclosures in Florida.

Michelle Moore graduated from Nova Law School in 1998. She has been a lawyer for 26 years, including 14 years spent defending foreclosures with Mr. Harrison. Prior to joining the firm, she was a supervising attorney at the Florida Department of Children and Families now known as Child Welfare Legal Service. On May 31, 2024, Ms. Moore started a new job in the Office of the Attorney General in West Palm Beach.

Michele K. Feinzig has been a member of the Florida Bar since 1988 and has focused her practice on civil appeals and litigation support for over 30 years. She graduated *cum laude* from Florida State University with a Bachelor's degree in Accounting in 1985, and *magna cum laude* from the University of Miami School of Law in 1988. Ms. Feinzig has handled appeals in five of Florida's District Courts of Appeal and the Florida Supreme Court, as well as the United States Court of Appeals for the Eleventh Circuit. Ms. Feinzig is AV-Rated by Martindale-Hubbell® and is an active member of the Appellate Practice Section of The Florida Bar, the Broward County Bar Association (of which she chaired the Appellate Practice Section for several years), the Florida Justice Association, the Broward County Trial Lawyers Association and the Broward County Women Lawyers' Association.

(10) THE "UNDESIRABILITY" OF THE CASE

The Court finds that in one sense this was an undesirable case to prosecute on behalf of the Defendant on a full contingency basis. Proof of the undesirability of this case is that Mr. Ustarez testified that no other law firm outside of the undersigned agreed to take it on a pure contingency basis. Even the Plaintiff's fee expert, Mr. Quinones, testified that he did not know anyone who would have taken Mr. Ustarez' case without demanding some payment. Although Mr. Quinones also testified that this foreclosure case was far better then most from the defense perspective. The Court agrees with Mr. Quinones that the defense had an even chance of winning this case from the inception, because the main issue was whether the Plaintiff complied with the Federal law requirement of a face-to-face meeting with the borrower, and there was evidence that did not happen, which would be a complete defense. The case was not a "slam dunk", but was a foreclosure case the Defendant could win when the time and effort was put into the case by his attorneys.

(11) THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT

This is the only case in which Malcolm Harrison's law firm has represented the Defendant.

The Defendant testified that he is grateful to Mr. Harrison because he was his only option for legal representation. Moreover, Defendant expressed that he is pleased with Mr. Harrison's handling of his defense.

(12) AWARDS IN SIMILAR CASES

The fees awarded by this Court are not unreasonable in relation to similar cases and the complexity of this case. In making this finding, the Court notes that this litigation has been ongoing for over five years, involved a motion for summary judgment and trial in 2019, five post-remand hearings in 2021 and 2022, and two appeals—even though the Defendant's attorneys are only seeking compensation for the second appeal

In *Union Home Mortgage v. Anderson* Pasco County Case 2019CA003652, which was also an FHA case, the parties stipulated to a prevailing party attorney award of $115,000 for Mr. Harrison's firm. Mr. Harrison represented the FHA-insured borrowers in *Anderson* for less than two years and the case was not appealed.

MULTIPLIER

In a contingency fee case like this one, once the court determines the lodestar amount, it must consider whether to apply a multiplier. *Quanstrom*, 555 So.2d at 831.

In *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So.2d 403 (Fla. 1999) [24 Fla. L. Weekly S220a], the Florida Supreme Court explained that the primary rationale for the contingency fee multiplier "is to provide access to competent counsel for those who could not otherwise afford it." *See also Joyce v. Federated Nat'l Ins. Co*., 228 So.3d 1122, 1134 (Fla. 2017) [42 Fla. L. Weekly S852a] ("contingency fee multipliers are intended to encourage attorneys to take cases they otherwise might not take.") As explained by the Supreme Court in *Joyce,* the lawyer taking the case on contingency "bears the risk of never being compensated for the number of hours spent litigation the case. This risk, among other factors, is what entitled the attorney to seek, and the trial court to consider, the application of a contingency fee multiplier."

Defendant argued that contingency fee multipliers have been used in foreclosure cases. For example, in *Nationstar Mortg. LLC v. Faramarz*, 331 So.3d 738 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2646b], the Fourth District Court of Appeal approved a fee multiplier of 2.0 to the lawyer representing a homeowner in foreclosure. In *J.P. Morgan Mortg. Acquisition Corp. v. Golden,* 98 So.3d 220 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D2298a], the Second DCA approved a multiplier of 2.5 where the borrower's expert witness testified that "he knew of no other attorneys in the area who would undertake a mortgage foreclosure defense on such a contingency contract." In *Bank of New York v. Williams,* 979 So.2d 347 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1005a] the First DCA found no abuse of discretion in the trial court's use of a multiplier of 2.5 in establishing the attorney's fees in a foreclosure case.

Pursuant to the case of *Stack v. Lewis*, 641 So. 2d 969 (Fla. 1st DCA 1994), when a trial court makes the determination as to the appropriateness of a fee multiplier that same determination applies to the appellate fees expended by the same counsel in litigating the case on appeal. Therefore, the Court is only required to do the multiplier analysis once—at the outset of the case. However, only the hours for Mr. Harrison and Ms. Moore are eligible for contingency fee enhancement. Pursuant to *Stack*, Ms. Feinzig's fees are not eligible for contingency fee enhancement.

HB 837 Is Not Retroactively Applicable to This Case

In March of 2023, through HB 837, the Florida Legislature amended Section 57.104, Florida Statutes, and added subsection (2) which states: "In any action in which attorneys fees are determined or awarded by the court, there is a strong presumption that a lodestar fee

is sufficient and reasonable. This presumption may be overcome only in rare and exceptional circumstances with evidence that competent counsel could not otherwise be obtained."

The Plaintiff has argued that this law is retroactive and applies to this case. That position, however, conflicts with the holding in the case of *Wolf v. Williams*, 49 Fla. L. Weekly D2363a (Fla. 5th DCA, November 24, 2024) in which the Fifth DCA affirmed the trial court's holding finding that HB 837 does not apply retroactively.

The Court finds that it is bound to apply the holding of the Fifth DCA in *Wolf*. *See Chapman v. Pinellas County,* 423 So. 2d 578, 580 (Fla. 2d DCA 1982) ("a trial court in this district is obliged to follow the precedents of other district courts of appeal absent a controlling precedent of this court or the supreme court.") Applying *Wolf* to the facts in this case, the Court finds that the amendments to Section 57.104 became effective on March 24, 2023—well after this case was filed on February 6, 2019.

Aside from *Wolf*, this Court finds that the plain language used by the Legislature makes clear that HB837 only applies to causes of action filed after the effective date of the statute. . .March 24, 2023. This lawsuit was filed before March 24, 2023, so the provisions of HB 837 do not apply to this case.

WHETHER A MULTIPLIER SHOULD BE APPLIED TO THE LODESTAR FEE

Determining whether a contingency fee multiplier should be applied to the lodestar fee requires the Court to consider "(1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client." *Quanstrom*, 555 So.2d at 834.

The Plaintiff argues that the "trial court is not required to apply a contingency multiplier, but is required only to consider whether a multiplier warranted." *El Brazo Fuerte Bakery 2 v. 24 Hour Air Service, Inc.,* 330 So. 3d 552, 558 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2539a] (quoting *Nalasco v. Buckman, Buckman & Reid, Inc.,* 171 So. 3d 759, 762 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1643a]). Plaintiff also argues that "[T]he existence of a contingent-fee agreement between attorney and client does not automatically require application of a multiplier." *Sun Bank of Ocala v. Ford*, 564 So. 2d 1078, 1079 (Fla. 1990). Plaintiff's position is also that "factors that are adequately accounted for in the lodestar cannot be the basis for enhancing the lodestar. *Perdue v. Kenny A. ex rel. Winn, supra*, S.Ct. at 1673. In sum, the 'party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified.' *Id*. at 1669." *Ottaviano v. Nautilus Ins. Co*.,717 F. Supp. 2d 1259, 1272 (M.D. Fla. June 2010).

1) WHETHER THE RELEVANT MARKET REQUIRES A CONTINGENCY FEE MULTIPLIER TO OBTAIN COMPETENT COUNSEL

As to the first factor, whether the market requires a contingency fee multiplier, the Supreme Court noted in *Joyce* that "[t]his factor is intended to assess, not just whether there are attorneys in any given area, but specifically whether there are attorneys in the relevant market who both have the skills to handle the case effectively and who would have taken the case absent the availability of a contingency fee multiplier." *Joyce*, 228 So. 3d at 1133.

The testimony was that when he went into foreclosure, Mr. Ustarez received between 15 and 20 solicitation letters from lawyers offering him their services. He contacted five or six of the attorneys and none of them offered to take Mr. Ustarez' case on a full contingency basis. Mr. Ustarez testified that he did not have any money to pay an attorney. Mr. Ustarez turned to legal aid for help. Unable to assist him, they referred Mr. Ustarez to Mr. Harrison's office.

Mr. Ustarez testified that he could not have afforded Mr. Harrison's fees. Based on that representation, Mr. Harrison offered Mr. Ustarez a full contingency fee agreement. Over the last five years, Mr. Ustarez has not paid Mr. Harrison's firm any legal fees or expenses. Mr. Ustarez testified that he has never been billed for anything.

Mr. Harrison testified that the only reason that his firm agreed to accept the risk of taking on this case is because of the possibility of receiving a contingency fee multiplier. As noted above, Mr. Harrison's firm was the only firm willing to take this case on a full contingency fee basis.

Defendant attorney fee expert Scott Lee testified that he did not know of any firm in the relevant market that would have taken this case on a pure contingency basis without the possibility of a multiplier. Mr. Lee testified that he spoke personally to attorneys Evan Rosen, Josh Bleil, and Joseph Altschul—all of whom focus on foreclosure defense—and each one of them confirmed that there is no attorney that they know of—including themselves—who would have taken on this case without the possibility of a multiplier. Mr. Lee testified that in his opinion the relevant market required a contingency fee agreement to obtain competent counsel. *See Citizens Prop. Ins. Corp. v. Laguerre*, 259 So. 3d 169, 177 (Fla. 3rd DCA 2018) [43 Fla. L. Weekly D1934b] ("a trial court generally may rely on expert testimony that a party would have difficulty securing counsel without the opportunity for a multiplier' in support of the imposition of the multiplier.")

Attorney Jonathan Kline, Mr. Ustarez' expert for the appellate fees, likewise testified that he did not know of any attorneys in the relevant market who would have taken this case on a pure contingency basis without the possibility of receiving a contingency fee multiplier. Mr. Kline testified that attorneys Joseph Altschul, Josh Bleil, and Ricardo Corona told him that they would not take an appeal without the possibility of a contingency fee multiplier. It was represented that each of these lawyers defend foreclosures in both the trial courts and the appellate courts. Mr. Kline concluded that Mr. Ustarez would not have been able to find counsel without the possibility of a contingency fee multiplier.

Even the Plaintiff's trial court expert witness, Mr. Quinones, testified that he did not know anyone who would have taken Mr. Ustarez' case on a pure contingency fee agreement without some type of payment.

In *Sun Bank of Ocala v. Ford*, 564 So. 2d 1078, 1079 (Fla. 1990), the Supreme Court held that "there should be evidence in the record, and the trial court should so find, that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." Here the Court has the required evidence to support the use of the multiplier.

Given that none of the lawyers who solicited Mr. Ustarez were willing to take the case on a contingency basis, that Mr. Quinones testified that he did not know a lawyer who would take this case without demanding some payment, that Mr. Ustarez could not afford to pay a lawyer to represent him, that neither Mr. Lee nor Mr. Kline knew of any lawyer who would defend a foreclosure on a pure contingency fee basis without the possibility of a multiplier, and that Mr. Harrison was only willing to take the case because there was a chance of earning a multiplier, the Court concludes that the relevant market does require a contingency fee multiplier to obtain competent counsel as the facts existed at the outset.

2) WHETHER THE ATTORNEY WAS ABLE TO MITIGATE THE RISK OF NONPAYMENT IN ANY WAY

"Generally, the controlling consideration in determining whether

an attorney can mitigate the risk of nonpayment under the second prong of *Joyce* is whether the plaintiffs can afford a retainer or hourly fees." *Wesson v. Fla. Peninsula Ins. Co.*, 296 So. 3d 572, 573 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1217c].

In *Joyce*, "[t]he court relied on testimony from the Joyces' attorney that the Joyces told her they could not pay a retainer, as well as testimony from the Joyces' fee expert that there was no meaningful way to have mitigated the risk of nonpayment in this case." *Joyce,* 228 So. 3d at 1125. Here, as in *Joyce*, Mr. Ustarez testified that during his initial consultation with Mr. Harrison's firm, he told Mr. Harrison that he could not afford to pay his firm for its services. Based on Mr. Ustarez' representation that he could not afford to pay Mr. Harrison, Mr. Harrison offered to represent Mr. Ustarez on a full contingency basis.

When asked if Mr. Harrison could have mitigated his risk of loss, Mr. Lee testified that he did not see a way to mitigate the risk when Mr. Usteraz was ill, and at times unemployed, with no ability to financially pay Mr. Harrison, the only way to handle this case for proper compensation would be with the inclusion of a multiplier. Likewise, when asked if there was a way to mitigate the risk of nonpayment, Mr. Kline testified there was not, and pointed out that Mr. Harrison spent $18,000 of his own money to see this appeal through, win or lose, and Mr. Harrison had no idea whether or not he was going to be victorious at the end of this appeal.

The Plaintiff's fee export, Mr. Quinones, suggested that Mr. Ustarez could have used the money that he was using to try to catch up his loan to pay for an attorney. However, there were indications these payments to the Plaintiff were made before Mr. Ustarez hired Mr. Harrison in March 2019. Based on the Plaintiff's own records, Mr. Ustarez made a $3,000 payment in August 2018, a $1,500 payment in November 2018, and a $2,000 payment in November 2018, before Mr. Harrison was retained in March of 2019.

Mr. Quinones further opined that Mr. Ustarez could have paid Mr. Harrison's firm because Mr. Ustarez stated in his summary judgment affidavit, which was written months after he retained Mr. Harrison, that he could resume payments or enter into a payment plan. However, the Court finds the binding Supreme Court precedent in *Joyce* requires courts to analyze the multiplier **at the time** that the attorney is retained. As set forth by the Supreme Court in *Joyce*:

> *[T]he lodestar amount, which awards an attorney for the work performed on the case, is properly analyzed through the hindsight of the actual outcome of the case, whereas the contingency fee multiplier, which is intended to incentivize the attorney to take a potentially difficult or complex case, is properly analyzed through the same lens as the attorney* ***when making the decision*** *to take the case.*
>
> *Joyce*, 228 So.3d at 1133 (emphasis supplied).

Consistent with *Joyce*, the 4th DCA held in *Michnal v. Palm Coast Development, Inc*., 842 So.2d 927 (Fla. App. 2003) [28 Fla. L. Weekly D688b] that:

> *As discussed in Quanstrom and its progeny, the appropriate time frame for determining whether a multiplier is "necessary" is when the party is seeking the employ of counsel. See, e.g., Simmons v. Royal Floral Distributors, Inc., 724 So.2d 99 (Fla. 4th DCA 1998)* [23 Fla. L. Weekly D1181a] *(there must be evidence that a contingent fee agreement was necessary in order for the prevailing party* ***to have obtained*** *competent counsel if a multiplier is to be imposed on the nonprevailing party). (emphasis in original)*

The dispositive issue, as Mr. Quinones agreed, is the status of Mr. Ustarez' ability to pay Mr. Harrison as expressed during their first meeting when Mr. Harrison was making the decision to take the case, even if Mr. Ustarez could not afford to pay Mr. Harrison any money. Mr. Ustarez testified that he earned $45,000 during 2019, but Mr. Harrison's law firm is requesting compensation for $69,235 of work performed for him during this period—more than the total amount Mr. Ustarez earned that year.

In *Joyce* the Supreme Court affirmed the use of a multiplier when the Joyces' attorney testified that the Joyces told her they could not pay a retainer, as well as testimony from the Joyces' fee expert that there was no meaningful way to have mitigated the risk of nonpayment in this case. *Joyce*, 228 So. 3d at 1125. The testimony in this case seems to be on all fours with *Joyce*.

The Court finds that Mr. Harrison's firm was not able to mitigate the risk of nonpayment in any way.

WHETHER ANY OF THE FACTORS SET FORTH IN *ROWE* ARE APPLICABLE

In considering the *Rowe* factors relevant to awarding a multiplier, the Court is to give special consideration to the amount involved, the results obtained, and the type of fee agreement between the attorney and the client. *Quanstrom*, 555 So.2d at 834.

Results Obtained

The Defendant obtained a complete victory. Mr. Lee, Mr. Kline, Mr. Quinones, and Mr. Harrison all testified that very few borrowers in mortgage foreclosure cases win. The result obtained here for Mr. Ustarez is the best that could be done.

Amounts Involved

If the Plaintiff had succeeded in its foreclosure action, Mr. Ustarez would have lost his residence along with the rights to enjoy the property. Under these circumstances, Mr. Ustarez had a high risk of financial loss because he would have lost his residence along with the rights to enjoy the property.

Type of Fee Arrangement

The fee agreement between Mr. Ustarez and Mr. Harrison is a pure contingency fee agreement. No other lawyer offered to represent Mr. Ustarez on contingency. Mr. Lee testified that a multiplier is appropriate where, this a pure contingency fee agreement, and Mr. Ustarez was not obligated nor did he pay Mr. Harrison anything.

The Court finds that this is a case in which a multiplier is justified. The multiplier benefited Mr. Ustarez as it enticed Mr. Harrison to take this case. As a direct result of the multiplier, the playing field between the Plaintiff and Mr. Ustarez was leveled, and Mr. Ustarez was able to retain competent counsel in this matter and save his home from foreclosure.

THE DEFENDANT IS ENTITLED TO A 1.5 MULTIPLIER BECAUSE SUCCESS WAS UNLIKELY AT THE OUTSET OF THE CASE

Defendant argues that as explained by the 5th DCA in *Progressive v. Schultz*, 948 So.2d 1027 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D548b], "**The riskier the case, the greater the multiplier**." The Court finds there was not such a great risk for the defense of a foreclosure case, given the FHA-insured loan having the requirement of Federal law for the Bank to have face-to-face counseling before the borrower is three months delinquent on the loan to provide an alternative to foreclosure, given the fact that Mr. Ustarez would testify that face-to-face meeting never occurred. This was a complete defense to foreclosure. Borrowers in a foreclosure case often do not have facts to support all of the defenses that could be asserted. Mr. Harrison and Mr. Quinones both testified to the difficulty in successfully defending a Bank foreclosure action, and how there is a low percentage of "wins" for the defense. However, the Court finds that with this FHA-insured loan and the availability of a complete defense based on Mr. Ustarez testimony, there was an even chance from the beginning that this foreclosure case could be won by the defense.

The record demonstrates that Mr. Harrison felt there was a good opportunity to successfully defend against foreclosure on this focused

issue of no face-to-face counselling of Mr. Ustarez, because approximately three months after this lawsuit was filed, Mr. Harrison filed a Motion for Summary Judgment based on that defense. Mr. Ustarez Motion for Summary Judgment was denied by Order dated July 8, 2019. On July 24, 2019, sixteen days after the order was entered denying the Motion for Summary Judgment, Mr. Harrison filed a Notice of Readiness for Non-Jury Trial. In this Court's experience, it is not often that a Defendant in a foreclosure action is pushing the case to trial as soon as possible.

It is clear to the Court that Mr. Harrison believed he had a very strong defense for Mr. Ustarez to prevent foreclosure of Mr. Ustarez home in this case. In fact, Mr. Harrison was successful in obtaining a complete defense of this foreclosure action on behalf of Mr. Ustarez based upon the trial judge finding Plaintiff failed to comply with the federally mandated requirements of the face-to-face counseling that formed the basis of this defense from the very beginning. However, the Court is also aware that Mr. Harrison, Ms. Moore and Ms. Fenzig had to be thorough, diligent and determined to obtain this favorable result. Despite Mr. Harrison's efforts to obtain a complete defense early in the litigation, it ultimately took 5 years and extensive research, preparation and argument through many other issues to finally obtain that favorable result.

The Court has performed a line by line analysis of the billing records and timesheets for the 3 attorneys representing Mr. Ustarez through the years of this litigation. The Court has made a decision described within this Order of the reasonable hours the attorneys for Mr. Ustarez should be awarded under the appropriate guidelines for their diligent and determined efforts in defending Mr. Ustarez. This issue now being considered, is the appropriate multiplier of the lodestar in this case, given the fact that the evidence demonstrates a multiplier is appropriate for the reasons described above.

Under *Quanstrom,* the amount of a multiplier is determined as follows:

> i. if the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1 to 1.5;
>
> ii. if the trial court determines that the likelihood of success was approximately even at the outset, the trial judge may apply a multiplier of 1.5 to 2.0; and
>
> iii. if the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5.

In *Joyce* the Supreme Court held that a fee multiplier "is properly analyzed through the same lens as the attorney when making the decision to take the case," as it "is intended to incentivize the attorney to take a potentially difficult or complex case." *Joyce*, 228 So.3d at 1133. Under *Quanstrom*, as applied by *Joyce*, it is improper for a "trial court [to] analyze the complexity of the case though [sic] the benefit of hindsight by looking at the actual outcome of the case." *Id.*

Hence, the dispositive issue is how this case is evaluated at the outset when Mr. Harrison offered to represent Mr. Ustarez on a contingency fee basis. Mr. Harrison testified that even though Mr. Ustarez told him that no one had come to his home to arrange a meeting with him during their initial meeting, he still viewed his chances of success as less than 50% here because (1) the Plaintiff could have presented credible evidence of its compliance; (2) one of the five exceptions to the meeting requirement set forth in 24 CFR 203.604(c) may have been applicable; and (3) the Plaintiff's failure to comply could have been excused because it did not cause prejudice to Mr. Ustarez. Defendant argues that all three of these factors came into play in this case and provided evidence and testimony to support his position. Mr. Harrison testified to very specific reasons based on his prior experience defending FHA-insured borrowers to support his view that success here was unlikely at the outset.

The Plaintiff argued that success by Mr. Utstrez was more likely than not from the outset. Plaintiff argues that it was previously established through case law in Florida that compliance with 24 CFR 203.604 was a mandatory condition precedent for FHA mortgage loans, and that failure to comply requires dismissal, citing to *Palma v. JPMorgan Chase Bank*, 208 So. 3d 771 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2694d]. The Plaintiff argues that Mr. Ustarez pled noncompliance with that regulation, immediately moved for summary judgment on that ground, as the Defendant noticed the case for trial himself, and ultimately prevail on this defense. Plaintiff argues that Mr. Ustarez chance of success was all but guaranteed because of PennyMac's noncompliance with that Federal regulation. The Plaintiff argues that a multiplier is not appropriate in this case, but if the Court finds a multiplier warranted, it should be no more than 1.1 to 1.2.

The Court finds from the evidence and testimony presented that at the outset when this lawsuit began and Mr. Harrison agreed to represent Mr. Ustarez on a contingency basis the likelihood of success was approximately even. The Court agrees with the testimony of Mr. Quinones that Mr. Ustarez' claims during his initial consultation with Mr. Harrison that no one had come to his home to arrange the meeting made this case "pretty straightforward." Again, the Court finds that Mr. Harrison's approach from the beginning of the case to seek a Motion for Summary Judgment and an early trial reflected the very solid and straightforward defense to this lawsuit for Mr. Ustarez. It can be argued he had a better than even chance of winning at the outset, but given the nature of foreclosure litigation, the Court finds that the chance of a successful defense was even at the outset.

Obviously, the later litigation involves years of legal work to come around to the final result that Mr. Harrison had initially obtained for Mr. Ustarez with Judge Colton's September 18, 2019 Order for Involuntary Dismissal. The Court's Lodestar reflects the reasonable hours and attorney's fees Mr. Ustarez' lawyers expended for his defense through all issues. As for an enhancement of that lodestar amount through a multiplier, the Court finds a multiplier of 1.5 is appropriate.

FEE CALCULATION

The reasonable attorney's fees and costs to be paid to the Law Office of Malcolm E. Harrison, P.A. are as follows:

	Hours	Hourly Rate	Total
Phase One			
Malcolm Harrison	104.4	$450	$46,980
Michelle Moore	27.5	$400	$11,000
Phase Two			
Malcolm Harrison	132.7	$500	$66,350
Michelle Moore	20.7	$400	$8,280
Phase Three			
Malcolm Harrison	97.8	$550	$53,790
Michelle Moore	17	$400	$6,800
Michele Feinzig	33.3	$425	$14,152.50

Pursuant to *Stack*, Michele Feinzig's fees are not subject to a multiplier. Hence, the amount subject to a contingency fee multiplier is $193,200—the time expended by Mr. Harrison and Ms. Moore.

Applying a 1.5 contingency fee multiplier results in an amount of $289,800.

The total lodestar amount due to Mr. Harrison's firm is $303,952.50 ($289,800 plus Ms. Feinzig's fee, which is $14,152.50)

PRE-JUDGMENT INTEREST

As explained by the Supreme Court in *Argonaut Ins. v. May*

Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985), if there is a date certain as to the issue of entitlement, this Court is obligated to perform its ministerial duty of computing the appropriate amount and adding it to the judgment. However, from the involved table of interest calculations Mr. Harrison included within his proposed final order, the Court finds calculation of pre-judgment interest is not a simple ministerial calculation for the Court in this case, and it is requested that the parties confer regarding the appropriate calculation of prejudgment interest up to the time a final judgment is entered, and provide a proposed final judgment including pre-judgment interest for the Court to enter. Pre-judgment interest should be calculated based on the finding in this Order.

Here, Mr. Harrison's firm is entitled to recover pre-judgement interest on the enhanced amount of $198,915 as of June 29, 2022, the date that Judge Colton determined entitlement to prevailing party attorney's fees and costs for the trial court work, which are the first and second phases of this case.

Defendant is further entitled to recover pre-judgment interest on the enhanced amount of $90,855 as of June 13, 2023, the date that the Appellate Court determined entitlement to attorney's fees for work done at the appellate level. (This number does not include Ms. Feinzig's fees which are not eligible for a contingency fee multiplier.)

Defendant is further entitled to recover pre-judgment interest on $14,152.50 for Ms. Feinzig's fees (which are not eligible for enhancement pursuant to *Stack*) as of June 13, 2023, the date that the Appellate Court determined entitlement to attorney's fees for work done at the appellate level.

The Court is requesting the parties confer and agree on the amount of prejudgment interest to be awarded pursuant to the rulings of the Court in this Order and the statutory rate of interest that applies during the applicable periods of time. The Court is requesting the parties then submit a Final Judgment that includes this prejudgment interest. If the parties cannot agree on the amount of prejudgment interest or wording of a Final Judgment, then competing proposed Final Judgments may be submitted, or a hearing scheduled before the Court to review these issues.

THE DEFENDANT IS ENTITLED TO RECOVER COSTS FOR THE TESTIMONY OF HIS EXPERTS

Finally, Mr. Ustarez is entitled to recover costs for his experts' testimony.

As explained in *Sea World of Fla., Inc. v. Ace Am. Ins. Cos.*, 28 So.3d 158, 160 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D361a] "where a party seeks to have the opposing party in a lawsuit pay for attorney's fees incurred in that same action, the general rule in Florida is that independent expert testimony is required." *See also Roshkind v. Machiela*, 45 So.3d 480 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1571a] ("case law throughout this state has adhered to the requirement of an independent expert witness to establish the reasonableness of fees, regardless of whether a first or third party is responsible for payment.") As explained in *Rock v. Prairie Bldg. Solutions, Inc.*, 854 So.2d 722, 724 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1951a] "[e]xpert witness fees paid to the testifying expert are not discretionary if the attorney expects to be compensated for his testimony."

Mr. Kline and Mr. Lee provided the required testimony here to support the reasonableness of Mr. Ustarez' fee requests.

Mr. Lee also testified that he expected to be paid for his work as an expert witness. Mr. Lee testified his hourly rate was $550 per hour, and he worked for 28.9 hours for a total award of $15,895.

Mr. Kline testified that he expected to be paid for testifying as a witness at the hearing. He worked a total of 27.35 hours at a rate of $700 per hour. That is a total award of $19,145.

As Mr. Lee and Mr. Kline testified that they expect to be compensated for their testimony, which is required under *Sea World*, this Court is required under *Rock* to order the Plaintiff to pay their fees. Therefore, Mr. Ustarez is entitled to recover expert witness fees in the amount of $15,895 for Mr. Lee and $19,145 for Mr. Kline.

Now, therefore, based upon the above, it is

ORDERED AND ADJUDGED as follows:

1. Defendant Eddy Ustarez shall recover of and from PENNYMAC LOAN SERVICES LLC, reasonable attorney's fees of $303,952.50, plus prejudgment interest to be determined, and expert witness fees of $35,040, making a total of $338,992.50 plus prejudgment interest to be determined.

2. Payment shall be made to the Law Office of Malcolm E. Harrison, P.A. and delivered to 1035 S. State Rd. 7, Suite 315, Wellington, Fl. 33414

* * *

Injunctions—Domestic violence—Evidence—Hearsay—Exceptions—Child hearsay—Motion to admit child hearsay and permit in camera testimony of children in proceeding for injunction for protection against domestic violence brought by father on behalf of three minor children against boyfriend of mother is denied—Because there is not good cause under rule 12.407 for minor children to testify against mother's long-term boyfriend, motion to permit in camera testimony is denied and children are deemed "unavailable" for purposes of child victim exception to hearsay rule—Hearsay statements of children cannot be admitted where there is no corroborative evidence of abuse—Motion to admit child testimony is also denied because it was untimely filed on day before hearing on motion to admit child hearsay—In absence of supporting evidence, petition for injunction is denied

LEVI STREITER, o/b/o J.S., S.S., and G.S., Petitioner, and MATTHEW IAN GOREN, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. DVCE-24-18595. Division 33. March 19, 2025. Johnathan D. Lott, Judge. Counsel: Jeannette Watkin, for Petitioner. Jessica Mishali, for Respondent.

ORDER DENYING PETITIONER'S AMENDED MOTION TO ADMIT CHILD HEARSAY AND TO PERMIT IN CAMERA TESTIMONY OF CHILDREN AND DENYING PETITION FOR DOMESTIC VIOLENCE INJUNCTION

Pending before the Court is Petitioner's Amended Motion to Admit Child Hearsay and to Permit in Camera Testimony of Children, filed February 13, 2025. An evidentiary hearing on the motion was held on February 14, 2025, lasting about three hours.

This matter concerns an issue of first impression: does Family Rule 12.407, which generally forbids the testimony of children in family proceedings absent good cause, operate to make children "unavailable" for the purposes of the child hearsay exception, Section 90.803(23), if such good cause is not shown? The answer, for the reasons discussed herein, is yes.

But here, even if that is wrong, this Court would still deny Petitioner's Motion to Permit in Camera Testimony of Children because the request was untimely, filed one day prior to the hearing that was set on the Motion to Admit Child Hearsay, thus effectively denying Respondent the opportunity to contest availability of the witnesses under Section 90.803(23).

And because the child witnesses were "unavailable" under 90.803(23), Petitioner needed to present corroborative evidence in order for the hearsay to be admissible under the exception. No corroborative evidence was presented. Therefore, the motion to admit child hearsay is denied.

And as Petitioner conceded, without the child hearsay, there is no evidence to support a domestic violence petition. The petition is therefore denied as well.

I. BACKGROUND

This is a domestic violence injunction proceeding brought on behalf of three minors by a Former Husband against the Boyfriend of his Former Wife. The children are 3, 6, and 9 years of age. Former Husband alleges that the children suffered abuse at Boyfriend's behest, including that Boyfriend yelled in the children's ears, denied them water when they were thirsty, locked them for extended periods in rooms and closets, and made the youngest child touch and taste his own feces as punishment for having a bathroom accident. The only evidence that was offered at the hearing was the hearsay statements themselves, as heard by Former Husband as well as two Department of Children and Families investigators, Josephine Facey and Joan McIver, who each interviewed all three of the children.[1] No other corroborating evidence that the abuse occurred was offered.

II. ANALYSIS

A. Child Testimony and the Child Hearsay Exception

Under Florida Rule of Family Procedure 12.407(a),

> Unless otherwise provided by law or another rule of procedure, children who are witnesses, potential witnesses, or related to a family law case, are prohibited from being deposed or brought to a deposition, from being subpoenaed to appear at any family law proceeding, or from attending any family law proceedings without prior order of the court based on good cause shown. In addition to in-person proceedings, this rule applies to family law proceedings held remotely via communication technology. The parties, counsel, and the court must ensure that children are not present or nearby during any remote proceedings or able to overhear any remote proceedings.

"[T]his rule is applicable to domestic violence proceedings." *Monteiro v. Monteiro*, 55 So. 3d 686, 688 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D460a].

Florida Statute § 90.803(23)(a) provides an exception to the rule against hearsay for statements made by children when abuse is alleged:

> Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 17 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
>
> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

B. Statutory Interpretation

Florida courts' "approach to interpreting the constitution reflects a commitment to the supremacy-of-text principle, recognizing that the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Planned Parenthood of Sw. & Cent. Florida v. State*, 384 So. 3d 67, 77 (Fla. 2024) [49 Fla. L. Weekly S73a] (cleaned up). "In interpreting a statute, our task is to give effect to the words that the legislature has employed in the statutory text." *Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022) [47 Fla. L. Weekly S134a]. "We strive to determine the text's objective meaning through the application of the text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021) [46 Fla. L. Weekly S287a] (cleaned up).

"Because the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," "judges must exhaust all the textual and structural clues that bear on the meaning of a disputed text." *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) [47 Fla. L. Weekly S199a] (cleaned up). "Viewed properly as rules of thumb or guides to interpretation, rather than as inflexible rules, the traditional canons of statutory interpretation can aid the interpretive process from beginning to end." *Id.* "Context is a primary determinant of meaning. . . 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." *Lab. Corp.,* 339 So. 3d at 324 (quotation omitted).

C. Absent a finding of "good cause" under Rule 12.407, a child in a family case is "unavailable" under Section 90.803(a)2.

This case presents an issue of first impression: if a child is not permitted to testify under Rule 12.407 because there has not been a finding of "good cause" under that rule, does that make the child "unavailable" for the purposes of the child hearsay exception, Section 90.803(23)(a)2?

This answer is yes. That derives from the plain text of Section 90.803.

Section 90.803(23) requires a double-bifurcated analysis. First, the Court must consider whether the statements are "reliable," that is, "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." 90.803(23)(a)1. Second, if that's true, one of two other things must ***also*** be true in order for the hearsay statements to be admitted: (1) the child must be available to testify as a witness and actually testify, ***or*** (2) if the child is unavailable to testify as a witness, there must be other corroborative evidence of the abuse. Section 90.803(23)(a)2.a-b.

The text of this second prong is as follows:

> Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

Fla. Stat. § 90.803(23)(a)2.b.

It is clear from the text that the second sentence is a ***non-exhaustive list*** of reasons that the witness might be found to be "unavailable" as a witness in the first sentence. Unavailability as the term as used in the first sentence "shall include" the "substantial likelihood of severe emotional or mental harm" circumstance that is unique to Section 90.803(23) and operates to procure unavailability if those circumstances are met, "in addition to" findings pursuant to Section 90.804(1), that is, the circumstances that make a witness "unavailable" within the normal meaning of the hearsay rule, such as death, incapacity, being outside the subpoena power of the court, etc. The language of "include" and "in addition to" shows that those two circumstances listed in the rule, "substantial likelihood of severe. . .

harm" and unavailability under Section 90.804(1), are not an exhaustive list of the circumstances that could cause a witness to be "unavailable" as that term is used in the first sentence. *See White v. Mederi Caretenders Visiting Services of Se. Florida, LLC*, 226 So. 3d 774, 781 (Fla. 2017) [42 Fla. L. Weekly S803a] (noting "the conventional rule in Florida that the Legislature uses the word 'including' in a statute as a word of expansion, not one of limitation"); Scalia and Garner, *Reading Law* 132 (2012) ("The verb *to include* introduces examples, not an exhaustive list.").

"Unavailable" in the first sentence is not defined. (By contrast, "unavailable" as the term is used in Section 90.804 *is* defined.) Because it is not defined, the word should be given its plain and ordinary meaning. *E.g, Nunes v. Herschman*, 310 So. 3d 79, 83 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D112b] ("One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature.") (quotation omitted). The child hearsay exception was enacted in 1985, *see State v. Townsend*, 635 So. 2d 949, 953 (Fla. 1994); this Court is not concerned that the ordinary public meaning of "unavailable" in 1985 is materially different than its modern meaning.

Rule 12.407(a), in turn, provides that "Unless otherwise provided by law or another rule of procedure, children who are witnesses, potential witnesses, or related to a family law case, are prohibited from being deposed or brought to a deposition, from being subpoenaed to appear at any family law proceeding, or from attending any family law proceedings without prior order of the court based on good cause shown." Thus as to would-be child witnesses in family law cases: "Children who are witness. . . are prohibited. . . from being subpoenaed to appear at any family law proceeding. . . without prior order of the court based on good cause shown."

Children who are "prohibited" from appearing at a proceeding are plainly "unavailable" to testify within the ordinary meaning of the word as used in the first sentence of Section 90.803(23)(a)2.b. And child-witnesses *are* "prohibited" from so appearing *unless* there is a "prior order of the court based on good cause shown." Rule 12.407(a).

Accordingly, because the second sentence of Section 90.803(2)(a)2.b provides a non-exhaustive list of circumstances that make the child witness unavailable, and child witnesses who are "prohibited" from appearing under Rule 12.407 absent a prior order based on good cause shown are plainly unavailable to testify, it follows that Rule 12.407 operates to make child-witnesses in family proceedings "unavailable" for the purposes of Section 90.803(23)(a)2 unless there is a prior order of the court based on good cause shown under Rule 12.407. This is true even if the child does not satisfy the other criteria that might cause unavailability under Section 90.803(2)(a)2, including "a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm" or any finding under Section 90.804(1).

This Court also notes that nothing in Section 90.803(23) operates to satisfy the exception clause of Rule 12.407 ("Unless otherwise provided by law or another rule of procedure. . ."). As explained, Section 90.803(2)(a)2.b provides only a non-exhaustive list of circumstances under which a child might be found to be unavailable for purposes of that rule. Any other finding of unavailability within the plain and ordinary meaning of the word is squarely contemplated by the language of Section 90.803(23)(a)2.b.

As mentioned, the interaction of Rule 12.407 and Section 90.803 appears to be an issue of first impression among Florida courts. Only a handful of courts appear to have considered Rule 12.407 at all, with none of them concerning the child hearsay exception. And only a handful of courts appear to have even considered Section 90.803(23) in proceedings in which the Family Law Rules of Procedure govern, with none of them on point. Indeed, most of the decisions considering Section 90.803(23), including the seminal *Townsend* decision noted above, arise under criminal law. Not only would these decisions have paid no heed to Rule 12.407, but they have the additional concern, absent in this family law proceeding, that a criminal defendant has rights under the Confrontation Clause that may cut against a finding of unavailability.

Helpfully, Professor Ehrhardt's treatise has considered this matter, and reached the same conclusion as this Court:

> A child under the age of 18 is prohibited from testifying as a witness or attending a hearing by Fla. Fam. L. R. P. 12.407 without prior court order, based on good cause shown. Thus, in the typical case a child cannot testify without a court order even if the child desires to do so. This provision, which is designed to protect children, probably makes the child "unavailable" as a witness. If it does, where if a child who is a victim of sexual abuse does not testify at a trial or hearing, a hearsay statement of the child concerning an abusive act is admissible under section 90.803(23) only if there is sufficient corroborating evidence that the abuse or offense occurred.

Ehrhardt and Lewis, 1 Fla. Prac., Evidence § 103.4 (2024 ed.).

And to be sure, Rule 12.407 does not leave parties seeking to admit Section 90.803(23) testimony without remedy. First, the party seeking to admit the child hearsay may attempt to show "good cause" under Rule 12.407 to permit the children to testify; the Rule is not an insurmountable barrier. Second, even if the child is unavailable as a witness and unable to testify, the hearsay may still be admitted so long as there is "corroborative" evidence of the alleged abuse. *See* Section 90.803(23)(a)2.b.

D. There is not "good cause" under Rule 12.407 for the minor children to testify in this case, and they are therefore "unavailable" for purposes of Section 90.803(23).

"Florida Family Law Rule of Procedure 12.407 [and other authority] make it clear that the children's interests are of the utmost importance in domestic and sexual violence cases. . . . [T]he trial court has discretion to determine how the best interests of the children are to be protected." *Monteiro v. Monteiro*, 55 So. 3d 686, 688-89 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D460a]. "[T]he trial court has inherent authority and discretion to protect a child witness." *Id.* at 689. The court has an "obligation to act in the children's best interests." *Id.* "One purpose of [Rule 12.407] is to protect children who may be harmed by unnecessary involvement in family law proceedings." *A.V. v. T.L.L.*, 321 So. 3d 940, 942 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1526a] (Kelly, J., concurring) (citing Fla. Fam. L. R. P. 12.407 committee note to 2018 amendment.). "Children who may be harmed by unnecessary involvement include children who may be the subject of the family law case and children who are witnesses, are potential witnesses, or have extensive involvement with the family that is the subject of a current family law case." Fla. Fam. L. R. P. 12.407 committee note to 2018 amendment. As one court noted,

> Judges in domestic cases often struggle mightily to foreclose parents from placing children in the midst of marital strife. The children of divorcing or divorced parents experience enough psychological trauma without the parents exacerbating the situation. Trial courts are given great leeway to minimize the involvement of children in these circumstances.

Hickey v. Burlinson, 33 So. 3d 827, 831 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D986a].

Having considered the evidence at the February 14, 2025 hearing, this Court finds, in an exercise of its broad discretion, that there is not "good cause" for the children to testify under Rule 12.407 and that the best interests of the children would instead be served by not hauling

them into court to have them testify against their mother's long-term boyfriend. Among the things that the Court has considered in reaching this decision are: the young ages of the children (9, 6, and 3); the nature of the relationships among the parties (the Respondent is the mother's long-term boyfriend who has been and may continue to be a significant figure in the children's lives); the fact that a guardian ad litem could be (and in fact, has now been) appointed to represent the interests of the children; the fact that the Department of Children and Families has already interviewed the children on multiple occasions and had the opportunity to investigate and remedy suspected harm against the children; and the particularly acrimonious nature of the litigation, including that the Petitioner is separately involved in a civil litigation against the Respondent.

Because there is not "good cause" for the children to participate in these proceedings, they are "prohibited" from testifying as witnesses under Rule 12.407. Petitioner's motion to admit child testimony is therefore denied. In addition, the children are "unavailable" to testify under Section 90.803(23).

E. The child hearsay statements cannot be admitted because the children are "unavailable" to testify and there is no "corroborative" evidence of abuse.

As noted, in order to qualify for the child hearsay exception, 1. the statements must be reliable, AND 2. the child must EITHER testify OR be unavailable to testify, provided that there is "corroborative" evidence of the abuse or offense. Fla. Stat. § 90.803(23)(a).

Here, there is no reason for the Court to consider prong 1. of the exception, because prong 2. fails, and both prongs must be satisfied to admit the testimony; the prongs are joined by the conjunctive "and" coordinator. *E.g, United States v. Garcon*, 54 F.4th 1274, 1278 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1957a] ("So when 'and' is used to connect a list of requirements, the word ordinarily has a 'conjunctive' sense, meaning that all the requirements must be met.") (abrogated in part on other grounds).

Prong (a)2. fails because, as discussed, the child is unavailable to testify, and there was no "corroborative" evidence of abuse adduced at the hearing.

" 'Corroborating evidence' has been defined as 'evidence supplementary to that already given, and tending to strengthen or confirm it. Additional evidence of a different character to the same point.' " *Perrault v. Engle*, 294 So. 3d 373, 377 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D857a] (cleaned up). "The common thread in all of these cases is that the other evidence tends to confirm the unlawful sexual act, *i.e.,* the 'abuse or offense.' " *Id.* (quotations omitted). "A child declarant's hearsay statements cannot be 'other' corroborating evidence within the meaning of section 90.803(23)." *Id.* (quotations omitted.

At the hearing, there was no evidence whatsoever presented to show that the abuse occurred other than the hearsay statements of the child witnesses. Indeed, after extended opportunity to do so at the conclusion of the hearing, counsel for Petitioner was not able to point to any corroborative evidence as that term has been construed by caselaw. Tr. 175:16-180:14.

Accordingly, the proffered hearsay statements do not satisfy Section 90.803(23)'s demands, and petitioner's motion to admit the child hearsay statements is denied.

F. Alternatively, the children were "unavailable" because the request to admit the child testimony was untimely and deprived Respondent of due process and an opportunity to respond.

Even if this Court is wrong that Rule 12.407 operates to make the children "unavailable" for purposes of Section 90.803(23) absent a finding of "good cause," this Court would still deny Petitioner's request to admit child testimony on the grounds that it was untimely.

A temporary injunction issued against Respondent in this matter on October 11, 2024. On November 12, 2024, the matter was set for 3-hour final hearing on February 18, 2025. On November 18, 2024, Petitioner filed his Motion to Admit Child Hearsay, which did not request that the children be permitted to testify. On February 4, 2025, the Court denied Petitioner's motion to continue the final hearing and set the Motion to Admit Child Hearsay for separate hearing on February 14, 2025. On February 13, 2025, three months after filing his child hearsay motion, ***one day*** before the hearing on the child hearsay motion, and just a few days before the final hearing, Petitioner filed his Amended Motion to Admit Child Hearsay and to Permit in Camera Testimony of Children. In that motion, for the first time, Petitioner requested that the children be permitted to testify. That request was set for consolidated hearing with the motion to admit the child hearsay and set for hearing the day after it was filed. Counsel for Respondent stated at the hearing she believed up until that point that Petitioner was stipulating that the children were "unavailable" for purposes of Section 90.803(23) and would not be testifying, Tr. 8:14-23. Petitioner did not disagree, and appeared to concede at much. Tr. 183:2-14.

Petitioner's actions in bringing the request to have the children testify, and thus that the children be treated as "available" to testify under Section 90.803(23), at the eleventh hour deprived Respondent of due process and opportunity to prepare for the hearing and present his case. Indeed, if this Court were wrong that Rule 12.407 makes a child-witness unavailable without a "good cause" showing—or, for the matter, if this Court erred in finding that there was no such "good cause" in this case—then Respondent would have had to utilize other means if she intended to show that the witnesses were "unavailable" within the meaning of Section 90.803(23). For instance, she may have wanted to show that "the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm." And there is caselaw that making that showing requires expert testimony. *E.g., Zmijewski v. B'Nai Torah Congregation of Boca Raton, Inc.*, 639 So. 2d 1022, 1025 (Fla. 4th DCA 1994). Given the timing of the request, Respondent could not have had an opportunity to retain or even subpoena expert witnesses who could have attempted to make such showing. In addition, Respondent repeatedly raised this objection both at the onset of the hearing and throughout the hearing.

Because Petitioner's last-minute request to admit the child testimony deprived Respondent of due process in presenting her defense to the witnesses being "available" within the meaning of Section 90.803(23), this Court denies the motion to admit child testimony and on this alternative ground declines to find the children were "available" to testify.

G. Without the child hearsay evidence, there is no evidence to support the petition for injunction, and it is accordingly denied.

Petitioner conceded that without the child hearsay evidence, he did have not enough evidence to support issuance of a permanent injunction for protection against domestic violence. *See* Tr. 193:9-12. *See also* Petitioner's November 25, 2024 Motion ("The allegations in this case are based 100% on the minor children' s statements. . ."). Because this Court has denied the motion to admit the child hearsay statements, the petition is also denied.

III. CONCLUSION

For these reasons, it is ORDERED:

(1) Petitioner's Amended Motion to Admit Child Hearsay and to Permit in Camera Testimony of Children is DENIED.

(2) The petition for protection against domestic violence is DENIED.

(3) The Clerk shall close the file.

[1]The Court, in making its findings in this matter, did not consider videos that were provided by Respondent. The Court found it unnecessary to rule on the admissibility of these videos because they were offered to show the reliability or unreliability of the hearsay statements, and the Court did not and need not reach that question because, as explained herein, the children are unavailable to testify and there was no corroborative evidence of the hearsay.

* * *

Injunctions—Stalking—Cyberstalking—Petition for injunction against stalking based on cyberstalking is denied where issuance of injunction requires at least two instances of cyberstalking, each comprised of two or more electronic communications—Although respondent sent two strings of mean text messages to petitioner ten months apart, at least one of those text strings would not have caused substantial emotional distress to any reasonable person in petitioner's circumstances given petitioner's own escalating behavior toward respondent

KILLYAH SAMUEL, Petitioner, v. KANDYCE LEANDRA AURELIA MCPHERSON, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. DVCE23006532 (33/58). March 27, 2025. Johnathan D. Lott, Judge. Counsel: Killyah Samuel, Pro se, Petitioner. Kandyce McPherson, Pro se, Respondent.

ORDER DENYING PETITION FOR INJUNCTION AGAINST STALKING

A final hearing on Petitioner's September 14, 2023 Petition for Injunction against Stalking was held on February 19, 2025. For the reasons stated herein, the Petition is DENIED.

* * *

What is "cyberstalking," and what does it take for a court to issue an injunction against stalking based on allegations of cyberstalking? Surprisingly, few courts have grappled with the minutiae of what is legally required for such an injunction to issue.

After review of the relevant statutes and caselaw, this Court finds that a person engages in "cyberstalking" if they (1) engage in a course of conduct to cyberstalk, that is, (a) sending two or more electronic communications (b) over a period of time, however short (c) which evidence a continuity of purpose; (2) which course of conduct is (a) directed at or pertaining to a specific person (b) causing substantial emotional distress to that person and (c) serving no legitimate purpose. § 784.048(1), Fla. Stat. And for an injunction against stalking to issue, there must be "repeated" "cyberstalking," so a petitioner must show at least two instances of cyberstalking, each made up of a distinct course of conduct, each of which is comprised of at least two electronic communications. §§ 784.048(2), 784.0485(1), Fla. Stat. .

Here, Respondent sent two strings of text messages to Petitioner about ten months apart. The text messages were, to put it gently, really, *really* mean. Although—perhaps unintuitively—two strings of text messages *could* amount to two instances of "cyberstalking" supporting the issuance of an injunction, here they do not, because at least one of the strings would not have caused a reasonable person under all the circumstances to suffer substantial emotional distress.

Thus because two instances of "cyberstalking" did not occur, the petition for injunction against stalking must be denied.

I. BACKGROUND

Although there many disputes brought to this Court's attention in the course of the hearing, the material facts are essentially undisputed.

Petitioner is in a long-term relationship with a man, D.G. Respondent is in a long-term relationship with D.G.'s brother, C.G. Both couples had been in their relationships for years prior to these incidents. Respondent owns and lives in a house that is next door to a house that is occupied by both D.G. and C.G. Despite these relationships, up until about September of 2022, Petitioner and Respondent had never interacted.

On September 10, 2022, Petitioner received an unsolicited text message—"Hey is this Killyah?" Petitioner called the number and Respondent answered. Respondent identified herself, and explained that she was calling to inform Petitioner that her boyfriend, D.G., was unfaithful to her and that she had proof of said unfaithfulness in the form of a recording of him. The conversation appeared civil. Respondent followed up by text message containing an audio file that purported to be a recording of D.G. talking in a manner that was suggestive of his unfaithfulness to Petitioner.

Petitioner was none too happy about all of this—it of course caused strife in her relationship with D.G. She communicated with C.G. in the days after the conversation and at some point called the Respondent a "hoe." *See* Resp. Exh. 1 & below (Petitioner admitted to Respondent that she had called her a "hoe" to C.G.).

Respondent, in turn, apparently heard about Petitioner so besmirching her, and was not to be outdone. The next direct contact was a text message sent from the Respondent's same phone number to Petitioner three days later, September 13, 2022. We'll call this "Mean Text No. 1." The lengthy text message read:

> Hi could you please ask your boyfriend and [C.G.] to stop harassing me. They're pressing me to come back to you and say I as lying when I'm really not lying.
>
> 1.) To take it a step durther, his ex Semetra has a baby that looks nothing like her boyfriend and looks like [D.G.] actually and she's been trying to get in touch with him forever because potentially that kid could be his. They were having sex tight up until she got pregnant lol and the baby is very young so you do the math
>
> 2.) Their mom is crazy and even in July she caught [D.G.] sneaking a girl in through [C.G.]'s back door where his room is at. Yes [D.G.] brings girls into their house while you're next door lmao
>
> 3.) He use to borrow [C.G.]'s car to take girls out to impress them because he didn't want to be embarrassed driving his moms car (remember that one time he turned hs location off then you asked him why it was off and then turned yours off) yeah [C.G.] told me all of that
>
> 4.) He told [C.G.] not to be with me and find a girl more low maintenance like Killyah (you) because he doesn't have to do shit for you or take you out and he still gets to fuck you, his exact words LMAO
>
> 5.) He told [C.G.] I'm toxic because I don't let [C.G.] get away with being disrespectful to me and [C.G.] should be more like him and have his bitches (you) and (the other girls) on a leash, his exact words not mine
>
> 6.) His birthday is coming up and he's more upset that he won't be getting a gift from you. . .
>
> Also [C.G.] told me everything you had to say about me, that you never liked me and that I will never be you LMAO baby girl nobody wants that life, you're literally 40 dating a 27 year old that is cheating on your ass badly, please visit a clinic and also a therapist. ♥

Resp. Exh. 1; Pet. Exh. C. Petitioner the same day responded to the text message—her response was not a model of kindness either:

> Look, I don't have time for your high school drama shit. First of all, I didn't say that, I'll tell you what I told [C.G.] verbatim, I said; "I don't like that hoe" be that's what I heard you are. Second, Idk why I live rent free in your head when I literally never met you in my life. I mean seriously, are you self aware? You are literally sitting somewhere texting me an itemized list about my pussy and a [slur] you not even fucking . . Lol are you joking? Like why are you so obsessed with [D.G.] and what we do? You trying to see if he and [C.G.] are down for a twin train? Do you, boo, but [C.G.] already ran through you, and I don't think sloppy seconds is my [slur]'s soul. Try doing some kegels to tighten that coochie up and maybe you can get a 27yo [slur] when you hit 40 too lol. Goodbye, and I'm truly sorry [C.G.] hurt you. You'll be ok though!

Resp. Exh. 1. Petitioner at this point blocked Respondent's number.

Respondent the sent another text message from a different number. (That text message can be seen as a blue box in Respondent's Exhibit 1.) The content of the message was indiscernible in the exhibits placed into the record, but Petitioner testified that it stated "You blocked me. You pathetic fucking bitch." Tr. at 25:21-30:8.

About ten months passed. During that time, there was no other direct conduct, although Respondent testified that she had heard from her boyfriend C.G. that Petitioner was continuing to say bad things about her. *E.g.,* Tr. at 82:23-83:15; 122:8-124:7.[1] Respondent also produced text messages between Petitioner and C.G. immediately following the September 13, 2022 text exchange in which Petitioner referred to Respondent as a "hoe" and a "bitch." Resp. Exh. 6.

On June 5, 2023, and Respondent again sent another text message (or, rather, a few in rapid succession) to Petitioner. We'll call this "Mean Text No. 2."

> Bitch I swore the last time I told your ugly ass to never speak on me and yet you still are lmao
>
> You need to worry about your damn self and the 2 bad bitched [D.G.] keeps checking on your dumb ass with lmao he won't even bring you out the fucking house you ugly Ass bitch.
>
> Don't ever mention my fucking name again hoe, and these ar the two girls, they're actually beautiful unlike you.
>
> [C.G.] told me he saw you raking Your backyard one day and he never really looked at you but you were so fucking ugly lmao as I said, you're just convenient next door pussy. [D.G.] won't even bring your old dried up ass outside.

> {picture of a woman}

> {picture of a woman}

> And here are the girls, you'll never look like them and that's why [D.G.] gonna keep cheating and never being you around his people, you ugly bitch
>
> And don't even fucking reply because you're blocked bitch. And if your dumb ass don't wanna believe, he be sneaking them right in that house through [C.G.] door too trust and believe lmfao focus on that and not what [C.G.] going through you raggedy bitch
>
> Talking about you'll do anything to help [C.G.] lmao anything? Bitch I'll dust the floor with you.[2]

About two months later, in September 2023, Petitioner filed for a stalking injunction against Petitioner. After numerous delays, including a reversal by the Fourth DCA and the recusal of three different circuit judges, a final hearing was held on this matter on February 19, 2025.

II. LEGAL STANDARD

A. Statutory Interpretation

Florida courts' "approach to interpreting the constitution reflects a commitment to the supremacy-of-text principle, recognizing that the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Planned Parenthood of Sw. & Cent. Florida v. State,* 384 So. 3d 67, 77 (Fla. 2024) [49 Fla. L. Weekly S73a] (cleaned up). "In interpreting a statute, our task is to give effect to the words that the legislature has employed in the statutory text." *Lab. Corp. of Am. v. Davis,* 339 So. 3d 318, 323 (Fla. 2022) [47 Fla. L. Weekly S134a]. "We strive to determine the text's objective meaning through the application of the text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." *Levy v. Levy,* 326 So. 3d 678, 681 (Fla. 2021) [46 Fla. L. Weekly S287a] (cleaned up).

"Because the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," "judges must exhaust all the textual and structural clues that bear on the meaning of a disputed text." *Conage v. United States,* 346 So. 3d 594, 598 (Fla. 2022) [47 Fla. L. Weekly S199a] (cleaned up). "Viewed properly as rules of thumb or guides to interpretation, rather than as inflexible rules, the traditional canons of statutory interpretation can aid the interpretive process from beginning to end." *Id.* "Context is a primary determinant of meaning. . . 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.' " *Lab. Corp.,* 339 So. 3d at 324.

B. Stalking Injunctions and Cyberstalking

There is a cause of action for an injunction against stalking § 784.0485(1), Fla. Stat. Stalking in that context includes cyberstalking. *Id.*

"Stalking" means to "willfully, maliciously, and repeatedly follow[ ], harass[ ], or cyberstalk[ ] another person." § 784.048(2), Fla. Stat. .

"Cyberstalk" means, in relevant part, to "engage in a course of conduct to communicate, or to cause to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person. . . causing substantial emotional distress to that person and serving no legitimate purpose." § 784.048(1)(d), Fla. Stat.

"Course of conduct" means, in relevant part, "a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose." § 784.048(1)(b), Fla. Stat.

This case requires a deeper dive into what conduct constitutes "cyberstalking" as well as what "cyberstalking" must occur for an injunction to issue.

1. "Cyberstalking"

Distilling the statutory definitions, a person engages in "cyberstalking" if they (1) engage in a course of conduct to cyberstalk, that is, (a) sending two or more electronic communications (b) over a period of time, however short (c) which evidence a continuity of purpose; (2) which course of conduct is (a) directed at or pertaining to a specific person (b) causing substantial emotional distress to that person and (c) serving no legitimate purpose.[3] The Court has extensively researched and has not found a cleaner description of the elements of "cyberstalking" under the statute.[4]

Element (1) and its subparts stem from the definition of "course of conduct." § 784.048(1)(b), Fla. Stat. Because a "course of conduct" means "a pattern of conduct composed of a series of acts," any "course of conduct" requires at least two "acts." *Id; accord T.B. v. State,* 990 So. 2d 651, 654 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2155a] ("engaging in a 'series' of acts or acting 'repeatedly' in the context of the statute means what the commonly approved usage of these words suggest—acting more than once"). "Cyberstalking," which requires

engagement in a "course of conduct," thus requires at least two "acts." "Act" as set forth in the definition of "course of conduct" is undefined.

In the context of cyberstalking, an "act" is sending an electronic communication. § 784.048(1)(d), Fla. Stat. The phrase "to communicate, or to cause to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication," modifies "course of conduct," which is again a "pattern of conduct composed of a series of acts." *Id.* & § 784.048(1)(b).

Element (2) and its subparts stem directly from the definition of "cyberstalking." § 784.048(1)(d), Fla. Stat. The statute requires engagement in a "course of conduct" that is directed at a specific person, that causes substantial emotional distress to that person, and that serves no legitimate purpose. *Id.* The phrases "directed at or pertaining to a specific person," "causing substantial emotional distress to that person" and "serving no legitimate purpose" each modify "course of conduct."

2. "Harassing"

Although this case concerns "cyberstalking," rather than "harassing," this Court analyzes "harassing" as well in order provide a fulsome understanding of the stalking injunction framework.

"Harass" means "to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose." § 784.048(1)(a), Fla. Stat. "Course of conduct" has the same definition as set forth above. As should be apparent, "harassing" has the same definition of "cyberstalking," the difference being that that the "acts" making up the "course of conduct" are not required to be electronic communications (and are, again, undefined in the definition of "course of conduct" and thus in the definition of "harassment"). Thus as courts have repeatedly held, "cyberstalking is harassment via electronic communications." *Scott v. Blum,* 191 So. 3d 502, 504 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1056a].

Thus distilling the statutory definitions, a person engages in "harassing" if they (1) engage in a course of conduct to harass, that is, (a) engage in two or more acts (b) over a period of time, however short (c) which evidence a continuity of purpose; (2) which course of conduct is (a) directed at or pertaining to a specific person (c) causing substantial emotional distress to that person and (c) serving no legitimate purpose. The Court has likewise extensively researched and has not found a cleaner description of the elements of "harassing" under the statute.

3. "Stalking"

"Stalking" is ***not*** a term defined in Fla. Stat. § 784.048(1).

Rather, it is a criminal offense, a first degree misdemeanor, the ***elements of which*** are set forth in Section 784.048(2): "A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking."

So the offense of stalking, in addition to the conduct being willful and malicious, requires "repeated" (that is, at least two) instances of any of (a) following, (b) harassing, or (c) cyberstalking "Repeated" plainly modifies any of the three verbs following it.[5] "Harassing" and "Cyberstalking" are defined as described more fully above, and to meet those definitions, the respondent must engage in a "course of conduct" which is made up on at least two "acts." So to meet the elements of the offense of "stalking," based on "harassing" or "cyberstalking," a respondent must engage in a minimum of ***four "acts"*** comprising ***at least two distinct "courses of conduct"*** and thus amounting to at least two distinct (and thus "repeated") instances of either "harassing" or "cyberstalking."

4. Injunction against Stalking

As noted, "stalking" is a misdemeanor criminal offense, the elements of which are set forth in Section 784.048(2), Florida Statutes.[6]

Section 784.0485 creates a civil cause of action for "protection against stalking." A Court may issue when "the petitioner is the victim of stalking." § 784.0485(6)(a), Fla. Stat.

"Stalking" is not defined in Section 784.0485, nor are any definitions or provisions of Section 784.048 specifically cross referenced.

The only sensible interpretation, however, is that "stalking" as used in 784.0485 means the "offense of stalking" as defined in Section 784.048(2). *E.g., Thoma v. O'Neal,* 180 So. 3d 1157, 1159 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D2721a] (discussing Sections 784.0485 and 784.048(2) together).

So for an injunction against "stalking" to issue, the elements of the "offense of stalking" must be met. As described above, that means "repeated" "following, harassing, or cyberstalking," so for claims based on "harassing" and "cyberstalking," a petitioner must show at least two instances of harassing or cyberstalking, each made up of a distinct course of conduct, each of which is comprised of at least two acts. Any other reading would render one of either the term "repeated" in the definition of "stalking," or "series" in the definition of "course of conduct" (which is incorporated into the definitions of "harassing" and "cyberstalking") superfluous. *Cf. Advisory Opinion to Governor re: Implementation of Amendment 4, The Voting Restoration Amendment,* 288 So. 3d 1070, 1080 (Fla. 2020) [45 Fla. L. Weekly S10a] ("This Court, of course, ordinarily avoids interpretations that render any language superfluous. Indeed, just as we do not add words to a constitutional provision, we are similarly not at liberty to ignore words that were expressly placed there at the time of adoption of the provision.") (cleaned up).

5. This Framework is Consistent with Caselaw

As noted, no Court appears to have clearly broken down what elements must be met for an injunction based on "cyberstalking" (or "harassment") to issue. This Court has interpreted the statute as instructed by the Florida Supreme Court and developed the framework set forth above. And this framework is consistent with what the Fourth DCA and other District Courts have said about the matter.[7] The Fourth DCA has written that

> Section 784.0485 creates a cause of action for an injunction for protection against stalking. Stalking is the offense of "willfully, maliciously, and repeatedly following, harassing, or cyberstalk[ing] another person." § 784.048(2), Fla. Stat. (2015). "Harass," in turn, "means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose." § 784.048(1)(a); see also § 784.048(1)(b) (defining "course of conduct" as "a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose").
>
> In order to be entitled to an injunction for stalking, the petitioner must allege and prove two separate instances of stalking. Each incident of stalking must be proven by competent, substantial evidence to support an injunction against stalking.

David v. Schack, 192 So. 3d 625, 627-28 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1239a] (citations, quotations, and alterations omitted).

The first paragraph cited is entirely consistent with this Court's framework set forth above—Section 784.0485 creates a cause of action for injunction against "stalking," which is met when a respondent meets the elements of the "offense of stalking" under Section 784.048(2), which definitions for the underlying "harassment" (or "cyberstalking") are supplied by Section 784.048(1).

In the second paragraph, the Court held that "the petitioner must allege and prove two separate instances of stalking." This is imprecise language, but ultimately entirely consistent with this Court's frame-

work. The Court did not hold, or mean, that the petitioner must prove two separate instances of the "offense of stalking" as defined in Section 784.048(2)."[8] Rather, the Court was looking already to 784.048(2), which itself requires *repeated* "harassing, or cyberstalking," *each of which* requires a distinct "course of conduct." The Court later referred to each incidence of the course of conduct comprising an instance of harassment (or cyberstalking) as a "stalking incident," and properly held that at least two "stalking incidents" are required for the "offense of stalking" (which requires "repeated" incidents) to be met and thus for an injunction against stalking to issue. *David,* 192 So. 3d at 628.

Accordingly, the Fourth DCA has held that "Two or more acts that are part of one continuous course of conduct are legally insufficient to qualify as separate instances of harassment." *Cash v. Gagnon,* 306 So. 3d 106, 109 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2467a] (citing *Packal v. Johnson,* 226 So. 3d 337, 338 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1863b]). The statute requires two distinct courses of conduct, each made up of two or more acts, for there to be "repeated" harassment (or cyberstalking) and for an injunction to issue. *Accord Johnstone v. State,* 354 So. 3d 1101, 1105 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1999a] (Artau, J., dissenting) ("As defined in the charging statute, the State was required to prove at least two or more incidents, each of which would constitute harassment or stalking the statute requires multiple qualifying acts 'willfully, maliciously, and repeatedly' directed against the neighbors in 'a series of acts over a period of time.' "); *see also Cash,* 306 So. 3d at 109 ("A course of conduct requires multiple acts that are separated by time or distance."); *Packal,* 226 So. 3d at 338 ("[T]he two acts cited by the trial court amount to one continuous course of conduct, establishing only one instance of harassment. . . This single instance cannot support a finding of stalking, which requires evidence of repeat harassment"); *Akin v. Jacobs,* 230 So. 3d 1292 (Fla. 5th DCA 2017) [43 Fla. L. Weekly D33a] ("[T]o obtain the instant injunction against stalking, Jacobs had to prove at least two separate instances of being willfully and maliciously harassed.").

The Fourth DCA, alongside the other DCAs, does appear to have issued opinions that conflate the "acts" underlying a course of conduct with the "course of conduct," which is itself composed of a series of acts. Courts, like the *David* court discussed above, appear to have non-specifically referred to either or both as "instances" or "incidents" of stalking or harassment.[9] A few decisions even have language suggesting that one "course of conduct" is enough:[10] But none of these decisions actually held that stalking may be satisfied by a definition contrary to the requirements of the plain language of the statute and the holdings of the Court, noted above, specifically interpreting those portions of the statute. *Cf. Pedroza v. State,* 291 So. 3d 541, 547 (Fla. 2020) [45 Fla. L. Weekly S93a] ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment"); *see also* Note 8, *above.* Rather, the plain language of the statute, which has been more clearly addressed by the Court in cases like *Cash,* makes clear there need to be at least two distinct "courses of conduct," each of which is made up of two or more acts, in order for "stalking" to occur.

A pair of decisions from the First and Sixth Districts also supports this framework, although they again use language that non-specifically distinguish between "acts" and "courses of conduct" that are comprised of "a series of acts".

In *Pickett v. Copeland,* 236 So. 3d 1142, 1144 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D159b], the Court purported to reject decisions that would require two instances of "stalking" for an injunction against stalking to issue.[11] The Court properly noted that "by its statutory definition, stalking requires proof of repeated acts. . . [s]tated differently, repeated acts are required for one act of stalking." *Id.* (quotations omitted). "Stalking is defined simply as 'willfully, maliciously, and repeatedly' following, harassing, or cyberstalking another person—not repeatedly stalking another person." *Id.* at 1145. The Court reasoned, again properly, that "if a stalking injunction requires two instances of 'stalking,' then at least four prohibited events must be proved by the person seeking the injunction—because a single 'stalking' offense requires repeated acts of malicious following, and/or harassment, and/or cyberstalking." This language is imprecise inasmuch as it does not reiterate that the "prohibited events"—two of which are required for the criminal offense of "stalking"—are "following, harassment, or cyberstalking," and that "harassment" and "cyberstalking" *each require at least two "acts."*[12] So there do need *at least four acts* giving rise to *at least two "prohibited events"* (that is, "harassment" or "cyberstalking") for an injunction against stalking based on harassment or cyberstalking to issue.

The *Pickett* court recognized as much in its holding. The court noted that "though Ms. Copeland accused Mr. Pickett of driving past her house on multiple occasions—presumably to prove harassment—the evidence only suggested a single incident of his passing by, which falls short of a malicious 'course of conduct' serving 'no legitimate purpose.' " *Id.*

In *Klein v. Manville,* 363 So. 3d 1163 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D715a], the Court purported to identify a district split between *Pickett* and *Touhey v. Seda,* 133 So. 3d 1203, 1204 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D530a], which was discussed in *Pickett.* As the Court framed the inquiry, "If Manville is correct, then she needed to prove two separate acts of following, harassment, or cyberstalking to prevail. If, on the other hand, Klein is right, then Manville had to demonstrate two separate acts of stalking, each of which would have required two separate predicate acts." *Klein,* 363 So. 3d at 1168-69. The Court held that "Manville is plainly correct" and adopted the *Pickett* court's discussion of the issue *Id.* As the Court noted, properly (like the *Pickett* court), "[t]he definition states that stalking occurs when someone 'willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person' . . . It does not require that a petitioner prove that a respondent has 'repeatedly stalked' them, just that the respondent has followed, harassed, or cyberstalked them 'repeatedly.' " But *Klein,* like *Pickett,* used non-specific language. The Court correctly noted that a petitioner "needed to prove two separate acts of following, harassment, or cyberstalking," but did not specify that each "act of . . . harassment, or cyberstalking" each requires a "course of conduct" made up of at least two "acts."

6. "Substantial Emotional Distress"

One other element needs discussion. In order for "cyberstalking" (or "harassing") to occur, the "course of conduct" forming the basis of the claim must cause "substantial emotional distress."

The Fourth DCA has explained:

> When determining whether a defendant's conduct would cause "substantial emotional distress," courts apply a reasonable person standard. The standard is that of a reasonable person in the same position as the victim. To satisfy this prong of the stalking statute, the defendant's conduct must cause substantial emotional distress, which is greater than just an ordinary feeling of distress. The reasonable person standard is applied to a person in the position of the party, and the standard is case specific.
>
> In determining whether an incident or series of incidents creates substantial emotional distress for a victim, the distress should be judged not on a subjective standard (was the victim in tears and terrified), but on an objective one (would a reasonable person be put in distress when subjected to such conduct?

Johnstone v. State, 298 So. 3d 660, 665-66 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1452a] (cleaned up). "Mere irritation, annoyance,

embarrassment, exasperation, aggravation, and frustration, without more, does not equate to 'substantial emotional distress.' " *Cash,* 306 So. 3d at 110. Such distress must be "greater than just an ordinary feeling of discomfort." *Id.* The stalking statute "does not allow the trial court to enter injunctions simply 'to keep the peace' between parties who, for whatever reason, are unable to get along and behave civilly towards each other." *Id.* at 111. "Unpleasant, uncivil, and distasteful communications do not rise to the level required to support a permanent injunction against stalking." *Rosaly v. Konecny,* 346 So. 3d 630, 633 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1800c] (quotations omitted). "[A] reasonable person does not suffer substantial emotional distress easily." *Ford v. State,* 387 So. 3d 1283, 1286 (Fla. 1st DCA 2024) [49 Fla. L. Weekly D1308a] (quotation omitted). " 'Substantial emotional distress' connotes an unjustifiable infliction of stress of great proportion, in the nature of fear and concern." *Kaye v. Wilson,* 363 So. 3d 1155, 1159 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D1265b].

C. The instant case

Having sorted out the relevant law, this Court proceeds to the facts of this case.

At the end of the day, Petitioner points to two alleged instances of cyberstalking: Mean Text No. 1 and Mean Text No. 2.[13]

Let's set aside Mean Text No. 2. This Court will assume, without deciding, that Mean Text No. 2, which was comprised of four electronic communications, was one instance of "cyberstalking."

That leaves Mean Text No. 1.

The text itself and the follow up text ("You blocked me you pathetic bitch") were a "course of conduct": two or more electronic communications over a period of time (however short) which evidence a continuity of purpose.

But this Court finds that the course of conduct does not amount to "cyberstalking" because it would not cause a reasonable person under all of the circumstances to suffer "substantial emotional distress." "Substantial emotional distress" is assessed objectively under *all* of the circumstances. "The reasonable person standard is applied to a person in the position of the party, and the standard is case specific." *Johnstone,* 298 So. 3d at 665-66.

Here, Petitioner's own conduct necessitates that under all of the circumstances, a reasonable person would not have suffered substantial emotional distress in response to Mean Text No. 1.

Foremost, Petitioner had, by her own admission, called Respondent a "hoe" to Respondent's boyfriend. Resp. Exh. 1. Perhaps Petitioner did not suspect that her badmouthing would make its way to Respondent or that Respondent would escalate the feud so aggressively and so quickly with Mean Text No. 1 (which was, to be clear, savagely mean, though probably less mean that Mean Text No. 2). But a reasonable person calling another person a "hoe" would not expect to have the last word. And sure enough, more words followed.

Second, Petitioner's response to Mean Text No. 1 rose right to its level. The text was, like Respondent's text, mean. And again, a reasonable person who sent that text would not have expected to have the last word (even though Petitioner attempted to block Respondent). Respondent texted back, from a different number, "you blocked me, you pathetic bitch." Resp. Exh. 1. That text was certainly in line in terms of tone with Petitioner's own response to Mean Text No. 1. And Mean Text No. 1 was not the whole of any "course of conduct"—it takes electronic two communications to make up a "course of conduct." The follow up text was not unreasonable or unexpected and certainly would not be expected to cause substantial emotional distress *in light of* Petitioner's own text that it responded to. So even setting aside how Mean Text No. 1 might appear in a vacuum, the "course of conduct" would not have caused the reasonable recipient—one who sent back the text Petitioner did in the middle of said course of conduct—to suffer substantial emotional distress.

Caselaw supports the proposition that an active participant in a feud will rarely be on the receiving end of anything causing substantial emotional distress. In *Klemple v. Gagliano,* 197 So. 3d 1283, 1286 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2009a], the court noted that the dispute involved "more of a 'tit-for-tat' situation than a 'stalker-victim' situation." *Id.* at 1286 (quoting *Power v. Boyle,* 60 So.3d 496, 498 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D857a]). The Court likewise noted that "The statute does not allow the trial court to enter injunctions simply 'to keep the peace' between parties who, for whatever reason, are unable to get along and behave civilly towards each other." *Id.*

This Court finds *Leach v. Kersey,* 162 So. 3d 1104 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D904b], particularly persuasive. The petitioner in that case had an eighteen-month affair with the respondent's husband. When the respondent found out, she became quite unpleasant toward the petitioner, and the petitioner sought a stalking injunction. The Court noted:

> [T]he evidence does not show that these contacts would cause a reasonable person in Kersey's circumstances to suffer substantial emotional distress. A reasonable woman who had an eighteen-month affair with another woman's husband might well expect to hear the scorn of an angry wife. In fact, Kersey herself clearly did not suffer substantial emotional distress from these contacts. With respect to the phone call, Kersey said she allowed Leach to "vent" and "just let her get it off her chest." Kersey also admitted that the affair could cause Leach to be upset with her. The evidence fails to show that a reasonable person in Kersey's situation would suffer substantial emotional distress from these contacts.

Id. (citations omitted). Just as a reasonable woman who had an affair with another woman's husband might well expect to hear the scorn of angry wife, a reasonable person who calls another person a "hoe" might well expect to hear her scorn. Resp. Exh. 1. A reasonable person who tells another person to "Try doing some kegels to tighten that coochie up," and then blocks her, might well expect to hear further profanities. Resp. Exh. 1.

In sum, there is at most one incident of cyberstalking arising from Mean Text No. 2. Any "course of conduct" that Mean Text No. 1 was a part of would not have caused substantial emotional distress to any reasonable person in Petitioner's circumstances given Petitioner's own escalating behavior. Because "stalking" requires at least two incidents of cyberstalking, and here we have at most one, no injunction against stalking may issue.[14]

III. CONCLUSION

For these reasons, IT IS ORDERED:

(1) The Petition for Injunction Against Stalking is DENIED.

(2) The temporary injunction is DISSOLVED.

(3) Respondent's March 10, 2025 MOTION TO ENFORCE NO CONTACT ORDER, ADDRESS PROCEDURAL CONCERNS, AND DISSOLVE INJUNCTION IN FAVOR OF A MUTUAL NO-CONTACT ORDER is DENIED AS MOOT.

(4) Respondent's February 24, 2025 MOTION TO EXPEDITE RULING OR, IN THE ALTERNATIVE, TO DISSOLVE TEMPORARY INJUNCTION FOR LACK OF DUE PROCESS is DENIED AS MOOT.

(5) The Clerk is directed to close the file.

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[1]Respondent's recantations of C.G.'s statements to her are inadmissible hearsay inasmuch as they are offered to prove the truth of the matter asserted, *i.e.,* that Petitioner said these to him, but may be admissible inasmuch as they are considered for another purpose, such as to show their effect on Respondent and her subsequent conduct.

[2]This Court credits Respondent's testimony that the threat to "dust the floor with you" was not a threat of physical violence but rather a threat of social and reputational

ruin.

[3]*Accord Washington v. Brown,* 300 So. 3d 338, 340 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1627a] ("Thus, the elements of cyberstalking are (1) electronic communications, (2) directed to a specific person, (3) causing substantial emotional distress, and (4) serving no legitimate purpose."); *Scott v. Blum,* 191 So. 3d 502, 504 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1056a] ("In order to succeed in a petition for injunction against cyberstalking, the petitioner must establish that a series of electronic communications directed at the petitioner caused substantial emotional distress and served no legitimate purpose.").

[4]At the time of this writing, it appears that only 88 decisions of the District Courts have addressed the injunction against stalking statute, Section 784.0485, Florida Statutes.

[5]It seems doubtful that any conducting meeting the definitions of "harassing" or "cyberstalking" would not be either willful or malicious. The "willful" and "malicious" qualifications seem more important when "following," which is not a defined term, is alleged. *Cf. Klemple v. Gagliano,* 197 So. 3d 1283, 1285 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2009a] (discussing following); *see also Santiago v. Leon,* 299 So. 3d 1114, 1117 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D48a] ("We conclude that, in the context of seeking a stalking injunction, the plain and ordinary meaning for 'follows' is to tail, shadow, or pursue someone."). Regardless, the Fourth DCA has clarified that "the plain meaning of the statutory term 'maliciously' is legal malice: i.e. wrongfully, intentionally, without legal justification." *Johnstone v. State,* 298 So. 3d 660, 664 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1452a] (cleaned up).

[6]There are other stalking criminal offenses, including various forms of aggravated stalking, set forth in Section 784.048, Florida Statutes.

[7]The Florida Supreme Court does not appear to have interpreted these statutes.

[8]"[I]t would be a mistake to read judicial opinions like statutes." *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369, 426 (2024) [30 Fla. L. Weekly Fed. S528a] (Gorsuch, J., concurring). An "opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *Id.* (quoting *United States v. Skoien,* 614 F.3d 638, 640 (7th Cir. 2010) (en banc)).

[9]*E.g., Sutton v. Fowler,* 332 So. 3d 1001, 1006 (Fla. 4th DCA 2021) [47 Fla. L. Weekly D35a] ("We cannot conclude that the petition alleged two incidents which would qualify for a stalking injunction."); *Rosaly v. Konecny,* 346 So. 3d 630, 633 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1800c] ("By its statutory definition, stalking requires proof of repeated acts. It takes two incidents of harassment to satisfy the requirements for an injunction against stalking") (cleaned up); *Garcia v. Soto,* 337 So. 3d 355, 361 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D923a] ("Because the court relied on these incidents alone to justify the issuance of the final judgment of injunction, the judgment was not supported by competent substantial evidence of stalking, because only one incident met the statutory requirements," and noting acts "were part of one 'continuous course of conduct,' which would constitute one instance of stalking, not four"); *Wyandt v. Voccio,* 148 So. 3d 543, 544 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2181a] ("Ms. Voccio did not establish two incidents of stalking."); *DiTanna v. Edwards,* 323 So. 3d 194, 201 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1533a] ("In order to be entitled to a stalking injunction two separate instances of stalking must be proven by competent substantial evidence."); *Carter v. Malken,* 207 So. 3d 891, 893-94 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D120a] ("[S]talking requires proof of repeated acts. . . A minimum of two incidents of harassment are required to establish stalking.").

[10]*E.g., Johnstone v. State,* 298 So. 3d 660, 664 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1452a] ("[S]talking requires the proof of a series of acts, willfully and maliciously directed at a specific person(s) and evidencing a continuity of purpose, which acts serve no legitimate purpose and cause substantial emotional distress to that person(s). . . the evidence clearly supports the trial court's finding that Appellant willfully engaged in "a pattern of conduct composed of a series of acts over a period of time" (here, a period of nearly three years), which "evidence[d] a continuity of purpose," and was "directed at" one or both of the neighbors."); *Robertson v. Robertson,* 164 So. 3d 87, 88 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1073b] (these three incidents, which were further verified by Appellant's e-mail to Appellee admitting to being at her residence, establish "a course of conduct" sufficient to support the trial court's entry of the injunction against Appellant").

[11]As noted above, this Court does not read any Fourth District precedent as holding that two incidents of the "offense of stalking" as defined in Section 784.048(2) must occur before a stalking injunction may issue.

[12]By contrast, where an injunction is sought based on "following," one "act" is sufficient to meet the definition of "following" (which is not defined in the statute, and does not require a "course of conduct" comprised of "a series of acts"). Thus only two total "acts" of following are required for an injunction against stalking to issue.

[13]There is no serious contention that the initial phone call and sending of the audio file on September 10, 2022 amounted to "cyberstalking." That conduct served a legitimate, if not particularly kind, purpose (letting Petitioner know that Respondent believed her boyfriend was cheating on her), was not done in any sort of rude or cruel manner, was not done "maliciously," and would not cause a reasonable person to suffer substantial emotional distress—at least, the course of conduct to so inform Petitioner would not cause substantial emotional distress, over and above any distress that the newfound knowledge of any fact of her paramour's philandering might cause. Those acts appear different in kind and in time from Mean Text No. 1 and so are not part of that course of conduct; but even if they were part of that course of conduct, they would not cause the course of conduct to rise to the level of causing substantial emotional distress.

[14]Accordingly, this Court need not reach the question of whether the ten-month time span between Mean Text No. 1 (and any course of conduct it may have been a part of) and Mean Text No. 2 is too disparate for the two to be considered as part of the same "stalking." Courts have noted that "the statute does not allow for aggregation of temporally distant acts." *Paylan v. Statton,* 376 So. 3d 822, 826 n.2 (Fla. 2d DCA 2023) [49 Fla. L. Weekly D48a]. But that caselaw seems to concern whether temporally distant acts may be said to constitute a "course of conduct," rather than whether temporally-distant but complete incidents of cyberstalking (or harassing), each made up of a distinct course of conduct, could be said to constitute "stalking."

* * *

Torts—Negligent misrepresentation—Complaint brought by plaintiffs who paid deposit to development company for unit in planned community after seeing a sign advertising the project alleging that defendant, a mortgagee who filed a quit claim deed with the property appraiser after development company defaulted on the mortgage, had duty to remove sign advertising the project—Complaint dismissed—There are no facts or reasonable inferences from which jury could find that defendant had any intent for plaintiffs to give deposit to developer—Further, defendant had no duty to personally communicate to strangers information about quit claim deed and subsequently-filed lis pendens that was readily available to public at no cost—Attorney's fees—Defendant is entitled to attorney's fees and costs where there was no justiciable issue, and plaintiffs knew or should have known that claim was not supported by application of law to facts

DAVID BERDUGO, et al., Plaintiffs, v. TYLER JONES, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE24002128. Division 14. April 4, 2025. N. Hunter Davis, Judge. Counsel: Miguel San Pedro, Miami, for Plaintiffs. Nathan J. Avrunin, Weston, for Ghasem Khavanin, Defendant.

ORDER

THIS CAUSE came before the Court for hearing on April 2, 2025 on consideration of Defendant Ghasem Khavanin's "Motion to Dismiss Amended Complaint as to Defendant Ghasem Khavanin and Motion For Sanctions Pursuant To §57.105", and the Court having reviewed the Motion, the Court file, heard argument of counsel for Defendant Ghasem Khavanin (hereinafter Khavanin) and Plaintiffs David and Meryl Berdugo (hereinafter Berdugos) and having been sufficiently advised in the premises, the Court hereby finds as follows,

Defendant Khavanin held a mortgage on land he sold to Co-Defendant Omni Development and Consulting Services (hereinafter OMNI). OMNI defaulted on their mortgage and Khavanin filed a quit claim deed with the property appraiser resulting in OMNI filing a *lis pendens* and lawsuit. The Berdugos assert that they saw a sign on this land advertising a planned townhome community and called which eventually led to them giving OMNI a $395,000.00 deposit for a unit at the Falls at Davie project. Since this was a deposit and not a closing, the Berdugos did not investigate title nor purchase title insurance. The Berdugos assert that Khavanin had a duty to them to remove the sign since he knew or should have known that OMNI was not capable nor had the capacity to complete the project.

The Berdugos filed against Khavanin one count of Negligent Misrepresentation. To establish a prima facie cause of action for negligent misrepresentation, a plaintiff must show:

(1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false;

(2) the defendant was negligent in making the statement because he should have known the representation was false;

(3) the defendant intended to induce the plaintiff to rely on the misrepresentation; and

(4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation.

Looking at the third element, the complaint does not allege that Khavanin intended to induce the Berdugos to rely on the misrepresentation. There is an issue of intent. There are no facts, nor reasonable inferences from those facts, for a jury to find that Khavanin had any intent for the Berdugos to give a deposit to OMNI. Khananin did what the law required by filing a quit claim deed with the property appraiser stating publicly that this was his property. A simple internet search, conducted without cost and taking mere minutes, would have unambiguously revealed Defendant's quit claim deed and *lis pendens*. Khavanin was in no privity with Plaintiffs and stood to gain absolutely no benefit from Plaintiff's purported reliance on the signage in this case. Khavanin had no duty to personally communicate to strangers information that is readily available to the public without cost in the O.R. Books of Broward County, the official and obvious place such information is maintained for this explicit purpose.

Accordingly, ORDERED AND ADJUDGED that said Motion to Dismiss Amended Complaint as to Defendant Ghasem Khavanin and Motion For Sanctions Pursuant To Florida Statute §57.105 is GRANTED. The Complaint is Dismissed with Prejudice as to Ghasem Khavanin. The Court finds that pursuant to Florida Statute 57.105 that there was no justiciable issue and the Berdugos knew or should have known that this claim was not supported by the application of law to the facts. Therefore, the Plaintiffs' and their attorney's failure to timely dismiss, entitles Defendant Ghasem Khavanin to attorney's fees and costs. Therefore, pursuant to Florida Statute 57.105 attorney's fees and costs incurred are assessed against Plaintiffs David and Meryl Berdugo and their counsel, to be paid in equal amounts by the losing party and the losing party's attorney. The Court finds that counsel for Defendant Ghasem Khavanin is entitled to attorney's fees and costs and reserves jurisdiction to determine an amount and enforce payment of same. As separate scheduling order on fees and costs shall be issued contemporaneously with this Order.

* * *

Mobile home parks—Class actions—Consumer law—Florida Consumer Collection Practices Act—Limitation of actions—Summary judgment granted in favor of tenant on counts alleging that park owner violated FCCPA by unlawfully asserting right to charge tenants for water usage below 5,000 gallons per month in two billing periods despite express terms of 2014 Prospectus stating that water and sewage up to 5,000 gallons per lot is included in base rent where right was nonexistent and owner had actual knowledge that right did not exist—Defense alleging that owner had right to bill for all water usage after giving 90-day notice of new 2021 Prospectus that eliminated water allowance fails where effective date of notice falls after two billing periods at issue, and owner failed to satisfy all statutory prerequisites to increasing rent or reducing services—Although current motion does not seek summary judgment on count alleging that owner violated obligation of good faith and fair dealing under Mobile Home Act, court notes that owner's failure to comply with statutory requirements of MHA constitutes breach of duty of good faith and fair dealing, as does owner's use of coercive practices—Defense that owner complied with MHA is legally and factually flawed—No merit to defense that tenants failed to exhaust administrative remedies—Where FCCPA does not require exhaustion, exhaustion is only required under MHA when valid prospectus amendment has been approved and delivered to tenants, and threats of eviction and coercion nullify availability of administrative remedies—No merit to argument that 2014 Prospectus that provides for water allowance is merely disclosure document and does not create contractual obligations where MHA explicitly incorporates prospectus into rental agreement—Defense that tenants voluntarily paid water charges, thereby waiving right to contest charges, fails where payments were made without enforceable obligation and were coerced—Claim that tenants are estopped from challenging charges that they paid fails legally and factually—Claim of laches fails where tenants filed suit within applicable two-year limitations period—Claim of bona fide error is meritless where owner lacked necessary compliance measures to prevent wrongful billing that occurred—Setoff of water charges by reduction in rent is not applicable where tenants did not agree to exchange rent reduction for increase in water billing, and billing practice was unlawful—Owner's motion for summary judgment as to counts predicated on whether owner successfully modified prior lease term so as to eliminate water allowance is denied where there is factual issue due to ambiguity within governing contract

LOURDES MCINTOSH, on behalf of Herself and all others similarly situated, Plaintiff, v. MISSILE VIEW MHP, LLC, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-CA-056512 (Class Representation). March 31, 2025. Samuel Bookhardt, III, Judge. Counsel: George M. Gingo, George M. Gingo, P.A., Mims; and James Orth, Orth Law, Titusville, for Plaintiff. Alyssa Nohren and Tyson Pulsifer, Icard Merrill, Sarasota, for Defendant.

FINAL JUDGMENT FOR PLAINTIFFS LOURDES MCINTOSH AND THE CERTIFIED CLASS

THIS CAUSE came before the Court on February 4, 2025, for consideration of Plaintiff Lourdes McIntosh's Motion for Partial Summary Judgment on Defendant's liability as to Counts I and II of the First Amended Complaint, and Defendant Missile View MHP, LLC's Motion for Summary Judgment on all counts. Plaintiff was represented by George Gingo, Esq. and James Orth, Esq. Defendant was represented by Alyssa Nohren, Esq. and Tyson Pulsifer, Esq. Upon due consideration of the pleadings, motions, supporting documentation, arguments of counsel, and the record in this certified class action, the Court hereby makes the following **FINDINGS**:

I. Mobile Home Park Regulatory Framework and Tenant-Landlord Relationship

1. Mobile home parks in Florida are regulated under Florida Statutes §723, et seq., which was enacted to provide stability and transparency in mobile home park operations. This statute governs the relationship between park owners and tenants.

2. A prospectus is required in a Florida mobile home park to ensure fairness and predictability in the landlord-tenant relationship. By mandating the clear disclosure of rental terms, fees, and services upfront, the law seeks to prevent abrupt changes that could leave mobile home owners without viable housing options. This requirement is reinforced by Florida Statutes § 723.031(4), which mandates a minimum one-year lease term for mobile home lots. Unlike apartment tenants, who may rent on a month-to-month basis and face eviction with minimal notice, mobile home park residents benefit from greater stability. This statutory safeguard prevents park owners from arbitrarily evicting tenants or making sudden lease changes that could result in displacement.

3. The necessity of these protections stems from the unique challenges mobile home owners face when forced to relocate. Unlike traditional renters, mobile home park tenants typically own their homes while leasing the land beneath them. However, moving a mobile home is often impractical or even impossible due to stringent safety regulations, road compliance issues, and the difficulty of finding a new park willing to accept relocated units. Recognizing these challenges, Florida Statutes § 723.004 states:

> "The Legislature finds that there are factors unique to the relationship between a mobile home owner and a mobile home park owner. Once occupancy has commenced, unique factors can affect the bargaining position of the parties and can affect the operation of market forces. Because of those unique factors, there exist inherently real and substantial differences in the relationship which distinguish it from other landlord-tenant relationships. *The Legislature recognizes that mobile home owners have basic property and other rights which must*

be protected. The Legislature further recognizes that the mobile home park owner has a legitimate business interest in the operation of the mobile home park as part of the housing market and has basic property and other rights which must be protected. This chapter is created for the purpose of regulating the factors unique to the relationship between mobile home owners and mobile home park owners in the circumstances described herein."

(Emphasis added)

4. Florida law establishes a two-step, ordered process for amending a Prospectus before a mobile home park owner can increase lot rental amounts or decrease services. A reduction in services, such as eliminating the inclusion of 5,000 gallons of water in the base lot rent, is treated similarly to a rent increase under Florida law and must follow the same statutory process to ensure fairness and transparency.

5. First, the park owner must obtain approval of an amended Prospectus from the Florida Division of Condominiums, Timeshares, and Mobile Homes. According to Florida Statutes § 723.031(7), "*No park owner may increase the lot rental amount until an approved prospectus has been delivered if one is required.*" (Emphasis added) Additionally, Florida Administrative Code Rule 61B-31.001(12) states, "*The park owner shall deliver the prospectus to existing home owners prior to the renewal of their rental agreements, or prior to entering into a new rental agreement, or prior to increasing the lot rental amount or decreasing services*." (Emphasis added)

6. Second, once an amended Prospectus is approved, the park owner must properly deliver it to all affected tenants before any changes can take effect. Florida Statutes § 723.037(1) states, "*A park owner shall give written notice to each affected mobile home owner and the board of directors of the homeowners 'association, if one exists, at least 90 days before any increase in lot rental amount or reduction in services or utilities provided by the park owner or any change in rules and regulations*." (Emphasis added)

7. These requirements ensure that tenants receive advance notice and an opportunity to adjust to changes in rental costs or available services, preventing arbitrary or unexpected financial burdens on mobile home park residents.

8. Furthermore, Florida law treats the Prospectus and Lot Rental Agreement as a single, binding contractual document. Florida Statutes § 723.031(10) affirms this by stating, *"The rules and regulations and the prospectus shall be deemed to be incorporated into the rental agreement."* (Emphasis added) This means that rent increases and service reductions must adhere to the procedures outlined in the governing Prospectus and Florida law before they become effective.

9. The Florida courts have further clarified this relationship in *Tara Woods SPE, LLC v. Cashin,* 116 So. 3d 492, 498-99 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1151a]. In that case, the court held that "The Act makes the prospectus part of the contract between the mobile home park owner and the mobile home owner, ..." The court emphasized that while the Prospectus governs park operations, it must be interpreted in conjunction with statutory provisions and lease agreements, ensuring that any modifications adhere strictly to Florida law and regulatory guidelines. This ruling reinforces the principle that park owners cannot unilaterally alter rental terms without following the statutory amendment process for Prospectuses and rental agreements.

II. Relationship between Missile View Mobile Home Park and its Tenants

A. 2014 Prospectus and Incorporated Lot Rental Agreement

10. Missile View Mobile Home Park (MVMHP) is a 115-unit mobile home park located in Brevard County, Florida, designated as a housing community for residents aged 55 and older. The park is governed by a Prospectus, which sets forth the rights and obligations of both the park owner and the tenants. For purposes of this action, the original governing document for the community is the 2014 Prospectus, which, along with its incorporated Lot Rental Agreement, was approved by the Florida Division of Condominiums, Timeshares, and Mobile Homes. This document was publicly posted in the community recreation room and made available to all tenants at the time of their tenancy. The 2014 Prospectus serves as the controlling agreement between the tenants and the park owner, establishing the terms under which lot rentals are provided and outlining the services included within the base lot rent. Among its key provisions, the 2014 Prospectus explicitly states that the base lot rent includes up to 5,000 gallons of water per month per unit, with any excess usage billed separately at cost. Specifically, Sections 7.01 and 8.03 of the 2014 Prospectus state in relevant part, respectively (at pages 7-8 and 17 of the 2014 Prospectus):

7.01 Water

The cost of water and sewage up through 5,000 gallons of water consumption per lot per month is included in the base rent. Sewer is billed with the water and the cost is based upon a percentage of water consumption. Consumption of water and sewage in excess of 5,000 gallons per month per lot is billed separately to that lot at the actual cost to the Park (2014 Prospectus, p. 7-8)

8.03 Base Lot Rent, Special Use Fees, Pass-Through Charges And Ad Valorem Tax and Utility Charges

. . .

The services presently included in base lot rent are:

(e) Water and sewer (up through 5,000 gallons of water and sewer charge based thereon per month). (2014 Prospectus, p. 17)

11. Plaintiff Lourdes McIntosh has been a resident of Missile View Mobile Home Park (MVMHP) since 2016, during which time the park was owned and operated by an entity other than the Defendant. She owns her mobile home but leases the lot on which it sits. As an elderly individual on a fixed income, she depends on the stability and predictability of her rental terms. Like other residents, she was provided a copy of the 2014 Prospectus upon moving into the park, which established the governing terms of her tenancy. However, it was the park's policy not to require tenants to execute the incorporated Lot Rental Agreement, and as a result, neither she nor other tenants signed it.

12. On June 24, 2020, Defendant Missile View MHP, LLC ("Defendant") acquired ownership and operational control of MVMHP. The Defendant continued its predecessor's longstanding practice of not requiring signed leases, instead operating under the 2014 Prospectus and its incorporated Lot Rental Agreement as the governing documents for all tenants. The Defendant expressly acknowledged that the 2014 Prospectus and Lot Rental Agreement governed the tenancy and further confirmed that copies of these documents remained publicly posted in the community recreation room for tenant access.

13. Despite the absence of signed leases, both the tenants and the park owner consistently adhered to the terms set forth in the 2014 Prospectus for years, operating under the mutual understanding that the 2014 Prospectus and its incorporated Lot Rental Agreement governed their tenancy. The tenants relied on these established terms when making their monthly payments, with the reasonable expectation that the park owner would not impose additional charges beyond those disclosed in the 2014 Prospectus. The park owner continuously honored these terms by accepting rent payments without separately billing for water usage below 5,000 gallons per month. The prior park owner's long-standing compliance with these terms, combined with the Defendant's continued recognition of the 2014 Prospectus as controlling, further reinforces that the 2014 Prospectus governed the contractual relationship between the parties. This uninterrupted

reliance and mutual performance by both the tenants and successive park owners underscores the binding nature of the 2014 Prospectus, establishing it as the operative agreement dictating the financial and operational obligations between the parties.

14. The Defendant bills tenants for water and sewer usage mid-month, covering water consumed during the last half of the prior month and the first half of the current month. The Defendant acknowledged and admitted that it posts these monthly bills on tenants' doors.

B. The 90-day Notice of Change in Rent and Services and its effects

15. On September 30, 2020, Defendant issued a "90-Day Notice of Lot Rental Amount Increase and Reduction of Services or Utilities" to Plaintiff and other residents. The notice informed tenants that, effective January 1, 2021, water and sewer charges for usage below 5,000 gallons per month would no longer be included in the base rent and would instead be billed separately based on monthly water meter readings.

16. However, because Defendant's billing practice spans two months, even if a 90-day notice could legally modify the lease terms, the earliest permissible charge under the new policy would have been on or after February 1, 2021—when Defendant could have first issued a bill reflecting water usage solely from January 2021 onward.

17. On December 15, 2020, Defendant issued a bill to all tenants for water used from November 17, 2020, through December 15, 2020. This bill, which is central to Count 1 of the First Amended Complaint, unlawfully charged tenants for water usage below the 5,000-gallon threshold, which was explicitly included in the 2014 Prospectus. Plaintiff received a bill for $28.73, reflecting a usage of only 463 gallons.

18. On January 14, 2021, Defendant issued another bill to all tenants for water used from December 16, 2020, through December 31, 2020. This bill, which is central to Count 2, again unlawfully imposed charges on tenants for water usage below the 5,000-gallon threshold in direct violation of the 2014 Prospectus. Plaintiff received a bill for $26.19, reflecting a usage of only 236 gallons.

19. Upon receiving these improper bills, Plaintiff and other tenants immediately objected, citing the 2014 Prospectus, which explicitly included 5,000 gallons of water in base rent. Rather than addressing the tenants 'valid concerns, Defendant's former park manager, Debbie Lyon, threatened tenants with eviction if they refused to pay the unlawful charges. This threat, made on behalf of Defendant and its management company, Leaseco Management, left tenants—particularly elderly and fixed-income residents—feeling coerced into making payments under duress.

20. Along with Plaintiff Lourdes McIntosh, ninety-six other tenants were improperly charged for water usage below 5,000 gallons per month in the December 15, 2020 bill (Count 1) and the January 14, 2021 bill (Count 2). These charges were in direct violation of the 2014 Prospectus and Lot Rental Agreement, both of which explicitly included up to 5,000 gallons of water in base rent.

C. Approval of the 2021 Amended Prospectus

21. On August 30, 2021, Defendant obtained approval from the Florida Division of Condominiums, Timeshares, and Mobile Homes for an amended Prospectus that purported to eliminate the provision including 5,000 gallons of water in the base lot rent. However, despite securing approval for this amendment, the Defendant failed to ensure internal consistency within the 2021 Amended Prospectus. Specifically, while the amendment sought to remove the provision covering 5,000 gallons of water in base rent, the final approved document still retained language explicitly stating that such water usage remained included in the base rent. This contradiction, appearing on pages 19-20 of the 2021 Amended Prospectus, states:

> "The services presently included in base lot rent are:
>
> . . .
>
> (e) Water and sewer (up through 5,000 gallons of water and sewer charge based thereon per month)."

22. The 2021 Amended Prospectus was drafted by the Defendant, and any ambiguities contained within it must be construed against the Defendant as the drafter. Under *Seifert v. U.S. Home Corp.,* 750 So. 2d 633, 641 (Fla. 1999) [24 Fla. L. Weekly S540a], the Florida Supreme Court held:

> "Under a well-established rule of construction, we are constrained to construe the provisions of the U.S. Home contract against its drafter, U.S. Home."

This principle of construing ambiguous contract provisions against the drafter, is further reinforced by *CTC Dev. Corp.,* 720 So. 2d at 1076, and *Prudential Prop. & Cas. Ins. Co. v. Swindal,* 622 So. 2d 467, 470 (Fla. 1993).

23. The continued inclusion of the 5,000-gallon water provision in the 2021 Amended Prospectus, despite Defendant's claim that it had been removed, creates a clear ambiguity that must be resolved in favor of the tenants. Florida law mandates that a contract must be interpreted as a whole, giving effect to all provisions in a manner that is consistent and reasonable. Since the 2021 Amended Prospectus still contains explicit language stating that 5,000 gallons of water remain included in base rent (pages 19-20), this provision must govern the tenancy and override Defendant's unilateral claims to the contrary.

24. The presence of this conflicting language further demonstrates that even after receiving regulatory approval for the amendment, Defendant continued to maintain a legal obligation to provide the first 5,000 gallons of water at no additional cost. Defendant's failure to fully implement its proposed changes in a legally effective manner invalidates its unilateral imposition of separate water charges on tenants.

D. The litigation

25. On December 14, 2022, Plaintiff, on behalf of herself and all similarly situated tenants, initiated this class action lawsuit to challenge Defendant's unlawful billing practices. Subsequently, on January 24, 2023, Plaintiff filed the First Amended Complaint, asserting fourteen distinct causes of action. Counts 1 through 13 allege violations of the Florida Consumer Collection Practices Act (FCCPA), each corresponding to a separate monthly billing statement issued to tenants between December 2020 and December 2021. These claims contend that Defendant knowingly and unlawfully charged tenants for water usage below the 5,000-gallon threshold that was explicitly included in base lot rent under the 2014 Prospectus.

26. Count 14 asserts that Defendant's actions violated the statutory duty of good faith and fair dealing under Florida Statutes § 723.021. Specifically, Plaintiff alleges that Defendant's premature and unauthorized imposition of water charges—before obtaining an approved and properly implemented amended Prospectus—was conducted in bad faith and with disregard for both the governing contract and the statutory protections afforded to mobile home park residents. Further, the Defendant's coercive tactics, including threats of eviction against tenants who objected to the unlawful charges, underscore its failure to act in good faith. As a result, Plaintiff seeks redress for herself and similarly situated tenants who were improperly charged and subjected to undue financial hardship due to Defendant's unlawful billing practices.

27. On November 6, 2023, the Court certified the class, defining it as:

> All tenants of Defendant Missile View MHP LLC, who used less than 5,000 gallons of water during each monthly billing period from December 15, 2020, through December 1, 2021, and who actually

paid Defendant Missile View MHP, LLC for water use and sewage during those specified months.

III. Summary Judgment Standard:

28. Under Florida law, summary judgment is governed by the directed verdict standard, meaning the moving party must demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *(In re Amendments to Florida Rule of Civil Procedure 1.510,* 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a]). The burden at summary judgment lies with the party that has the burden of proof at trial. If the nonmoving party must prove a fact to prevail at trial, the moving party can either produce evidence disproving that fact or point out that the nonmoving party lacks the evidence necessary to prove it (*Celotex Corp. v. Catrett,* 477 U.S. 317 (1986)). Additionally, courts are permitted to weigh the evidence as a reasonable jury would in assessing the plausibility of inferences relied upon by the non-moving party (*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)).

IV. Counts 1 & 2

29. In *Read v. MFP, Inc.,* 85 So. 3d 1151, 1154 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D769a], the court stated:

> "To show a violation of section 559.72(9), 'it must be shown that a legal right that did not exist was asserted and that the person had actual knowledge that the right did not exist."

A. A legal right that did not exist was asserted

30. For purposes of Plaintiff's Motion for Partial Summary Judgment as to liability on Counts 1 and 2, the Court finds that, despite the absence of individually signed lease agreements between the tenants and Defendant, the controlling lease terms are those set forth in the 2014 Prospectus and its incorporated Lot Rental Agreement. Florida law requires that mobile home park tenancies be governed by an approved prospectus, which must incorporate a minimum one-year lease agreement. This statutory requirement further reinforces that the 2014 Prospectus and Lot Rental Agreement constitute the binding lease terms for tenants. This conclusion is also supported by Defendant's long-standing acknowledgment of the 2014 Prospectus as the operative document governing tenant obligations, its continued posting of the document in the community recreation room for public access, and the consistent practice of tenants paying rent in accordance with its provisions—including the expectation that up to 5,000 gallons of water usage per month would be included in base rent. Furthermore, Defendant accepted rental payments under these terms without objection, reinforcing the mutual understanding between the parties that the 2014 Prospectus and its incorporated Lot Rental Agreement governed the tenancy.

31. The Court further finds that Defendant unlawfully asserted a non-existent legal right to charge tenants for water usage below 5,000 gallons per month for the billing periods of November 17, 2020, through December 15, 2020 (Count 1), and December 16, 2020, through December 31, 2021 (Count 2). At all relevant times, Defendant was bound by the express terms of the 2014 Prospectus, which unequivocally stated:

> "The cost of water and sewage up through 5,000 gallons of water consumption per lot per month is included in the base rent."

32. Despite this binding contractual provision, Defendant improperly billed tenants, including Plaintiff and other class members, for water usage below this threshold before obtaining a legally effective amendment to the governing Prospectus. The Court therefore finds that Defendant's actions violated the tenants 'contractual rights under the 2014 Prospectus and constituted an unlawful assertion of a non-existent legal right in violation of the FCCPA.

B. Defendant had actual knowledge that the right did not exist.

33. The Court finds that Defendant had actual knowledge that it lacked legal authority to impose separate water charges on tenants for usage below 5,000 gallons per month in both the December 15, 2020 bill, which invoiced tenants for water used from November 17, 2020, through December 15, 2020 (Count 1), and the January 14, 2021 bill, which invoiced tenants for water used from December 16, 2020, through December 31, 2020 (Count 2). Multiple facts confirm Defendant's awareness of this legal limitation:

a. Defendant had followed this same rental structure for at least five years (2016-2020) without separately billing for water usage below 5,000 gallons. The sudden change, without first amending the prospectus, confirms Defendant's awareness that its actions were improper.

b. Defendant began issuing separate water charges in December 2020, nearly a year before the 2021 Amended Prospectus was approved (August 30, 2021) and delivered to tenants (December 2, 2021). Because § 723.031(7), Florida Statutes, prohibits increasing rent until an amended prospectus is approved and delivered, Defendant knew it was implementing an unenforceable billing change.

c. Furthermore, § 723.037, Florida Statutes, requires park owners to provide at least 90 days 'written notice before increasing rent or reducing services. Even under Defendant's September 30, 2020, notice, separate water charges were not set to begin until January 1, 2021. Since Defendant's billing cycle spans two months, the earliest lawful bill reflecting this change should have been February 1, 2021, yet Defendant improperly began billing for water in December 2020, before the notice period expired.

d. Beyond improper billing, Defendant coerced tenants into paying by threatening eviction for non-payment. In December 2020, when tenants, including Plaintiff, objected, Defendant's property manager, Debbie Lyon, threatened eviction if they did not pay. These payments were made under duress, demonstrating Defendant's intent to enforce an unlawful charge through intimidation rather than a legitimate contractual right.

V. Defendants Motion for Summary Judgment

A. Counts 1 and 2—No Material Factual Disputes

34. As to Counts 1 and 2, the Court finds no genuine issue of material fact precluding summary judgment. The 2014 Prospectus, including its incorporated Lot Rental Agreement, remains the controlling and enforceable contract between the parties.

35. Defendant relies on its September 30, 2020, 90-day notice as the operative document modifying the contractual relationship. However, by its own terms, the notice did not take effect until January 1, 2021. Since Counts 1 and 2 involve billing that occurred before January 1, 2021, Defendant's reliance on the notice is legally misplaced. Accordingly, summary judgment in Plaintiff's favor is appropriate unless the affirmative defenses preclude judgment.

B. Counts 3 through 14—Factual Disputes Remain for Trial

36. Plaintiff has not moved for summary judgment on Counts 3 through 14. These counts are predicated on whether the Defendant successfully modified the prior lease terms to eliminate the inclusion of 5,000 gallons of water in base rent.

37. A factual dispute remains as to whether the contract still entitles tenants to 5,000 gallons of water in base rent, given that pages 19-20 of the 2021 Amended Prospectus state:

> "The services presently included in base lot rent are:
>
> . . .
>
> (e) Water and sewer (up through 5,000 gallons of water and sewer charge based thereon per month)."

38. Because this ambiguity exists within the governing contract, the issue must be resolved at trial to determine whether Defendants actions with regard to its 90-day notice and the amendment of its 2021 Prospectus validly removed the water allowance or whether the

original provision remains binding such that the tenants are still entitled to receive 5,000 gallons of water in base lot rent.

C. Defendant's Evidence Fails to Meet Summary Judgment Standard

39. Defendant's evidence does not rise to the level that a reasonable jury would conclude judgment should be granted in its favor. The conflicting contract terms, coupled with Defendant's failure to establish that the amendment lawfully eliminated the 5,000-gallon water allowance, prevent the Court from granting summary judgment for Defendant. Accordingly, the only remaining issue for the Court to determine at this stage is whether Defendant's affirmative defenses preclude summary judgment in favor of Plaintiff on Counts 1 and 2.

D. Affirmative Defenses

First Affirmative Defense—Failure to State a Cause of Action Under the FCCPA.

40. Defendant contends that the Florida Consumer Collection Practices Act (FCCPA) does not apply because it had a legal right to bill for water usage below 5,000 gallons per month after providing a 90-day notice in accordance with Florida Statutes § 723.037. However, this defense is both factually and legally deficient for multiple reasons. Under *Read v. MFP, Inc.,* 85 So. 3d 1151 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D769a], a violation of the FCCPA is established when:

1. A party asserts a legal right that does not exist; and
2. The party has actual knowledge that the right does not exist.

Here, both elements are met because Defendant prematurely billed tenants for water usage before the 90-day notice could take effect, rendering the charges unauthorized, and failed to comply with the mandatory two-step statutory process required to modify lease terms under Florida law, making its assertion of a right to impose separate water charges legally invalid.

41. First, even assuming, arguendo, that Defendant's 90-day notice effectively modified the terms of the 2014 Prospectus and its incorporated Lot Rental Agreement, the earliest possible date Defendant could have lawfully imposed separate water charges was February 1, 2021. This is due to Defendant's own billing cycle, which spans two months. As a result, the January 14, 2021 bill included water usage charges from December 2020, making it impossible for the 90-day notice to justify the charges at issue in Counts 1 and 2, both of which arise from Defendant's premature billing for water used in 2020.

42. Second, Defendant's reliance on the 90-day notice alone is legally inadequate for multiple reasons:

1. Its earliest possible effective date would have been February 1, 2021, but Defendant altered the billing structure prior to that date, meaning it did so without the authority of an effective 90-day notice.

2. Florida law mandates a two-step process before a mobile home park owner can increase rent or reduce services. Under Florida Statutes §§ 723.031(7) and 723.037, a park owner must:

a. Obtain approval of an amended Prospectus from the Florida Division of Condominiums, Timeshares, and Mobile Homes; and

b. Deliver the approved Prospectus to all affected tenants before implementing any changes.

43. Because Defendant failed to satisfy these statutory prerequisites, its unilateral billing of tenants in December 2020 was unlawful, thereby satisfying both elements of an FCCPA violation.

44. Defendant knowingly asserted a non-existent legal right by billing for water without a legally enforceable amendment to the 2014 Prospectus, making this affirmative defense untenable as a matter of law.

Second Affirmative Defense—Failure to State a Cause of Action Under § 723.021

45. Defendant contends that Plaintiff's claim under Florida Statutes § 723.021 (obligation of good faith and fair dealing) fails because no statutory duty was breached. This defense is misplaced and fails for multiple reasons.

46. First, Plaintiff's Motion for Partial Summary Judgment does not seek judgment on Count 14, which alleges a violation of § 723.021. Defendant's argument that Plaintiff has failed to state a cause of action under this statute is irrelevant to the present motion, as the Court is not being asked to rule on this claim at this stage. Instead, the issue of Defendant's breach of its duty of good faith and fair dealing remains a question of fact for trial.

47. Second, even assuming this argument were relevant, Defendant's failure to comply with the statutory requirements of Florida Statutes § 723.031(7) and § 723.037 constitutes a breach of the duty of good faith and fair dealing. Specifically, these statutes require:

1. Prior approval of an amended Prospectus by the Florida Division of Condominiums, Timeshares, and Mobile Homes before reducing services or increasing lot rental amounts; and

2. Delivery of the amended Prospectus to tenants before any changes take effect.

Defendant did not comply with either of these statutory requirements before implementing separate charges for water in December 2020. Instead, Defendant unilaterally imposed these charges before obtaining approval of the 2021 Amended Prospectus on August 30, 2021, and before delivering it to tenants on December 2, 2021.

48. Third, Defendant's conduct went beyond mere procedural missteps; it actively misled tenants into believing these charges were legitimate. Debbie Lyon, Defendant's park manager, threatened eviction for nonpayment, further evidencing bad faith. The Florida Supreme Court has held that where statutory protections exist, failure to adhere to them constitutes evidence of bad faith. Here, Defendant's coercive tactics and premature billing without following required legal procedures amount to an abuse of its position and a clear violation of its obligation of good faith and fair dealing. Accordingly, this affirmative defense lacks merit as a matter of law and does not preclude Plaintiff's claim under § 723.021.

Third Affirmative Defense—Compliance with the Florida Mobile Home Act

49. Defendant's claim that it complied with the Florida Mobile Home Act (Fla. Stat. § 723) is legally and factually flawed. Under Fla. Stat. §§ 723.031(7) and 723.037, rent increases and reductions in services require both (1) prior approval of an amended Prospectus and (2) a 90-day notice after approval. Defendant failed to obtain an amended Prospectus before billing tenants in December 2020, rendering its reliance on a 90-day notice invalid.

50. Defendant's amended Prospectus was not approved until August 30, 2021, nor delivered to tenants until December 2, 2021, yet Defendant billed separately for water as early as December 2020. Because Fla. Stat. § 723.031(7) prohibits rent increases or service reductions without an approved and delivered amended Prospectus, Defendant's actions were unlawful.

51. Even if the September 30, 2020, 90-day notice was valid, the earliest lawful billing date would have been February 1, 2021. However, Defendant's December 2020 and January 2021 bills included water charges from 2020, meaning the notice had no legal effect on these charges. Defendant's own billing cycle contradicts its compliance claim, as it spans two months, proving that the charges in Counts 1 and 2 were premature and unlawful.

52. Despite claiming that water usage below 5,000 gallons was removed from base rent, the 2021 Amended Prospectus explicitly states that 5,000 gallons of water remain included Motion. If Defendant truly intended to eliminate this provision, it would have removed it before seeking approval. The continued inclusion of this language creates ambiguity, which must be construed against Defendant as the drafter (*Seifert v. U.S. Home Corp*., 750 So. 2d 633, 641 (Fla. 1999) [24 Fla. L. Weekly S540a]).

53. Defendant argues that tenants failed to form a committee or petition regulators, but this is irrelevant. The law places the burden on the park owner to comply with statutory requirements before modifying rental terms *(Tara Woods SPE, LLC v. Cashin,* 116 So. 3d 492, 498-99 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1151a]). Tenant inaction does not cure Defendant's failure to follow the law.

54. In *Read v. MFP, Inc.,* 85 So. 3d 1151 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D769a], the court held that asserting a non-existent legal right violates the FCCPA. Here, Defendant billed tenants for water in December 2020 before obtaining regulatory approval, making its charges unlawful.

55. Defendant billed separately for water before obtaining approval of an amended Prospectus, violating Fla. Stat. § 723.031(7). The 90-day notice did not authorize charges from December 2020, as its effective date was January 1, 2021. The 2021 Amended Prospectus still includes 5,000 gallons of water in base rent, contradicting Defendant's claim that it was removed. Florida law prohibits asserting non-existent legal rights, making Defendant's billing practices unlawful. Accordingly, Defendant's Third Affirmative Defense fails as a matter of law.

Fourth & Fifth Affirmative Defense—Failure to Exhaust Administrative Remedies

56. Defendant asserts that Plaintiff failed to exhaust administrative remedies under Fla. Stat. § 723.037 by not forming a committee to challenge the billing change or requesting mediation. Defendant argues that Plaintiff was required to follow the statutory dispute resolution procedures before filing suit.

57. Florida's FCCPA does not require administrative exhaustion before a claim can be brought. Defendant conflates the procedural requirements for rent increases under the Mobile Home Act (MHA) with the consumer protection provisions of the FCCPA, which operates independently of Chapter 723. Courts have repeatedly held that where a statutory violation exists, exhaustion of administrative remedies is not a prerequisite to filing suit(*Read v. MFP, Inc*., 85 So. 3d 1151, 1154 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D769a]). Counts 1 and 2 are FCCPA claims, and Defendant's attempt to impose an exhaustion requirement is legally misplaced.

58. Even under the MHA, exhaustion is required only when the park owner has complied with statutory prerequisites. Fla. Stat. § 723.037 applies only after an amended Prospectus has been approved and delivered. Here, Defendant's amended Prospectus was not approved until August 30, 2021, yet Defendant billed tenants for water separately starting in December 2020—months before any lawful amendment took effect. A committee challenge under § 723.037(4) would have been futile because the charges imposed in December 2020 and January 2021 were unlawful from the outset, as no valid amendment had been implemented at that time.

59. The doctrine of exhaustion does not apply where tenants are deprived of a meaningful opportunity to challenge unlawful charges. In December 2020, Debbie Lyon, Defendant's park manager, threatened eviction if tenants refused to pay the unlawful charges. These threats coerced payments under duress, effectively stripping tenants of any realistic ability to pursue administrative remedies. Courts recognize that exhaustion is not required when the party asserting it prevents the plaintiff from meaningfully invoking the available remedies through intimidation or coercion.

60. Defendant wrongly assumes that tenants were obligated to challenge the billing changes through a committee process. However, no statutory obligation exists for tenants to initiate administrative challenges when the park owner itself has failed to comply with statutory prerequisites. Exhaustion applies only when the park owner has lawfully enacted a change, which Defendant did not do.

61. FCCPA claims do not require exhaustion, and § 723.037 applies only after a valid amendment has been approved and delivered, which had not occurred when Defendant began unlawfully billing tenants in December 2020. Furthermore, threats of eviction and coercion nullify the availability of administrative remedies, making exhaustion both legally and practically irrelevant. Accordingly, Defendant's Fourth and Fifth Affirmative Defenses fail as a matter of law and should be stricken.

Sixth Affirmative Defense—The 2014 Prospectus is Not a Contract

62. Defendant argues that the 2014 Prospectus is merely a disclosure document and does not create contractual obligations.

63. Florida law explicitly incorporates the prospectus into the rental agreement. Florida Statutes § 723.031(10) states that "[t]he rules and regulations and the prospectus shall be deemed to be incorporated into the rental agreement." This establishes that the prospectus is not merely a disclosure document but a binding contractual instrument governing the landlord-tenant relationship.

64. Defendant misinterprets *Tara Woods SPE, LLC v. Cashin,* 116 So. 3d 492 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1151a]. The case does not hold that a prospectus lacks contractual force; rather, it confirms that the prospectus must be read alongside statutory provisions and lease agreements. Florida courts, including *Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc.,* 683 So. 2d 591, 593 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2447a], have consistently recognized the prospectus as a key part of the rental agreement.

65. Defendant's own actions further confirm that the 2014 Prospectus governs tenant obligations. Defendant accepted rental payments in accordance with its terms, publicly posted it as the operative agreement, and did not dispute its applicability until after imposing unlawful charges. The 2014 Prospectus explicitly states that 5,000 gallons of water are included in base lot rent, yet Defendant billed separately for water before obtaining an amended prospectus, violating statutory requirements.

66. Because Florida law incorporates the prospectus into rental agreements, Tara Woods does not support Defendant's argument, and Defendant's own conduct confirms the prospectus as binding, this defense fails as a matter of law and should be stricken.

Seventh Affirmative Defense—Voluntary Payment Doctrine

67. Defendant claims that Plaintiff and other tenants voluntarily paid the water charges, thereby waiving any right to contest them.

68. Defendant argues that Plaintiff and other tenants voluntarily paid the unlawful water charges, thereby waiving any right to contest them. This defense is legally invalid because the voluntary payment doctrine does not apply when payments are made without an enforceable obligation or where payment was coerced. Florida Statutes § 725.04 explicitly provides that when a party makes a payment under a contract but was under no enforceable obligation to do so, the defense of voluntary payment cannot be used to bar recovery.

69. Here, tenants were never legally obligated to pay separate water charges. The 2014 Prospectus, which governed their tenancy, expressly included 5,000 gallons of water in base rent. Defendant unilaterally imposed these charges before obtaining an amended prospectus, meaning there was no enforceable obligation requiring payment. Furthermore, Defendant's park manager, Debbie Lyon, explicitly threatened eviction if tenants refused to pay, depriving them

of a meaningful choice. Courts have consistently held that payments made under duress or coercion—especially under threat of losing housing—are not voluntary (*Hassen v. MediaOne of Greater Florida, Inc.,* 751 So. 2d 1289 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D749a]). Because these payments were both legally unrequired and extracted through coercion, Defendant's Seventh Affirmative Defense fails as a matter of law and must be stricken.

Eighth Affirmative Defense—Waiver

70. Defendant asserts that Plaintiff waived her right to challenge the water charges by continuing to pay without formally objecting. This defense is legally and factually incorrect.

71. Waiver requires the intentional and voluntary relinquishment of a known right. Here, Plaintiff and other tenants objected immediately upon receiving their first improper bill in December 2020. Rather than addressing these objections, Defendant's property manager, Debbie Lyon, threatened eviction if tenants refused to pay. Threats of eviction effectively stripped tenants of any real choice, making their payments involuntary. Florida law does not recognize waiver where a party was coerced into compliance. (See *Hassen v. MediaOne of Greater Florida.,* Inc. 751 So. 2d 1289 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D749a]). Furthermore, waiver cannot be inferred where a party continues to perform under protest or where payments were made under duress. The evidence shows that tenants repeatedly objected, but their financial and housing security were placed at risk, forcing them to comply.

72. Defendant's assertion of waiver is also inconsistent with Florida law regarding unilateral contract modifications. Tenants were contractually entitled to 5,000 gallons of water under the 2014 Prospectus. Defendant imposed separate charges without obtaining an amended prospectus, in direct violation of Florida Statutes §§ 723.031(7) and 723.037. A party cannot waive rights that are protected by statute unless there is clear, affirmative consent, which is absent here. Moreover, Defendant's reliance on continued payments ignores the fact that tenants paid under duress, fearing eviction and financial harm. Because waiver must be knowing and voluntary, and Plaintiff and other tenants neither consented to nor accepted the unlawful charges without protest, Defendant's Eighth Affirmative Defense is legally and factually untenable and should be stricken.

Ninth Affirmative Defense—Estoppel

73. Defendant contends that Plaintiff is estopped from challenging the charges because she knew about them and continued to pay.

74. Defendant argues that Plaintiff is estopped from challenging the water charges because she was aware of them and continued to pay. This defense is legally flawed and factually unsupported.

75. Estoppel applies only where a party knowingly induces another to rely on its representations to their detriment. Here, it was Defendant—not Plaintiff—who misrepresented the legality of the charges. Defendant unilaterally imposed water fees despite the 2014 Prospectus explicitly stating that up to 5,000 gallons of water were included in base lot rent. Defendant falsely represented to tenants that it had the legal authority to charge separately for water before obtaining an amended prospectus, in violation of Florida Statutes §§ 723.031(7) and 723.037. Defendant further coerced tenants into paying by threatening eviction, eliminating any meaningful opportunity for them to withhold payment without severe consequences.

76. Moreover, estoppel is inapplicable where a party asserts a legal right that does not exist. Defendant had no lawful right to impose separate water charges prior to an approved and delivered amended prospectus. Instead, Defendant engaged in a pattern of coercion and misrepresentation to enforce an unlawful charge, making it the party that should be estopped from asserting any defense based on these wrongful acts. Accordingly, Defendant's Ninth Affirmative Defense fails as a matter of law and should be stricken.

Tenth Affirmative Defense—Laches

77. Defendant argues that Plaintiff delayed in asserting her claims, causing prejudice to Defendant.

78. Laches is an equitable defense that applies only when a plaintiff unreasonably delays bringing a claim and that delay results in material prejudice to the defendant. Here, Plaintiff filed suit well within the applicable two-year statute of limitations for FCCPA claims under Florida Statutes § 559.77(4). Courts do not apply laches where a claim was timely filed, as statutory limitations periods control.

79. Furthermore, Defendant was on notice of tenants 'objections as early as December 2020, when Plaintiff and others protested the unlawful charges. Rather than address these concerns, Defendant's property manager, Debbie Lyon, threatened eviction if tenants refused to pay. Defendant cannot claim prejudice from a delay when it was aware of the dispute from the outset and continued to demand payment under threat of removal from the park.

80. Because Plaintiff acted within the statutory period, and Defendant was neither misled nor harmed by any alleged delay, the laches defense is inapplicable and should be stricken as a matter of law.

Eleventh Affirmative Defense—Bona Fide Error

81. Defendant asserts that any improper billing was a bona fide error under Florida Statutes § 559.77(3). However, this defense is legally and factually inapplicable.

82. To invoke the bona fide error defense, a defendant must demonstrate that the violation was unintentional and that it maintained procedures reasonably adapted to avoid the error. Florida law requires more than a mere assertion of mistake; Defendant must show that it had safeguards in place to prevent wrongful billing.

83. Here, Defendant has admitted in depositions that it had no formal policies or procedures in place to ensure compliance with Florida Statutes § 723.031(7) and § 723.037 before billing separately for water. Defendant's own admissions establish that it failed to implement any system to verify the legality of its charges before imposing them on tenants. This absence of safeguards precludes a bona fide error defense as a matter of law.

84. Because Defendant lacked the necessary compliance measures to prevent the wrongful billing at issue, its invocation of the bona fide error defense is meritless and should be stricken.

Twelfth Affirmative Defense—Setoff

85. Defendant argues that tenants benefitted from a rent reduction that should offset their damages. However, rent did not decrease—tenants actually paid more overall due to the unlawful water charges. Even if rent had decreased, tenants never agreed to exchange a rent reduction for separate water billing, making setoff inapplicable. Moreover, statutory damages under the FCCPA are independent of actual damages and serve as a penalty for unlawful collection practices. Fla. Stat. § 559.77(2) allows up to $1,000 per violation, which cannot be offset by an alleged rent decrease. Finally, setoff cannot apply where the underlying charges were unlawfully imposed. Because Defendant's billing practice was unlawful, no setoff is available, and Defendant's Twelfth Affirmative Defense fails as a matter of law.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. The Court GRANTS Plaintiff's Motion for Partial Summary Judgment on Counts 1 and 2 as to liability.

2. The Court DENIES Defendant's Motion for Summary Judgment on all counts.

3. The Court RESERVES jurisdiction over Counts 3 - 14 for trial.

* * *

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COUNTY COURTS

Insurance—Automobile—Windshield repair—Declaratory action—Complaint for declaratory relief is dismissed as to counts that can be fully and completely resolved through pending breach of contract claim—"Assignment to Collect and Cause of Action" qualifies as assignment under section 627.7289—Count predicated on this assignment agreement is also dismissed

WINSHIELD FUNDING SERVICES, LLC, a/a/o Amanda Hernandez, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant. WINSHIELD FUNDING SERVICES, LLC, a/a/o Keval Patel, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case Nos. 2024 10295 CODL and 2024 10301 CODL. Division 71. WINSHIELD FUNDING SERVICES, LLC, a/a/o Alyssa George, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Case No. 2024 10315 CODL. WINSHIELD FUNDING SERVICES, LLC, a/a/o Sue Marshall Coon, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Case No. 2024 10311 CODL. WINSHIELD FUNDING SERVICES, LLC, a/a/o William Paul Norton, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Case No. 2024 10299 COCI. WINSHIELD FUNDING SERVICES, LLC a/a/o Tracy Fox (Lilly), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Case No. 2024 10317 CODL. WINSHIELD FUNDING SERVICES, LLC, a/a/o Amanda Kakert, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Case No. 2024 10314 CODL. WINSHIELD FUNDING SERVICES, LLC, a/a/o Blake Keech, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Case No. 2024 10313 CODL. WINSHIELD FUNDING SERVICES, LLC, a/a/o Mary Elizabeth Finn, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Case No. 2024 10310 CODL. April 1, 2025. Angela A. Dempsey, Judge. Counsel: Donald J. Masten, Donald James Masten, LLC, Orlando, for Plaintiff. Paula Anastasia Post (Lead Counsel) and Peggy A. Struallo, The Post Law Firm, P.A., St. Augustine; and Matthew J. Conigliaro, Carlton Fields, Tampa, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

THIS CAUSE having come before the Court upon the Defendants', State Farm Automobile Insurance Company's and State Farm Fire & Casualty Company's (together "State Farm" or "Defendants") Motion to Dismiss Plaintiff's Complaint for Declaratory Relief, and the Court being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED that:

1. Counts I and III of Plaintiff's Complaint are dismissed as they can be adequately, fully, and completely resolved through the breach of contract claim already before this Court. *Ramos v. CACH, LLC,* 183 So. 3d 1149, 1153-54 (Fla. 5th DCA 2015) [41 Fla. L. Weekly D70a].

2. Additionally, the "Assignment to Collect and Cause of Action" agreement between Winshield Funding Services, LLC and the named insureds, which is incorporated into Plaintiff's Complaint, qualifies as an assignment agreement under section 627.7289, Florida Statutes (2023). As a result, Count II is dismissed because it is predicated on that assignment agreement.

3. The Court did not consider the constitutionality of section 627.7289 as applied to Plaintiff's assignment agreement because Plaintiff has not plead a constitutional challenge to that statute, if it is read to invalidate Plaintiff's assignment agreement.

4. Plaintiff shall have 15 days from the date of this Order in which to file an Amended Complaint that asserts Plaintiff's breach of contract claim with an alternative argument challenging the constitutionality of section 627.7289, if it is read to invalidate Plaintiff's assignment agreement, and the repeal of section 627.428.

5. The Parties are relieved from any deadlines in any existing Case Management Order and Order Setting Jury Trial. Upon the filing of the Amended Complaint, a new Case Management Order will be entered.

Defendants', State Farm Automobile Insurance Company's and State Farm Fire & Casualty Company's, Motion to Dismiss Plaintiff's Complaint for Declaratory Relief is hereby GRANTED and Plaintiff's Complaint is dismissed, without prejudice, with the opportunity to Amend as discussed above.

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations on application—Failure to disclose prior PIP claim—Insurer not entitled to summary judgment on its affirmative defense that recovery under policy was barred because the insured failed to disclose on application that he had made a PIP claim within 36-month period preceding application date—Records of medical providers related to a prior PIP claim with another insurer are unauthenticated, inadmissible hearsay that cannot be considered in support of insurer's motion for summary judgment on material misrepresentation defense—Even if admissible, records show that prior PIP claim was made by medical providers to whom insured had assigned policy benefits, not by insured—Because insurer pled defense that insured made prior PIP claim, it cannot now proceed on unpled argument that providers made claims "on behalf" of insured; and in any event, there is no evidence or inference that providers made claims for insured's benefit—Summary judgment entered in favor of provider/assignee

GREEN MOUNTAIN MED CON, INC., Plaintiff, v. LYNDON SOUTHERN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-012573-CC-25. Section CG01. February 27, 2025. Jorge A. Perez Santiago, Judge. Counsel: Majid Vossoughi and Brad Blackwelder, Majid Vossoughi, P.A., Miami, for Plaintiff. Melissa Muros and Colin Milam, Hernandez & Valois, Ft. Lauderdale, for Defendant.

ORDER ON COMPETING MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on January 30, 2025, on (i) Defendant's Motion for Final Summary Judgment Due to No Coverage for Material Misrepresentation ("Defendant's Motion for Summary Judgment") (docket # 111) and (ii) Plaintiff's Response to Defendant's Motion for Summary Judgment / Plaintiff's Motion for Summary Judgment as to Count II of Plaintiff's Complaint and Defendant's Affirmative Defense of Material Misrepresentation ("Plaintiff's Motion for Summary Judgment") (docket # 127).

The parties were represented by counsel at the hearing who presented arguments to the Court. Melissa Muros, Esq. and Colin Milam, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. and Brad Blackwelder, 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, hereby makes the following factual findings and conclusions of law, and enters this Order DENYING Defendant's Motion for Summary Judgment and GRANTING Plaintiff's Motion for Summary Judgment, for the reasons set forth below as well as those stated on the record.

BACKGROUND & FACTUAL FINDINGS

On May 16, 2022, Plaintiff filed this breach of contract suit against Defendant for unpaid personal injury protection ("PIP") benefits (docket # 2).

"Material Misrepresentation" Defense Pled by Defendant

The critical issue in this case is whether the Defendant's named insured, Pablo Casademunt, made a "material misrepresentation" in response to question #16 of the Defendant's application for insurance which provides as follows:

APPLICANT QUESTIONNAIRE

16. Have you or any driver or household resident, or someone on your behalf, made or filed a claim for Personal Injury Protection (PIP) within the 36 months prior to the date of this application?

(Emphasis added).

On October 5, 2022, Defendant served its Answer and Affirmative Defenses to Plaintiff's Complaint (docket # 13) and raised its "material misrepresentation" affirmative defense alleging that its insured, *"Pablo T Casademunt Pollan, did not disclose that he made a PIP claim with Infinity Insurance"*:

AS A FIRST AFFIRMATIVE DEFENSE, the Defendant affirmatively alleges that pursuant to Fla. Stat. §627.409, the subject policy of insurance, and the application for the policy of insurance recovery is barred and/or precluded under the policy of insurance on the grounds that the named insured made material misrepresentations, omissions, concealments of fact or incorrect statements on the application for the policy of insurance. Specifically, the policy at issue explicitly asks whether any driver or household member filed a Personal Injury Protection claim in the previous thirty-six (36) months, to which the named insured answered "No," despite that being inaccurate. The purpose of the question at issue is to allow the Defendant the information necessary to adequately analyze risk and properly price the policy. In the present case the applicant, Pablo T Casademunt Pollan, did not disclose that ***he made a PIP claim*** with Infinity Insurance under claim number 21123738046 regarding date of loss 8/10/2021, within the relevant thirty-six (36) month period preceding the application. Had the Defendant known of the prior PIP claim it would have materially affected the risk such that the policy would never have been issued under the underwriting guidelines of the Defendant, amounting to a material misrepresentation under the law.

(Emphasis added).

On October 29, 2024, the Court set this case for jury trial to begin the week of February 3, 2025 (docket # 110).

Defendant's Motion for Summary Judgment and Supporting Affidavit

On November 22, 2024, Defendant filed its Motion for Summary Judgment (docket # 111). Defendant's motion argues that Pablo Casademunt failed to disclose that he made a prior PIP claim with Infinity Insurance on the application for insurance resulting in a "material misrepresentation."[1]

On November 23, 2024 Defendant filed the affidavit of Farah Florestal, its adjuster and corporate representative, in support of Defendant's Motion for Summary Judgment (docket # 112). Florestal's affidavit attached various documents that appear to be Defendant's documents.[2] The affidavit also attached documents from a different insurer, Infinity Insurance. These are not Defendant's business records. The affidavit further attached documents from third-party medical providers. These are neither the Defendant's nor Infinity Insurance's business records.

Plaintiff's Motion for Summary Judgment

On December 6, 2024 Plaintiff filed its Motion for Summary Judgment (docket # 127). Plaintiff's motion argues that Defendant has failed to come forth with admissible evidence sufficient to meet its burden of proof as to its "material misrepresentation" affirmative defense and, accordingly, Plaintiff is entitled to entry of summary judgment as a matter of law.

Specifically, Plaintiff's Motion for Summary Judgment argues that documents belonging to Infinity Insurance and third-party medical providers are unauthenticated and inadmissible hearsay which cannot be considered by the Court at summary judgment. Plaintiff further argues that even if the Court were to consider these documents over the Plaintiff's objection, these documents establish that the prior PIP claims with Infinity Insurance were made by two (2) medical providers (Atlantic Medical and Diagnostic Corp. and Red Diamond Medical Group), not Pablo Casademunt. Plaintiff's Motion for Summary Judgment also objected to any argument by the Defendant that the medical providers' PIP claims were made "*on behalf of*" Pablo Casademunt because Defendant did not plead that the prior PIP claims were made on the insured's behalf. At the hearing, Plaintiff also argued that PIP claims made by assignee medical providers were not made "on behalf of"—which means to do so as someone's representative or in their interests—Pablo Casademunt. The medical providers made PIP claims in pursuit of their own interests.

Defendant's Opposition and Additional "Affidavit"

On January 2, 2025, Defendant filed the affidavit of Jill Douglas, Infinity Insurance's Records Custodian (docket # 137). This appeared to be in response to the evidentiary issues raised in Plaintiff's motion for summary judgment. Douglas' affidavit attached documents that appear to be Infinity Insurance's documents.[3] But they are not. Like Florestal's affidavit, Douglas' affidavit attached the same third-party medical providers' documents that are not Infinity Insurance's business records.

On January 20, 2025 Defendant filed its Opposition to Plaintiff's Response to Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment as to Count II of Plaintiff's and Defendant's Affirmative Defense of Material Misrepresentation ("Defendant's Opposition") (docket # 140). Defendant's Opposition cited to a document from Atlantic Medical and Diagnostic Corp., titled "Application for Florida 'No Fault' Benefits." This document was attached to Douglas' affidavit so Defendant could argue, for the first time, that the prior PIP claim made with Infinity Insurance was filed both "*by and on behalf of*" Pablo Casademunt. Defendant's Opposition did not respond to Plaintiff's argument that the "on behalf of" argument was not pleaded in its affirmative defenses.

Parties' Representation to the Court at Case Management Conference

On January 27, 2025, the Court held an in-person case management conference to address pretrial issues (docket # 147). At the case management conference, both parties represented to the Court that they would like to proceed on their respective summary judgment motions in lieu of trial and that the Court's rulings on the competing motions would be dispositive of this action. Pursuant to the parties' representation and agreement, a hearing on both parties' summary judgment motions was noticed to occur on January 30, 2025 (docket # 154).

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's Material Misrepresentation Defense Fails as a Matter of Law Because Unauthenticated, Hearsay Documents are Insufficient to Meet its Burden of Proof

As contemplated by *Celotex,* Plaintiff's Motion for Summary Judgment sets forth that despite more than adequate time for discovery (nearly three years of litigation), Defendant has failed to present evidence sufficient to establish its "material misrepresentation" defense.

To overcome Plaintiff's Motion for Summary Judgment and avoid the entry of summary judgment against it, Defendant was required to establish that Pablo Casademunt made a prior PIP claim with Infinity Insurance, as pled, by proffering admissible summary judgment evidence. *See* 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 establish that Pablo Casademunt made a prior PIP claim with Infinity Insurance through Florestal's and Douglas' affidavits (docket #s 112, 137) and the attached documents. But neither affidavit is sufficient to meet the Defendant's burden and, accordingly, Plaintiff is entitled to entry of summary judgment in its favor on the "material misrepresentation" issue as a matter of law.

Both affidavits attach records from Atlantic Medical and Diagnostic Corp. and Red Diamond Medical Group which Defendant relied upon. But a third party's documents are neither Defendant's nor Infinity Insurance's business records.[4] Neither the Defendant nor Infinity Insurance "ma[d]e" any of the medical providers' records, it is not their "regular practice" to "make such . . . record[s]," and they cannot testify from personal knowledge about whether these records were "made at or near the time of the event" or "made by or from information transmitted by a person with knowledge" because the documents were prepared by third-party medical providers unrelated to Defendant or Infinity Insurance.

Although the affidavits contain the "magic words" mandated by Fla. Stat. 90.803(6) to establish the business records exception to the rule against hearsay, this is not the end of the Court's inquiry. *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"). "[T]he 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.*; *see also, 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] (following rehearing of a decision initially suggesting a third-party law firm's letter was admissible as Infinity Auto Insurance Company's business record, the court reversed judgment in the insurer's favor because the insurer relied on a letter from a third-party law firm but failed to establish any hearsay exception).

The Court finds that the medical providers' documents attached to Florestal's "Application for Florida 'No Fault' Benefits," are unauthenticated,[5] inadmissible and Douglas' affidavits, including Atlantic Medical and Diagnostics Corp.'s hearsay which cannot be considered at summary judgment. So, the record before the Court is devoid of any documents from which the Defendant could even *attempt* to establish that Pablo Casademunt "made a PIP claim with Infinity Insurance," as alleged within its affirmative defense. Accordingly, Defendant's affirmative defense fails as a matter of law.

If the Court were to Consider the Medical Providers' Hearsay Records, Then the Prior PIP Claim with Infinity Insurance was Made by the Medical Providers and Not Pablo Casademunt

Even if the Court was to consider the inadmissible hearsay documents attached to Florestal's and Douglas' affidavits, Defendant still fails to meet its burden of establishing that Pablo Casademunt made a prior PIP claim with Infinity Insurance. Those documents establish that Atlantic Medical and Diagnostic Corp. and Red Diamond Medical Group made prior PIP claims with Infinity Insurance, not Pablo Casademunt.

The terms "*made or filed a claim for [PIP]*" or "*claim*" are neither expressly defined in Defendant's insurance policy nor in the insurance application. However, "claim" is a commonly used word which must be given its plain and ordinary meaning. *See e.g., Southeastern Fisheries Assoc., Inc. v. Dep't of Natural Resources,* 453 So. 2d 1351, 1353 (Fla. 1984) ("[w]here a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning").

The Court finds that the term "claim" in this context means a demand for payment of monies from an insurance company. *See e.g., Dampier v. Dep't of Banking & Fin.,* 593 So. 2d 1101, 1107 (Fla. 1st DCA 1992) ("[i]n other words, 'claim' means the amount which a person may 'demand' from the Fund"); *Eagle Am. Ins. Co. v. Nichols,* 814 So.2d 1083 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D596a] ("A claim under the policy is a demand against the insured for money. In this case, there was but one demand for money"); *Washington v. GEICO,* No. 6:16-cv-1775-Orl-40KRS (MD Fla. 2017) ("Black's Law Dictionary" defines "claim" as "[a] demand for money, property, or a legal remedy to which one asserts a right"); *RREF SNV-FL SSL, LLC, v. Shamrock Storage,* 250 So.3d 788 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1498a] (" 'Claim' means a right to payment"); *The*

Penn Ins. Co. v. Kuriger, No. 14-14-00986-CV (Tex. Ct. of Appeals, 14th Dist. 2016) ("claim" means "a demand or request for something considered one's due" . . . "a demand for money, property, or a legal remedy to which one asserts a right"); *State Farm v. Chiropractic One, Inc.,* 18 Fla. L. Weekly Supp. 868a (Fla. 9th Cir. Ct., J. Evans, Jan. 19, 2011) ("[i]n the context of insurance, the term 'claim' is commonly understood to mean an assertion of a right to payment of benefits under an insurance policy"); *Leviton Mfg. CO., Inc. v. Pass & Seymour, Inc.,* 264 F. Supp. 3d 421 (ED NY 2017) (agreement did "not define the word 'claim,' but its meaning is clear enough. It is a 'demand or request for something considered one's due.' . . . it means that someone is asking for money, property or other consideration to come their way"); *In re Bridge Contr. Servs. of Fla., Inc.,* 12 Civ. 3536 (S.D.N.Y. Sept. 5, 2016) (relying on definition of "claim" in holding that "[u]ntil Ayala *made a demand for money*, property, or a legal remedy, there was no event that required Bridge to indemnify Tutor Perini").

Defendant has not come forth with any evidence showing that Pablo Casademunt ever made a claim and/or demand for payment of money to Infinity Insurance. The records Defendant relies on—Infinity Insurance's PIP Log and checks—reflect that it was two medical providers who submitted bills demanding payment of PIP benefits and received payment of their bills from Infinity Insurance. And Infinity Insurance's checks are addressed to the medical providers, reflect the medical providers as the payee, and state in large type "*Your claim payment*" in clear reference to the claims made by the medical providers.

The "Application for Florida 'No Fault' Benefits" from Atlantic Medical and Diagnostic Corp. relied on by the Defendant does not change this result. This document is Atlantic Medical and Diagnostic Corp.'s document (its on their letterhead) for submission of their PIP claim to Infinity Insurance. The fact that Pablo Casademunt may have signed this document does not mean that *he* made a PIP claim with Infinity Insurance. In fact, Pablo Casademunt's signature appears below language providing for release of his medical records "as the *company* may deem necessary to perfect *its* rights of recovery under the No Fault Act," and serves to enable Atlantic Medical and Diagnostic Corp. to make a PIP claim with Infinity Insurance. (Emphasis added).

Accordingly, Defendant's evidence did not establish that Pablo Casademunt made or filed a PIP claim with Infinity Insurance. So Defendant cannot show that Pablo Casademunt's answer to Defendant's (inartful) question # 16 was a misrepresentation.

Even if the Court were to Consider the Medical Providers' Hearsay Records, Same Establish that Pablo Casademunt was Legally Barred from Making a PIP Claim

Included within the medical providers' records are assignments of benefits (AOB) which assigned the PIP benefits under Pablo Casademunt's insurance policy to the two (2) medical providers. Under well-established Florida law, once an insured assigns their PIP benefits they have no legal right to make a claim under the policy. As stated by the Third District Court of Appeal in *United Auto. Ins. Co. v. Otero,* 39 So. 3d 563 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1683b], citing to *Livingston v. State Farm,* 774 So. 2d 716, 718 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D533c]:

> [A]n unqualified assignment transfers to the assignee all the interest of the assignor under the assigned contract, and . . . ***the assignor has no right to make any claim*** on the contract once the assignment is complete.[6]

Accordingly, because Pablo Casademunt assigned his PIP benefits, he had no legal right to make a claim with Infinity Insurance. Only Atlantic Medical and Diagnostic Corp. and Red Diamond Medical Group could have "*made or filed a claim for [PIP]*" with Infinity Insurance pursuant to their respective AOB.

As Pablo Casademunt did not, and could not have, "*made or filed a claim for [PIP]*" with Infinity Insurance, his answer to question # 16 on the application for insurance could not have been a misrepresentation.

Defendant's Argument that the Medical Providers' PIP Claims were made "On Behalf" of Pablo Casademunt is Procedurally Barred and Rejected

At the hearing, defense counsel argued that any distinction between a claim made by Pablo Casademunt directly and a claim made by a medical provider pursuant to an assignment of benefits from Pablo Casademunt was irrelevant or immaterial because any claim by the medical provider was purportedly made "*on behalf*" of Pablo Casademunt.

The Court rejects the Defendant's "*on behalf*" argument on multiple grounds and finds this distinction is, in fact, critical in this case.

First, Florida courts have repeatedly held that a defendant is bound by its pleading and is barred from arguing or attempting to prove at summary judgment an unpled defense. *See, Reina v. Gingerale,* 472 So. 2d 530, 531 (Fla. 3d DCA 1985) ("[a]t a summary judgment hearing, the court must only consider those issues made by the pleadings"); *BSP/Port Orange, LLC., v. Water Mill Properties, Inc.,* 969 So. 2d 1077 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2494b] (same); *Arky, Freed, Stearns v. Bomar,* 537 So. 2d 561 (Fla. 1989) ("litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared"); *Michael H. Bloom, P.A. v. Dorta-Duque,* 743 So. 2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] ("a [party] cannot be found liable under a theory that was not specifically pled").[7] The Defendant cannot now on summary judgment argue or seek to establish that anyone other than Pablo Casademunt made a PIP claim with Infinity Insurance.

As set forth above, the affirmative defense pled by the Defendant in this case alleges that Pablo Casademunt himself made a PIP claim with Infinity Insurance ("*he made a PIP claim*"). The defense simply does not allege that someone else (*i.e.*, a medical provider) made a PIP claim "on behalf" of Pablo Casademunt. This distinction is significant. The Defendant cannot proceed on the unpled "on behalf" issue. *See Advanced Florida Med.,* 364 So. 3d at 1133 (insurer who pled assignor "failed to *appear*" for EUO was not permitted to argue he "failed to *submit*").

But even if Defendant had pled the "on behalf" theory for its material misrepresentation defense, this Court would still conclude based on the record that the PIP claims made by the two (2) medical providers with Infinity Insurance were not done "on behalf" of Pablo Casademunt. The medical providers were *assignees* of Pablo Casademunt's rights and benefits under the policy. They were not his agent or representative. And, as stated above, an unqualified assignment transfers to the assignee (*i.e.*, the medical providers) all the interest of the assignor (*i.e.*, Pablo Casademunt) under the assigned contract. So, the medical providers assumed Pablo Casademunt's interest under the insurance policy so they could make a claim for PIP benefits for their pecuniary gain. There is no evidence or inference from the evidence that the medical providers made PIP claims for Pablo Casademunt's benefit.

Defendant made a public policy argument in response to this conclusion at the hearing. It suggested that the question in the application was designed to uncover this particular risk, and that the Court's ruling undermines the question's purpose. The Court understands Defendant's frustration with this result. But this is the

result the facts and law demand. Defendant might be right that its subjective intent when it designed this question was to uncover any PIP claims made under his insurance policy. But words, and their plain meaning, matter. Defendant's question was not broad enough to cover the situation presented here, and that is the question Pablo Casademunt answered. Pablo Casademunt cannot be blamed, and the medical provider's PIP claims rejected, because he did not interpret the question the way Defendant subjectively hoped he would to disclose that he assigned his rights under his prior policy to medical providers so that they might make PIP claims. And there is a solution to Defendant's public policy concern. Defendant *could* have crafted (and can craft) a question (or questions) on its insurance application to capture this situation.

Based on the foregoing, the Court finds that there was no "material misrepresentation" and that Plaintiff is entitled to entry of final summary judgment in its favor as a matter of law.

CONCLUSION

Accordingly, based on this Court's analysis set forth above, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment as to Count II of Plaintiff's Complaint and Defendant's Affirmative Defense of Material Misrepresentation is hereby GRANTED.

The parties have previously stipulated and this Court has entered Orders as to the issues of reasonableness, relatedness, and medical necessity (docket # 158 & 159), and same provide 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 within five (5) days 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 Motion for Summary Judgment also cites, in part, to a different portion of the application titled "Accidents & Convictions" which asked the insured to "[l]ist all accidents, claims and moving violations any DRIVER or RESIDENT . . . had within the last three years." But this portion of the application was not pled as a factual basis in support of Defendant's affirmative defense. And even if it was, the "materiality" element of the defense hinged upon Pablo Casademunt having made a prior PIP claim (not any prior accidents or moving violations).

[2]These documents include Defendant's application for insurance, policy of insurance, underwriting guidelines, notice of rescission, premium refund check, and a denial letter.

[3]These documents include Infinity Insurance's PIP Payment Record / PIP & Medical Payment Log ("PIP Log") and copies of payment drafts to medical providers (Atlantic Medical and Diagnostic Corp. and Red Diamond Medical Group).

[4]Under section 90.803(6)(a), to establish the business records hearsay exception the proponent must establish that "(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and that (4) it was a regular practice of that business to make such a record". *Roesch v. U.S. Bank Nat'l Ass'n*, 294 So. 3d 429, 432 (Fla. 2d DCA) [45 Fla. L. Weekly D846a], *rev. denied,* 2020 WL 3568334 (July 1, 2020); *see also, Yisrael v. State,* 986 So.2d 491, 496 (Fla. 2008) [33 Fla. L. Weekly S131a].

[5]*See,* Fla. Stat. 90.901.

[6]*See also, Estate of Basile v. Famest, Inc.,* 718 So. 2d 892 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2144a] (because an assignment vests in the assignee the right to enforce the contract, an assignor retains no rights to enforce the contract after it has been assigned); *State Farm v. Ray,* 556 So. 2d 811 (Fla. 5th DCA 1990) (the assignor has no right to make any claim on contract once assignment is complete); *Superior Ins. Co. v. Libert,* 776 So. 2d 360 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D381a] (same); *Oglesby v. State Farm,* 781 So. 2d 469 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D702a] (only the insured or the medical provider can "own" the claim or cause of action against the insurer at any one time); *Garcia v. State Farm,* 766 So. 2d 430 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D2050c] (same).

[7]*See also Advanced Florida Med. Group, Corp. v. Progressive Am. Ins. Co.*, 364 So. 3d 1131, 1133 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D1078b] (insurer could not deviate from averment in its pleading—failure to appear to examination under oath—by arguing the insured failed to submit to an examination under oath); *Strahan Manufacturing Co. v. Pike,* 194 So. 2d 277 (Fla. 2d DCA 1967) (reversing lower court and holding that defendant's motion for summary judgment concerned estoppel which was not raised in any pleadings so granting summary judgment in favor of Defendant was reversible error); *Sunbeam Television Corp. v. Mitzel,* 83 So. 3d 865 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] ("when a [party] pleads one claim but tries to prove another, it is error for a trial court to allow the [party] to argue the unpled issue at trial"); *H.L. Mills v. Dade County,* 206 So. 2d 227 (Fla. 3d DCA 1968) (reversing lower court and holding that affirmative defense of estoppel could not be raised on motion for summary judgment since same was not properly raised within the pleadings); *Couchman v. Goodbody & Co.,* 231 So. 2d 842 (Fla. 4th DCA 1970) (reversing summary judgment based on an unpled defense and holding that on motion for summary judgment issues to be considered are those made by the pleadings); *Meigs v. C.F. Lear,* 191 So. 2d 286 (Fla. 1st DCA 1966) (summary judgment is not to be used as a substitute for parties' pleadings and where defenses of estoppel and statute of limitation were not raised in the pleadings such defenses did not constitute issues in case in which parties could submit evidence either at trial or in summary judgment proceedings); *B.B.S. v. R.C.B.,* 252 So. 2d 837 (Fla. 2d DCA 1971) (an affirmative defense must be pleaded and not raised by motion for summary judgment); *Accurate Metal Finishing Corp. v. Carmel,* 254 So. 2d 556 (Fla. 3d DCA 1971) ("[a]ffirmative defenses must be pleaded"); *Straub v. Muir-Villas Homeowners Ass'n, Inc.,* 128 So. 3d 885 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a] (finding error in trial court's consideration of an unpled defense); *Du Pont De Nemours & Co. v. Desarrollo Indus. Bioacuatico S.A.,* 857 So. 2d 925 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2171a] (rejecting a party's attempt to inject an unpled failure to warn theory of liability into a negligence action and reversing the trial court); *Robbins v. Newhall,* 692 So. 2d 947, 949 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D945b] (reversing final judgment where a party had alleged three specific acts of negligence, but tried the case on a fourth alleged act that was never pled); *Bank of America v. Asbury,* 165 So. 3d 808, 809 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1230a] ("[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are"); *Assad v. Mendell,* 550 So. 2d 52, 53 (Fla. 3d DCA 1989) (a party should not suffer the unfair surprise and prejudice of legal claims and theories not encompassed by the pleadings); *Freshwater v. Vetter,* 511 So. 2d 1114, 1115 (Fla. 2d DCA 1987) ("[a] judgment upon a matter entirely outside the issues made by the pleadings cannot stand, and such a judgment is voidable on appeal"); *Goldschmidt v. Holman,* 571 So. 2d 422 (Fla. 1990) (the law is clear that a judgment must be based on a claim or defense that was properly pled).

* * *

Criminal law—Driving under influence—Evidence—Expert—Blood alcohol content—Extrapolation—Deputy who has no formal toxicology, medical, biomedical, or pharmacological training is not qualified to testify as to what defendant's blood alcohol level would have been at time she was driving based on results of breath test performed one and a half hours after she was detained

STATE OF FLORIDA, Plaintiff, v. NYKEA WILLIAMS, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. ADH25QE. April 17, 2025. Marcus Bach Armas, Judge. Counsel: Maria Paula Molano, Miami, for Plaintiff. Emma Sheridan and Sean Werkheiser, Miami, for Defendant.

ORDER GRANTING MOTION TO EXCLUDE EXPERT TESTIMONY

THIS CAUSE came before the Court on Defendant's Motion to Exclude Expert Testimony (the "Motion"). The Motion seeks to exclude the testimony of Miami-Dade Sherriff's Office Deputy R. Closius ("Closius"), who the State designated as an expert witness to offer an opinion as to what the Defendant's blood alcohol content ("BAC") would have been *at the time she was driving* given her BAC breath test result of .065 g/100mL approximately 1.5 hours after she was detained.[1] The Court has carefully considered the Motion, the State's response, the scientific literature, the testimony of the proffered expert, the very capable oral argument of the parties, and the law. For the reasons set forth herein, the Court concludes that Deputy Closius is not qualified to testify as an expert regarding retrograde extrapolation. Therefore, the Motion is granted and the proffered expert may not testify at trial regarding his opinion of the Defendant's blood alcohol levels.

I. BACKGROUND

At 3:52 am on the date of incident, Nykea Williams ("Defendant")

was detained in connection with a driving under the influence ("DUI") investigation. After performing field sobriety exercises, she voluntarily provided a breath test which generated a blood alcohol result of .065 g/100mL. Ms. Williams was charged with driving under the influence. In advance of trial proceedings, the State designated Deputy Closius as an expert to testify regarding the science underlying metabolization rates of alcohol by the human body, and more specifically, to offer an expert opinion as to what the Defendant's BAC would have been *at the time she was driving* given her BAC breath test result of .065 g/100mL approximately 1.5 hours after she was detained. Defendant then filed the Motion seeking to exclude the proffered expert testimony pursuant to Fla. Stat. § 90.702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), arguing that Deputy Closius is not qualified to testify competently regarding such matters. The State filed a response opposing the Motion, and an evidentiary hearing was held on April 16, 2025 during which testimony was taken from Deputy Closius.

II. LEGAL STANDARD

"For nearly a century, Florida followed the *Frye* standard for admissibility of expert testimony. However, on June 4, 2013, Florida Governor Rick Scott signed into law House Bill 7015, amending Florida Statute section 90.702, and transforming Florida into a *Daubert* jurisdiction. After a number of failed attempts, Florida lawmakers finally succeeded in aligning Florida's standards for expert admissibility with the standards that govern in federal court and many states around the country." Erica W. Rutner & Lara B. Bach, *Florida's "Brave New World": The Transition from Frye to Daubert Will Transform the Playing-Field for Litigants in Medical Causation Cases*, 20 Barry L. Rev. (2015). While the Florida Supreme Court initially rejected the Legislature's efforts as an unconstitutional infringement on the judiciary's rule-making authority, it later changed course and formally adopted *Daubert* in 2019. *See In re Amendments to Florida Evidence Code*, 278 So. 3d 551 (Fla. 2019) [44 Fla. L. Weekly S170a].

As a result, section 90.702 of the Florida Statutes now governs the admissibility of expert testimony in Florida courts. The statute provides:

> **If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto 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.**

Because the statute was intended to mirror Federal Rule of Evidence 702, *see* Fla. Stat. §90.702 (Pmbl. 2013) (expressly adopting *Daubert* and its progeny in stating the statute's purpose of eliminating pure opinion testimony), federal case law on the subject, which has been developed over the course of many decades by the federal courts (including the United Supreme Court), is both instructive and highly persuasive.

Daubert requires district courts to undertake a rigorous analysis and ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert,* 509 U.S. at 597. Courts applying *Daubert* principles refer to the trial court as the "gatekeeper" in this context because "when engaging in a *Daubert* analysis, the judge's role is that of evidentiary 'gatekeeper,' that is, the one who determines whether the expert's testimony meets the *Daubert* test. The purpose of the gatekeeping requirement is to ensure an expert employs in the court[ ]room the *same level of intellectual rigor that characterizes the practice of an expert in the relevant field.*" *State v. Barber,* 360 So. 3d 1180, 1185 (Fla. 2nd DCA 2023) [48 Fla. L. Weekly D785b] (internal citations and quotations omitted) (emphasis added).

"This function inherently requires the trial court to conduct an exacting analysis of the foundations of expert opinions to ensure they meet the standards for admissibility under Rule 702." *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C1132a]. In determining the admissibility of expert testimony, the trial courts are required to conduct a three-part inquiry about whether: (1) the expert is qualified to testify competently regarding the matters they intend to address; (2) the methodology by which the expert reaches their conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the applications of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1194 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C1025a] (citing *Frazier*, 387 F.3d at 1260). The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the testimony satisfies each prong. *See id.* (citing *Boca Raton Cmty. Hosp., Inc. v. Tenet Health Care*, 582 F.3d 1227, 1232 (11th Cir. 2009) [22 Fla. L. Weekly Fed. C130a]).

In this case, only the first prong is at issue. In other words, the question for the Court is straightforward: is Deputy Closius qualified to testify as an expert regarding retrograde extrapolation and render a reliable opinion as to what the Defendant's blood alcohol level would have been at the time she was driving?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Deputy Closius is an officer with decades of experience in law enforcement that has conducted numerous DUI investigations, breath tests, and blood draws.

2. Deputy Closius has attended a multitude of conferences and workshops and been extensively trained on matters pertaining to DUI investigations, including metabolization rates of alcohol by the human body, as well as mathematical formulas that can be used to conduct a retrograde extrapolation analysis.

3. Deputy Closius has no knowledge of the Defendant's drinking habits, underlying medical conditions, prescription medications, race/ethnicity, body composition, volume of distribution, or biological sex, all of which are factors that could have a substantial impact on alcohol metabolization rates in the context of a retrograde extrapolation analysis.

4. To the contrary, Deputy Closius was "flying blind" as to these individual factors, notwithstanding his acknowledgment that these factors could significantly affect retrograde extrapolation results.

5. Instead, Deputy Closius' proffered expert opinion is based solely on (1) the results of the breath test, (2) the time elapsed between initial detention and the breath test, (3) when Defendant stopped eating and/or drinking, and (4) a mathematical formula developed by toxicologists that he is familiar and applied to the case at hand.

6. Deputy Closius is not a toxicologist and has received no formal toxicology training, although he noted at the hearing that he spends a lot of with toxicologists in the field.

7. Deputy Closius has no formal medical training.

8. Deputy Cloisus has no formal biochemical or pharmacological training.

9. Deputy Closius has never authored or edited a peer-reviewed publication regarding metabolization rates or retrograde extrapolation.

10. Deputy Closius has never received lab training.

11. Deputy Closius does not and has never taught or lectured regarding the specific biological principles underlying the metabolization rates of alcohol in the human body.

12. Deputy Closius is capable of utilizing mathematical formulas and applying best practices provided by toxicologists for use in the field, but when asked to explain why these best practices and formulas have evolved over the years, Deputy Closius was unable to do so, conceding that he did not possess technical the expertise required to explain the changes in best practices governing retrograde extrapolation.

13. Deputy Closius is able to perform elementary retrograde extrapolation analyses using the "easiest method," but does not have the expertise to perform a more advanced analysis that would account and adjust for potentially and materially impactful factors that are unique to each human being (e.g., height, weight, race, liver function, drinking habits, medical history, etc.).

14. The State has presented no case law—whether binding or persuasive—supporting the proposition that a police officer with no formal toxicology, medical, biochemical, or pharmacological training can be qualified as an expert under *Daubert* and offer an expert opinion as to what a defendant's BAC would have been at a specific point in time prior to a blood alcohol test.

15. Despite diligent search, the Court was also unable to find any such case law. To the contrary, retrograde extrapolation cases in Florida all appear to involve challenges to the retrograde extrapolation testimony of witnesses specifically trained in the field of toxicology. *See, e.g., Vitiello v. State*, 281 So.3d 554 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2480e]; *State v. Barber,* 360 So. 3d at 1185.

16. Of course, the qualification of an expert witness is to be evaluated by trial courts on a case-by-case basis, and this Court is not expressly or impliedly suggesting the existence of a bright-line rule establishing that a police officer cannot be qualified as an expert witness on retrograde extrapolation. In fact, authority from outside the State of Florida has concluded that a *former* police officer, who later became a field technician analyst who was extensively trained and co-authored publications in the fields of pharmacology, pharmacokinetics, and blood alcohol physiology, can pass muster under *Daubert* and testify as an expert on retrograde extrapolation. *State v. Turbyfill*, 243 N.C. App. 183 (2015).

17. The instant case, however, presents us with a very different set of facts. While Deputy Closius has vast experience with DUI investigations and is well-versed on blood draws, the effects of alcohol on the human body, and the best practices and formulas developed by the trained scientists (e.g., toxicologists and pharmacologists) that study retrograde extrapolation, his testimony made clear to the Court that he does not possess a sufficient technical understanding of the scientific principles underlying same and thus would not be able to "employ[ ] in the court[ ]room the same level of intellectual rigor that characterizes the practice of an expert in [retrograde extrapolation]." *Barber,* 360 So. 3d at 1185.

18. Because the State has failed to meet its burden to show by a preponderance of the evidence that Deputy Closius is qualified to testify competently regarding the highly technical science of retrograde extrapolation, the Motion must be granted and Deputy Closius may not testify at trial.

IV. CONCLUSION

For the reasons set forth above, the Defendant's Motion is GRANTED and Deputy Closius shall not testify as a qualified expert witness in the above-captioned matter.

[1]As explained by the Fifth District Court of Appeal in *Vitiello v. State*: "[r]etrograde extrapolation applies a mathematical calculation to estimate a person's blood alcohol level at a particular point in time by working backward from the time the blood [sample] was taken. Hence, the need for retrograde extrapolation arises when a test puts a suspect's BAC below the legal limit, but the State seeks to prove the suspect was above the legal limit at the time he or she was operating a car or boat. The alcohol metabolization process consists of three phases: absorption, peak blood alcohol level, and elimination. The absorption phase begins immediately upon consumption. Once consumed, some alcohol is absorbed through the lining of the stomach into the bloodstream. The rest passes to the small intestine where it is absorbed into the blood and carried throughout the body. During the absorption phase, a person's blood alcohol level increases until all the alcohol is absorbed into the blood. Once absorption is complete, the person's blood alcohol level peaks and begins to decline. How long it takes to reach peak alcohol level can vary depending on factors, including the subject's drinking pattern, time of last drink, and when the subject last ate." 281 So.3d 554 (5th DCA 2019) [44 Fla. L. Weekly D2480e] (internal citations and quotations omitted).

* * *

Insurance—Personal injury protection—Coverage—Owner of vehicle for which security was required by law—Insurer of vehicle in which passenger was injured is liable for PIP benefits—Exception to PIP coverage for owner of vehicle with respect to which security is required is not applicable where passenger purchased required insurance for vehicle owned by her, but passenger was neither listed as a named insured on that policy nor a resident relative of the named insured

AVALON CHIROPRACTIC, P.A., Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-018563-CC-26. Section SD06. March 20, 2025. Christopher Green, Judge. Counsel: Majid Vossoughi and Brad Blackwelder, Miami, for Plaintiff. Jessica Zlotnick Martin, Deerfield Beach, for Progressive American Insurance, Defendant. Sandra Rodriguez-Hickman, Law Offices of Acosta Farmer & Marsh, Oklahoma City, Oklahoma, for Security National Insurance Company, Defendant.

OMNIBUS ORDER ON COMPETING MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on February 14, 2025 on (i) Defendant, Progressive American Insurance Company's, Amended Motion for Final Summary Judgment Regarding Coverage ("Progressive's Motion for Summary Judgment") (docket # 326), (ii) Defendant, Security National Insurance Company's, Amended Motion for Final Summary Judgment and Response to Progressive American Insurance Company's and Plaintiff's Motion for Summary Judgment ("Security National's Motion for Summary Judgment") (docket # 337), and (iii) Plaintiff, Avalon Chiropractic, P.A.'s, Motion for Summary Judgment as to Count I of Plaintiff's Complaint Re: PIP Coverage ("Plaintiff's Motion for Summary Judgment") (docket # 344).

The parties were represented by counsel at the hearing who presented arguments to the Court. Jessica Zlotnick Martin, Esq. appeared on behalf of Defendant, Progressive American Insurance Company ("Progressive"), Sandra Hickman, Esq. and Monica Lally, Esq. appeared on behalf of Defendant, Security National Insurance Company ("Security National"), and Majid Vossoughi, Esq. and Brad Blackwelder, 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, hereby makes the following factual findings and conclusions of law, and enters this Order finding that Defendant Progressive is liable for PIP benefits to Plaintiff, for the reasons set forth below.

BACKGROUND & FACTUAL FINDINGS

On January 13, 2021, Maritanne Jeannot was injured in a motor vehicle accident while riding as a passenger in a 2013 Mercedes Benz C250.

As a result of her injuries, Maritanne Jeannot received reasonable, related, and medically necessary treatment at the Plaintiff's medical facility.[1]

The 2013 Mercedes Benz C250 that Maritanne Jeannot was occupying at the time of the accident was insured through a policy of insurance issued by Progressive, including statutory mandated Personal Injury Protection ("PIP") benefits.

At the time of the accident, Maritanne Jeannot owned a 2012

Nissan Pathfinder which carried insurance through a policy issued by Security National. Although Ms. Jeannot was a rated driver under this policy of insurance, she was neither a named insured under said policy nor a resident relative of Security's National's named insured.

Plaintiff, as assignee of Ms. Jeannot, submitted its bills for payment of PIP benefits to both Progressive and Security National. However, both Progressive and Security National denied PIP coverage under their respective insurance policies and essentially "pointed the finger" at the other insurer as being liable for PIP benefits.

Due to the carriers' conflicting coverage denials, on May 16, 2022 Plaintiff filed the instant action seeking declaratory relief as well as damages for breach of contract against both Progressive and Security National. (docket # 2).[2]

Consistent with their pre-suit denials, Progressive and Security National both raised coverage defenses alleging that that they were not required to extend PIP coverage to Ms. Jeannot for the subject loss (docket # 46 & 60).

Progressive's coverage defense claims Plaintiff ought to recover PIP benefits from Security National since "Maritanne Jeannot owned a 2012 Nissan Pathfinder . . . on the purported date of loss that was insured by Security National" and that "Plaintiff is not entitled to PIP coverage or recovery in this action from Progressive."

Security National's coverage defense claims it is not responsible for payment of PIP benefits since "[Maritanne Jeannot] is excluded from coverage under said policy because [she] failed to meet the definition of an insured under the subject policy."

On May 24, 2024 Progressive filed its Motion for Summary Judgment (docket # 326). Progressive's motion argues that since Maritanne Jeannot owned a 2012 Nissan Pathfinder that was insured by Security National she should be entitled to receive PIP benefits from Security National. Progressive's motion argues that an exclusion to coverage under its policy applies since Ms. Jeannot was an "*owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405*", citing to Fla. Stat. 627.736(4)(e)4.a.[3]

On September 9, 2024 Security National filed its Motion for Summary Judgment (docket # 337). Security National's motion argues that since Maritanne Jeannot was (i) not a named insured on its insurance policy, (ii) not a resident relative of their named insured, and (iii) not occupying the 2012 Nissan Pathfinder at the time of the subject loss, she was not entitled to PIP benefits under its policy. Security National's motion further argues that since Ms. Jeannot was occupying the 2013 Mercedes Benz C250 insured by Progressive, she was entitled to PIP benefits from Progressive. Security National's motion also argues that the exclusion relied upon by Progressive to deny coverage is inapplicable pursuant to binding precedent in *Pearson v. State Farm Mut. Auto. Ins. Co.,* 560 So.2d 416 (Fla. 2d DCA 1990).

On December 13, 2024 Plaintiff filed its Motion for Summary Judgment (docket # 344). Plaintiff's motion primarily[4] argues that Progressive is liable for PIP benefits under its policy of insurance, as well as Fla. Stat. 627.736(1), since Maritanne Jeannot was an occupant of the 2013 Mercedes Benz C250 insured by Progressive. Plaintiff's motion argues that, under *Pearson,* the exclusion relied upon by Progressive is inapplicable since same would only apply if Ms. Jeannot had failed to ensure that her 2012 Nissan Pathfinder carried PIP insurance. Plaintiff's motion argues that since it is undisputed that Ms. Jeannot's 2012 Nissan Pathfinder did in fact carry the required PIP insurance, the exclusion does not apply and Progressive cannot avail itself of same. Plaintiff's motion further argues that, under *Pearson,* nothing in law required Maritanne Jeannot to be listed as a named insured under Security National's policy on her 2012 Nissan Pathfinder.

At the hearing, the parties represented that the coverage issue framed by the parties' respective filings is the only remaining issue in this case and that the Court's ruling would be dispositive of this matter.[5] Accordingly, this Court must now determine which Defendant, Progressive or Security National, is obligated by its contract and applicable Florida law to extend PIP coverage for the subject loss.

LEGAL ANALYSIS

Absent a valid exclusion, there is plainly coverage under Progressive's insurance policy since Maritanne Jeannot was a passenger in the 2013 Mercedes Benz C250 insured by Progressive at the time of the loss. Fla. Stat. 627.736(1) ("REQUIRED BENEFITS.—An insurance policy complying with the security requirements of s. 627.733 *must provide personal injury protection* to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, *passengers in such motor vehicle*. . . ").[6]

As such, the issue before this Court is whether the exclusion to coverage within Fla. Stat. 627.736(4)(e)4.a. and Progressive's policy of insurance is applicable to the facts of this case. Stated otherwise, the issue before this Court is whether Maritanne Jeannot, as the owner of a 2012 Nissan Pathfinder that was in fact insured with Security National, was also required to be a named insured under said policy.

The exclusion to coverage relied upon by Progressive and the identical issue before this Court was addressed in *Pearson v. State Farm Mut. Auto. Ins. Co.,* 560 So.2d 416 (Fla. 2d DCA 1990).[7]

Pearson held that the exclusion to coverage relied upon by Progressive only applies if the owner of a motor vehicle has failed to ensure that said motor vehicle carries insurance:

> We believe that the exception to coverage provided in section 627.736(4)(d)(4)(a), only applies if the owner required to have insurance has failed to arrange for its purchase. ***It does not apply when the required insurance has been purchased and simply does not insure the owner***.

Pearson interpreted the security requirement found in Fla. Stat. 627.733(1)[8] to require the owner of a motor vehicle to ensure that said *motor vehicle* carries insurance and not a requirement that the owner also be a named insured under the policy:

> We interpret the requirement of section 627.733(1) that each owner must "maintain security" to mean that ***each owner must be sure the car is insured. It does not require each owner to buy a separate policy***.

Applying this binding precedent to the undisputed facts before it, the Court finds that Progressive cannot avail itself of the exclusion here.

It is undisputed that the 2012 Nissan Pathfinder owned by Maritanne Jeannot did in fact carry PIP insurance through Security National's policy in full compliance with the requirements of Florida law. However, Ms. Jeannot was not a named insured on Security National's policy and, as recognized in *Pearson,* she was in no way required to be listed as a named insured.[9]

Since Ms. Jeannot was not listed as a named insured under Security National's policy, was not a resident relative of Security National's named insured, and was not occupying the 2012 Nissan Pathfinder at the time of the loss, Ms. Jeannot was not entitled to PIP benefits under Security National's policy for the January 13, 2021 motor vehicle accident. That is, although "the required insurance ha[d] been purchased [same] simply does not insure [Ms. Jeannot]" and, accordingly, binding precedent provides that the exclusion to coverage relied upon by Progressive does not apply. *Id.*

Indeed, Progressive's argument that it can escape liability since Maritanne Jeannot owned a vehicle that was insured through a policy that *did* not provide PIP coverage for her accident, is the *exact same argument* that was expressly rejected by the District Court in *Pearson,* which this Court is bound to follow.

Based on the foregoing, the Court finds that Progressive is liable for PIP benefits and that Plaintiff is entitled to entry of final summary

judgment in its favor and against Progressive as a matter of law.

CONCLUSION

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

ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment as to Count I of Plaintiff's Complaint Re: PIP Coverage is hereby GRANTED, Security National's Amended Motion for Final Summary Judgment is hereby GRANTED, and Progressive's Amended Motion for Final Summary Judgment Regarding Coverage is hereby DENIED. Final judgment is entered for Defendant Security National and against Plaintiff Avalon Chiropractic, P.A. Based on the representation of the remaining parties, Plaintiff and Defendant Progressive shall submit an agreed final judgment, and the Court shall reserve jurisdiction to consider motions to tax costs and attorney's fees.

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[1]All parties have stipulated that Plaintiff's treatment rendered to Maritanne Jeannot was reasonable, related, and medically necessary ("RRN"). *See, Order(s) Adopting Stipulation of the Parties* (docket # 288 & 289). As such, Plaintiff has met its burden of proof in this action. *Derius v. Allstate Indemnity Co.,* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a].

[2]The Court notes that the instant matter—a coverage dispute between a medical provider and two (2) different PIP insurers—is a textbook example of when declaratory relief under Fla. Stat. 86.011 is eminently appropriate.

[3]An essentially identical exclusion is also found in the text of Progressive's insurance policy. However, the Court notes that any *policy* exclusion that does not comport with the exclusion(s) found in the *PIP statute* would be a legally unenforceable nullity. *See e.g., Reeves v. Miller,* 418 So.2d 1050 (Fla. 5th DCA 1982) ("*Insurance provided to comply with a statutory requirement must comply with the statute. A policy purporting to provide the required statutory coverage but containing exclusions not contemplated by the statute does not provide the required coverage. Since the unauthorized exclusions are contrary to public policy as established by the statute, they are deemed inapplicable and disregarded and the policy is enforced as if it were in express compliance with the statutory requirements*."); *Custer Med. Center v. United Auto.,* 62 So.3d 1086, 1089, n. 1 (Fla. 2010) [35 Fla. L. Weekly S640a] ("[t]he prohibition of policy exclusions, limitations, and non-statutory conditions on coverage controlled by statute is clear"); *Flores v. Allstate Ins. Co.,* 819 So.2d 740, 745 (Fla. 2002) [27 Fla. L. Weekly S499a] (courts have an obligation to invalidate exclusions on coverage that are inconsistent with the purpose of the statute); *Salas v. Liberty Mut. Fire. Ins. Co.,* 272 So.2d 1, 5 (Fla. 1972) (insurance coverage that is a creature of statute is not susceptible to insurer's attempts to limit or negate the protection afforded by law); *Mullis v. State Farm Mut. Auto. Ins. Co.,* 252 So.2d 229, 232-34 (Fla. 1971) (automobile insurance obtained to comply with or conform to the law cannot be narrowed by the insurer through exclusions and exceptions contrary to the law).

[4]Plaintiff's motion also argues as alternative relief that, should the Court not find Progressive liable, then Security National must instead be found liable and/or that both carriers be found liable on a pro rata basis. While the Court finds these alternative arguments to be perhaps academically interesting, since the Court finds that it is bound by the holding of *Pearson* it need not reach same.

[5]Progressive's additional defenses pertaining to pre-suit demand letter and failure to state a cause of action were abandoned by Progressive.

[6]Consistent with the statutory command, Progressive's policy itself defines an "insured person", in relevant part, to be "any other person sustaining bodily injury while *occupying* a covered auto".

[7]The *Pearson* decision is binding under *Pardo v. State,* 596 So. 2d 665 (Fla. 1992) ("in the absence of interdistrict conflict, district court decisions bind all Florida trial courts"). At the time *Pearson* was decided the exclusion was found at Fla. Stat. 627.736(4)(d)(4)(a) but same was subsequently renumbered to Fla. Stat. 627.736(4)(e)4.a.; however, the text of the exclusion remains unchanged.

[8]Fla. Stat. 627.733(1) provides in pertinent part that "every owner or registrant of a motor vehicle, other than a motor vehicle used as a school bus as defined in s. 1006.25 or limousine, required to be registered and licensed in this state shall maintain security as required by subsection (3) in effect continuously throughout the registration or licensing period".

[9]"The Florida motor vehicle no-fault law does not require all owners to be listed as named insureds on policies which insure a specific motor vehicle. Indeed, the definition of 'named insured' expressly recognizes that an owner may not always be a named insured." *Id.* at 418; *see also*, Fla. Stat. 627.732(4) (" 'Named insured' means a person, *usually* the owner of a vehicle, identified in a policy by name as the insured under the policy").

* * *

Insurance—Personal injury protection—Discovery—Insurer is ordered to produce documents that are relevant to declaratory judgment and not covered by work product privilege

WISNER JEAN DC, P.A., Plaintiff, v. SAFECO INSURANCE COMPANY OF ILLINOIS, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-044245-SP-21. Section ND05. March 23, 2025. Scott M. Janowitz, General Magistrate. Counsel: David S. Kuczenski, Schrier Law Group, Miami, for Plaintiff. Pablo Arrue, Hamilton, Miller and Birthisel, Miami, for Defendant.

REPORT AND RECOMMENDATION OF GENERAL MAGISTRATE ON PLAINTIFF'S MOTION TO COMPEL (DIN 52)

This matter came before the General Magistrate for hearing on March 18, 2025, on Plaintiff's Motion to Compel (DIN 52), pursuant to the trial court's Order of Referral (DIN 77) dated February 25, 2025.

No objection to the Order of Referral to the Magistrate was made. Counsel for all parties were present at the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and being otherwise fully advised in the premises, the General Magistrate makes the following Findings of Fact, Conclusions of Law, and Recommendations:

1. Plaintiff filed a Petition for Declaratory Relief [DIN 2].

2. Plaintiff alleges that Defendant "wrongfully afforded less than full coverage for the services Petitioner Provided." (Paragraph 17 of DIN 2). The outline of the Plaintiff's position can be found in the different methods to calculate the allowable amount. (See generally paragraphs 26-34 of DIN 2). Ultimately, Plaintiff seeks a declaratory judgment regarding the coverage methodology and that Defendant provided a lower amount of coverage than what the policy affords (see paragraphs (c) and (e) of the WHEREFORE clause of DIN 2).

3. Defendant answered on February 3, 2025.Defendant denies most of the allegations and via its affirmative defense agrees that it did not pay in the manner Plaintiff believes payment should made. Defendant asserts that only a reasonable amount, not maximum amount, must be paid. Notably, Defendant has not pled exhaustion but has only pled Plaintiff's standing, failure to provide a pre suit demand letter, and methodology.

4. Plaintiff propounded requests for production.

5. Defendant answered RFP #1 and #2 and objected to the remainder.

6. Plaintiff withdrew the following requests for production: 3,4,55,60,61,63 and 65-74.

7. Discovery is limited to those matters relevant to the litigation as framed by the parties' pleadings." *ESJ JI Leasehold, LLC v. PJGWI, Inc.,* 337 So. 3d 115, 116 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2580b] (internal citations omitted)

8. The law is clear that discovery under the Florida Rules of Civil Procedure, although wide-ranging, has certain limits. It cannot be utilized to explore all the minute details of a controversy or delve into immaterial or inconsequential matters. Nor can such discovery be so unduly burdensome upon a party as to be oppressive. *Travelers Indem. Co. v. Salido,* 354 So. 2d 963, 964 (Fla. 3d DCA 1978).

9. The undersigned also reviewed the case regarding discovery in PIP matters, including *State Farm Mut. Auto. Ins. Co. v. Premier Diagnostic Centers, LLC,* 185 So.3d 55 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D278a].

10. Florida Rule of Civil Procedure 1.280(c) states: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

11. The undersigned finds the following requests for production to be irrelevant, categorically work -product, or unproportional to the

needs of the case: 5,6, 24-36, 40, 46-54, 56-58, 62, 64,

12. The undersigned finds the following requests for production are relevant to the declaratory judgment and are not covered under a work-production privilege: 7-23, 37-39, 41-45, and 59.

RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED that the Court enter its Order Adopting Report and Recommendation of the General Magistrate, and order as follows:

1. Plaintiff's Motion to Compel be GRANTED IN PART. Defendant's objections are overruled for the following requests for production: 7-23, 37-39, 41-45, and 59.

2. Defendant shall amend its responses and produce relevant documents within twenty (20) days.

This hearing was audio recorded by the Civil General Magistrate's Office, in accordance with Administrative Order No. 22-13, In Re: Electronic Recording of Judicial Proceedings Without Court Reporter. See Section IV. B. and C. and Section V. A.

All requests for copies of audio recordings of judicial proceedings by attorneys of record, parties to a case, and self-represented litigants shall be submitted electronically utilizing the Audio/Transcript Recording Request Form, in conjunction with the Prohibition Against Dissemination Form, available on the Eleventh Judicial Circuit Court website, https://www.jud11.flcourts.org, under the Digital Court Reporting Services site. Upon full review a final invoice shall be sent to the requester, which must be paid prior to release of the audio recording.

IF YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH FLORIDA RULE OR CIVIL PROCEDURE 1.490(i). YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

A party who files an exception shall provide a copy to the Civil General Magistrate's office (via email to Michelle Franco at mfranco@jud11.flcourts.org) promptly to avoid the submission of a proposed order adopting the report and recommendation to the presiding judge.

* * *

Landlord-tenant—Eviction—Dismissal—Case is moot and is dismissed with prejudice where sole remedy sought in eviction suit was possession of premises, parties agreed on amount to be paid as rent owed to landlord, but tenant vacated premises and handed over keys before deadline for payment of rent

CHRISTEN REAVES, Plaintiff, v. CHIQUITA BRUNSON, et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-143253-CC-20. Section CL02. March 23, 2025. Kevin Hellmann, Judge. Counsel: Gail Ruiz, Law Offices of Gail M. Ruiz, PLLC, Coral Gables, for Plaintiff. James Glover, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT AS MOOT

THIS CAUSE having been brought before the Court on Defendant's Motion to Dismiss Complaint as Moot (Index 24), which was filed on January 5, 2025, and the Court having reviewed the entire case file and reviewed all case law and statutes relevant to the case and having heard from both parties on February 21, 2025, it is hereby

ORDERED AND ADJUDGED: that Defendant's Motion to Dismiss Complaint as Moot is GRANTED for these reasons:

Plaintiff's complaint in this case (Index 3), which was filed on July 24, 2024, sought possession of the premises as the exclusive remedy. After conducting lengthy hearings on the case, both parties eventually agreed to have the Court issue an Order for Defendant to pay the amount of $15,400.00 in owed rent to Plaintiff by 3:00PM on January 6, 2025 (see Index 25). Before 3:00PM on January 6, 2025, Defendant vacated the premises and handed over the apartment keys to Plaintiff. Plaintiff Christen Reaves testified under oath in court on February 21, 2025, that she received the keys from Defendant at 1:40PM on January 6, 2025, which was before the 3:00PM deadline for payment. No evidence or testimony refuted or impeached Plaintiff's sworn testimony to this fact. By effectively vacating the premises and handing over the keys to the apartment, Defendant fully satisfied the remedy sought by Plaintiff and rendered this case moot at that very moment. Therefore, the Court shall grant Defendant's Motion to Dismiss and dismisses the case with prejudice.

* * *

Consumer law—Debt collection—Credit card—Standing—Credit card company lacks standing where there is no evidence that credit card account opened by defendant with bank was assigned to or acquired by plaintiff—Dismissal is with prejudice where trial has been commenced and completed

CAPITAL ONE, N.A., Plaintiff, v. DAVID R. DE LEON, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-040253-SP-26. Section CL02. March 21, 2025. Kevin Hellmann, Judge. Counsel: Melissa Alvarez, Lloyd & McDaniel, PLC, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Altamonte Springs; and Shawn Wayne, Law Office of Robert Wayne, for Defendant.

THIS CAUSE having been brought before the Court on Plaintiff's Statement of Claim (Index 2), which was filed on February 23, 2024, and the Court having conducted a non-jury bench trial on March 3, 2025, and having considered all witness testimony and evidentiary exhibits presented during trial, it is hereby

ORDERED AND ADJUDGED:

that Defendant's Motion for Dismissal of the Complaint is GRANTED based on the following:

Barbara Kurkowski was the sole witness who testified on behalf of Plaintiff. As an employee of Capital One, N.A., Ms. Kurkowski testified exclusively to the procedures and records of Capital One, N.A. On cross-examination, Ms. Kurkowski stated that the account at issue in this case was opened on January 18, 2013. She further testified that the account was opened with Capital One Bank USA, N.A. She provided no testimony about any subsequent assignment or acquisition of the Capital One Bank USA, N.A. account by Plaintiff Capital One, N.A. Additionally, the records admitted into evidence through the evidentiary foundation laid by Ms. Kurkowski are attributed exclusively to Captial One, N.A. The trial record is devoid of any evidence whatsoever that the account initially opened with Capital One Bank USA, N.A. was subsequently assigned to, merged with or acquired by Plaintiff Capital One, N.A. After establishing in two cross-examination questions of Ms. Kurkowski that the account at issue was initiated with Capital One Bank USA, N.A., and not with Plaintiff Capital One, N.A., Defendant's counsel rested their case and made timely argument that Capital One, N.A. lacked legal standing based on the evidence presented. Without any record evidence whatsoever establishing that Capital One, N.A. obtained the Capital Bank USA, N.A. account, the Court agrees that Plaintiff lacks standing in this case, grants Defendant's motion for dismissal, and dismisses the case with prejudice since the trial was already commenced and completed. *See Certo v. Bank of N.Y. Mellon,* 268 So.3d 901 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D866a]; *Segall v. Wachovia Bank, N.A.*, 192 So.3d 1241 (Fla. 4th DCA 2016) [41 Fla.

L. Weekly D1310a].

* * *

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—On rehearing, order granting summary judgment in favor of insurer on exhaustion defense is set aside where there is genuine issue of material fact as to validity of payments made by insurer

GABLES INSURANCE RECOVERY, INC., a/a/o Zucely Garcia, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-015350-SP-26. Section SD03. January 31, 2025. Lissette De la Rosa, Judge. Counsel: Aymee Gonzalez and Robert Pelier, for Plaintiff. Jared Lord and Priscilla Freitas, Law Offices of Terry M. Torres & Associates, Doral, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR REHEARING AND TO SET ASIDE FINAL JUDGMENT

[Original Opinion at 32 Fla. L. Weekly Supp. 355c]

THIS CAUSE having come to be heard on January 21, 2025 on Plaintiff's Motion for Rehearing and to Set Aside Final Judgment, as it pertains to Defendant's Motion for Summary Judgment Regarding its Affirmative Defense of Exhaustion of PIP Benefits (Docket Index Number: 43) and the Court order entered on October 4, 2024 (Docket Index Number: 62), and the Court having reviewed the Motion, the Response (Docket Index Number: 74), and stated record evidence and after hearing argument of counsel, it is hereby:

ORDERED and **ADJUDGED:**

1. Plaintiff's Motion is hereby GRANTED.

2. Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

3. Defendant, to prevail on its Motion for Summary Judgment as to its affirmative defense of exhaustion of PIP benefits, has the burden of proving that it exhausted benefits by and through the payment of $10,000 in *valid* claims. See *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.,* 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] ("Once the PIP benefits are exhausted through the payment of *valid claims*, an insurer has no further liability on unresolved, pending claims, absent bad faith in the handling of the claim by the insurance company."); See also, *United Servs. Auto. Ass'n v. Less Inst. Physicians*, 344 So. 3d 557, 559 (Fla. 3d App. 2022) [47 Fla. L. Weekly D1556a].

4. The Court finds that the record evidence presented by the Plaintiff in opposition to Defendant's Motion for summary judgment including, the affidavit of Carlos Plana, and the deposition testimony of Defendant's Corporate Representative, creates a genuine issue of material fact as to the validity of the payments made by the Defendant to exhaust benefits, thereby precluding summary judgment.

5. The Order Granting Defendant's Motion for Final Summary Judgment and Final Judgment for Defendant, dated October 4, 2024, is hereby set aside.

* * *

Insurance—Automobile—Discovery—Summary—Supporting documentation—To admit claims history spreadsheet into evidence, insurer must make spreadsheet and originals or duplicates of data from which it is compiled available for examination and copying

SHAZAM AUTO GLASS, LLC, a/a/o Kimberly Sakowski, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 18-CC-029169. Division: K. April 16, 2025. Jessica G. Costello, Judge. Counsel: Keith P. Ligori, Meaghann C. Ligori, Feras Hanano, Francisco Cruz, and James T. Tanton, Ligori & Ligori, Tampa, for Plaintiff. Scott Zimmer, Law Office of Jaskirat K. Asti, Tampa, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL BETTER RESPONSES AND RESPONSIVE DOCUMENTS TO PLAINTIFF'S FOURTH REQUEST FOR PRODUCTION

THIS CAUSE came before this Court on April 1, 2025, concerning "Plaintiff's Motion to Compel Better Responses and Responsive Documents to Plaintiff's Fourth Request for Production" filed on December 31, 2024 (Doc. 87). The Court, having considered the motion, the arguments of counsel, and the record, and being otherwise advised in the premises,

ORDERED AND ADJUDGED as follows:

1. The "Plaintiff's Motion to Compel Better Responses and Responsive Documents to Plaintiff's Fourth Request for Production" (Doc. 88) is **hereby GRANTED**, as follows:

(a) The Court finds that the 2018 Claims History Spreadsheet is a "summary" as contemplated by Section 90.956, Florida Statutes.

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

(c) As such, Defendant shall provide better/complete responses to Requests numbered 24 and 25 of Plaintiff's 4th Request for Production by **April 25, 2025**.

(d) The Defendant: (i) shall, by **April 25, 2025**, serve the Plaintiff's counsel by email with copies of all non-privileged underlying documents responsive to Requests numbered 24 and 25 (including electronically stored information) from which the 2018 Claims History Spreadsheet was obtained, and (ii) shall also produce such documents (including electronically stored information) at trial.

* * *

Insurance—Automobile—Attorney's fees—Payment of claim in full pursuant to post-suit appraisal—Insured's motion for attorney's fees is denied—Fact that insurer made additional payments of benefits after each demand in ongoing dispute regarding actual cash value of covered vehicle prior to suit being filed demonstrates that claims process did not break down to level that lawsuit was necessary catalyst to resolve dispute

PAUL BOBROW, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division RJ. Case No. 50-2023-CC-006244-XXXX-MB. April 8, 2025. M. Katherine Mullinax, Judge. Counsel: Austin Hogan and Daniel Smith, Hogan Smith Law, Orlando, for Plaintiff. Miguel A. Rodriguez and Johanna Clark, Carlton Fields P.A., Orlando, for Defendant.

ORDER

THIS CAUSE came before the Court on the Plaintiff's Amended Motion for Attorney's Fees and Costs and Supporting Memorandum of Law [DE # 23] and the Defendant's Motion for Final Summary Judgment of Dismissal and Response in Opposition to Plaintiff's Amended Motion for Attorney's Fees and Costs [DE #24]. The hearing for the motions occurred on March 25, 2025 wherein counsel for both the Defendant and the Plaintiff were present. After careful consideration, the Court states as follows:

The Plaintiff, Paul Bobrow, brought a one count Complaint alleging that the Defendant, State Farm Fire and Casualty Company, breached a motor vehicle insurance policy by failing to pay the full amount of insurance benefits due and owing. On August 2, 2023, the Defendant and Plaintiff filed a Joint Motion to Stay Pending Completion of Appraisal. The joint motion states that State Farm invoked the appraisal provision of the subject policy on June 21, 2023. On March 18, 2024, the Plaintiff filed a motion seeking attorney's fees and costs.

Paragraph 1 of the motion states that "Defendant has paid the disputed insurance benefits at issue in this lawsuit." On March 19, 2024, State Farm filed an Appraisal Status Report stating that the appraisal over the Actual Cash Value ("ACV") of the vehicle has been resolved and State Farm is working to pay the appraisal award.

After the filing of the Plaintiff's motion for attorney's fees and the status report, there was no further action taken for almost two months. Accordingly, the Court issued an Order closing the file on May 17, 2024. Almost two months after the Court closed the file, the Plaintiff filed an Amended Motion for Attorney's Fees and Costs and Supporting Memorandum of Law on July 9, 2024. On October 2, 2024, the Defendant filed a Motion for Final Summary Judgment of Dismissal and Response in Opposition to Plaintiff's Amended Motion for Attorney's Fees and Costs. The Plaintiff filed a Response in Opposition to Defendant's Motion for Final Summary Judgment on October 31, 2024. The hearing on the Plaintiff's motion was scheduled to take place on November 21, 2024. However, the hearing was cancelled on November 7, 2024.

After no action for about a month, the Court closed the case again. The Plaintiff filed a Motion to Re-Open the Case which the Court granted. The hearing for the motions was set for March 25, 2025 on the same day the Court reopened the case. On March 4, 2025, the Plaintiff filed an Amended Response in Opposition to Defendant's Motion for Summary Judgment.

The Court conducted a joint hearing on the Plaintiff's motion seeking attorney's fees and costs and the Defendant's motion for summary judgment. There was no testimonial evidence presented at the hearing. *See Valdivieso v. Citizens Prop. Ins. Corp.*, 388 So. 3d 1004 (Fla. 3d DCA 2024) [49 Fla. L. Weekly D516b]. Both parties agreed that as to the underlying damages claim, the matter is moot and State Farm has since paid the appraisal award. Accordingly, the only judicial labor left for this Court to complete is to resolve the Plaintiff's claim as to attorney's fees and costs.

State Farm argues that the Plaintiff is not entitled to attorney's fees and costs as the Plaintiff failed to comply with the appraisal provision in the subject insurance policy prior to filing a lawsuit. Additionally, the Defendant argued that Plaintiff is not entitled to attorney's fees as the lawsuit was not reasonably necessary. Mr. Bobrow states that entitlement to attorney's fees and costs is appropriate for this case as appraisal may be demanded after a lawsuit is filed, the language in the insurance policy is ambiguous, and the payment of the appraisal amount is akin to a confession of judgment.

In order to determine whether the Plaintiff in this case is entitled to an award of attorney's fees, the Court looks at whether there was a breakdown in the claim adjusting or communication process and whether there was a refusal to pay the claim. *7635 Mandarin Drive, LLC v. Certain Underwriters at Lloyd's, London, Subscribing to Pol'y No. B050719MKSC000018-00*, 392 So. 3d 592, 596 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D1744a]. "In the context of a party demanding an appraisal within the policy terms, in order to secure attorney's fees, the insured must show that this was not a "race to the courthouse" but that the claims' adjusting process has broken down." *Id.* at 597.

The Court reviewed correspondence between the parties and a check issued to the Plaintiff upon completion of the appraisal process. Prior to the involvement of counsel for the Plaintiff, the Plaintiff disputed the amount initially paid by the Defendant. In correspondence of February 8, 2023, the Plaintiff stated that he believed the Defendant was responsible for a total amount of $17,395.13. In response, the Defendant issued an updated subtotal payment amount of $13,848.25 on February 24, 2023. On February 24, 2023, the Plaintiff wrote "I accept your offer".

On May 4, 2023, there is another updated payment amount with a subtotal of $14,289.21. There is also an e-mail to Plaintiff's counsel that states that State Farm reevaluated the Plaintiff's claim and provided an updated settlement amount. Notably, counsel for the Plaintiff responds that the "undisputed" amount may be sent to his office. After the lawsuit was filed by the Plaintiff and the parties completed the appraisal process, an additional payment of $3,681.38 issued.

The Court finds this case to be distinguishable from *Goldman v. United Servs. Auto. Ass'n*, 244 So. 3d 310 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D854a]. Here, there is a dispute between the parties as to the amount of the loss as late as May 4, 2023, which is prior to the lawsuit filed on May 16, 2023. However, the Court also finds this case to be distinguishable from *7635 Mandarin Drive, LLC v. Certain Underwriters at Lloyd's, London, Subscribing to Pol'y No. B050719MKSC000018-00*, 392 So. 3d 592 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D1744a] as State Farm did not refuse to participate in the appraisal process. Instead, the facts of this case fall somewhere in the middle.

The parties were both working to resolve the claim with State Farm continuing to make additional payments upon each notification of a dispute from the Plaintiff. However, there was a dispute as to the amount sought by the Plaintiff for over four months. The policy at issue states that disputes regarding the actual cash value of the covered vehicle will be resolved by mediation or appraisal. In this case, there were at least two documented instances where there was a dispute as to the actual cash value of the vehicle. Instead of either party demanding participation in the appraisal or mediation process, State Farm paid additional undisputed sums of money upon each demand.

The Court finds that based upon the facts of this particular case, the claims process did not break down to a level sufficient that the Court can say that the lawsuit was a necessary catalyst to resolve the dispute at issue. *See People's Tr. Ins. Co. v. Farinato,* 315 So. 3d 724, 729 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D787a]. The Court finds that there was not a coverage issue that needed to be resolved by the lawsuit. *See Federated Nat. Ins. Co. v. Esposito*, 937 So. 2d 199, 200 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2220a]. In this case, there was not even a partial denial of coverage which the insurance company later abandoned. *Bryant v. GeoVera Specialty Ins. Co.*, 271 So. 3d 1013, 1020 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1232a]. Instead, this case presents a dispute only as to the appropriate ACV value of the covered vehicle in which the Defendant made additional payments upon each demand. The Court finds the particular facts of this case to be more in line with the case law requiring a denial of the motion requesting attorney's fees and costs.

Accordingly, it is hereby

ORDERED that Plaintiff's Amended Motion for Attorney's Fees and Costs is DENIED. It is further

ORDERED that State Farm's Motion for Final Summary Judgment of Dismissal is GRANTED only to the extent that the judicial labor for this action has been resolved. The Court is granting the motion as a procedural formality and not based upon the merits.

* * *

Criminal law—Driving under influence—Evidence—Scientific evidence—Breath test results—*Daubert* hearing on admissibility of breath test results from Intoxilyzer 8000 is not necessary where both Florida Legislature and Florida Department of Law Enforcement have determined that methodology and results of Intoxilyzer 8000 tests are reliable and admissible

STATE OF FLORIDA, Plaintiff, v. CHARLES ANTHONY YOUNG, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 59-2021-CT-4042-A. April 1, 2025. Debra Krause, Judge.

ORDER ON MOTION FOR *DAUBERT* HEARING

THIS CAUSE came before this Court upon the Defendant's

Motion for *Daubert* Hearing filed September 7, 2023 and the State's Response to Defendant's Motion for *Daubert* Hearing and Request to Deny Motion Without Hearing filed on February 7, 2025[1] and the Court having reviewed the pleadings, the relevant case law and the applicable statutes and rules makes the following finds of fact and conclusions of law:

In 2019, the Florida Supreme Court adopted Florida Statute §90.702 of the Florida Rules of Evidence which adopted the standard for admissibility of scientific evidence created in *Daubert v. Merrel Dow Pharmaceuticals. Inc.,* 509 U.S. 579 (1993).

Daubert substantially altered the evidence landscape concerning the admissibility of scientific evidence and testimony. Prior to *Daubert*, scientific evidence, to be admissible, only had to meet the standard announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923). The *Frye* standard allowed scientific evidence to be admissible if it was generally accepted in the scientific community without any regard for the reliability of the evidence. After *Daubert,* scientific evidence is admissible only if the testimony will assist the trier of fact to understand the evidence and it meets a three prong test set forth in in rule 702.[2] The three prong test is:

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.

Additionally, the *Daubert* Standard requires that the Court be the "gatekeeper" to determine if the evidence will assist the trier of fact and whether it meets the three prong test and is thereby admissible. However, the Court, as the "gatekeeper" is not mandated to hold a hearing in every case that a Daubert hearing is requested. For example, if the Court finds the Motion for a *Daubert* hearing legally insufficient then the Court need not hold a hearing. See *Booker v. Sumter County Sheriff's Office*, 166 So. 3d 189, 193 (Fla. 1st DCA) [40 Fla. L. Weekly D1291c]. Another exception which does not require the Court to hold a hearing is rooted in the concept of judicial notice. A trial court need not hold a hearing "if the expect testimony has been deemed reliable by an appellate court" *Booker*, 166 So. 3d at 194. This Court has found no Florida appellate case finding the Intoxilyzer 8000 either reliable or unreliable. However, this Court believes, based on the principle of comity, another exception to the requirement to hold a *Daubert* hearing is based upon a court taking judicial notice that another branch of government has already determined the reliability of expert testimony. This Court takes judicial notice that the Florida Legislature by enacting Florida Statutes 316.1932 through 316.1934 determined that the methodology used by the Intoxilzyer 8000 is reliable and admissible.[3]

As it relates to Breath Tests in Florida, the Legislature has lawfully delegated, pursuant to a statutory scheme, the ability to establish the procedures to determine whether a particular method of infrared light test to determine the alcohol content of a person's breath is reliable and whether a particular breath instrument using this method is reliable to the Florida Department of Law Enforcement (FDLE), a department within Florida's Executive Branch. As such, the courts of this state should rely on this determination of reliability as it relates to the admissibility of evidence. FDLE has complied with its statutory duty and established procedures to determine whether infrared spectroscopy and a particular instrument using infrared spectroscopy is reliable. Then FDLE applied those procedures and determined that infrared spectroscopy and a particular instrument, the Intoxilyzer 8000, are reliable. Additionally, FDLE established procedures to ensure that a particular test, utilizing the Intoxilyzer 8000, is reliable. Defense argued that even when all the FDLE procedures are followed, there are discrepancies in the results. Therefore, the methodology cannot be reliable. The Court acknowledges that there has been a statistically insignificant amount of discrepancies in results, some attributable to the subject (defendant) and some without explanation. However, these discrepancies go to the weight of the evidence not the reliability and admissibility of the evidence.

This Court takes judicial notice that both Florida's Legislative Branch and Florida's Executive Branch have determined that the methodology and results of the Intoxilyzer 8000 are reliable and admissible, therefore concludes that a *Daubert* hearing is not necessary.

Therefore, it is **ORDERED AND ADJUDGED:**
That the Defendant Motion for a *Daubert* Hearing is **DENIED**.

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[1]In deciding the issue of whether a *Daubert* hearing is required, the Court need not address the argument in the State's response that rule 702 does not apply as the State is not offering expert witness testimony subject to rule 702. For the purposes of this order, the Court assumes, without deciding the issue, that the results of the breath test are based upon expert witness testimony.

[2]For the purposes of this opinion, when referring to rule of evidence 702, the Court is referring to the Florida version of 702 found in Florida Statute 90.702.

[3]Most simply stated, the Intoxilyzer 8000 is an instrument (diagnostic tool) that uses infrared light absorption to measure breath alcohol concentration, analyzing the amount of infrared light absorbed by alcohol molecules in a breath sample.

* * *

Attorney's fees—Amount

DAVID DE LEON, Plaintiff, v. MANDARICH LAW GROUP, LLP, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2025-CC-000564. March 27, 2025. Wayne Culver, Judge. Counsel: Shawn Wayne and Robert Wayne, Law Office of Robert Wayne, for Plaintiff.

FINAL JUDGMENT OF ATTORNEY'S FEES AND COSTS

THIS CAUSE CAME to be heard during an evidentiary proceeding on March 26, 2025, upon Plaintiff's Motion for Attorney Fees and Costs, and the Court having reviewed the entire court file, including the relevant time records and expert report submitted, having heard uncontroverted testimony by both counsel and his expert, and being otherwise fully advised in the premises, the Court finds as follows:

1. The issues for consideration by this Court are to determine entitlement and the reasonable hours expended by Plaintiff's counsel, Robert Wayne, Esq. of the Law Office of Robert Wayne ("Mr. Wayne"), for his work in connection with this action, and at what hourly rate.

2. Entitlement is hereby granted. *See* Fla. Stat. 559.77

3. In support of his request, Mr. Wayne submitted an "Affidavit of Attorney Fees and Costs" and an "Agreement for Legal Services" that was entered into between his office and the Plaintiff, David De Leon ("Plaintiff") ("retainer agreement").

4. Mr. Wayne's affidavit states that he has been a member of the Florida Bar in good standing since 1970 with his practice focused on the areas of consumer debt and real property at both the trial and appellate level. The affidavit, incorporated time entries, and Mr. Wayne's testimony reflect a total time of 10.8 hours billed at an hourly rate of $525.00. The affidavit also states that costs in the amount of $400.85 were incurred by Mr. Wayne during the case.

5. The retainer agreement also reflected an agreed hourly rate of $525.00 for all work performed in the case, as well as reimbursement of all costs and expenses incurred.

6. During the hearing, Mr. Wayne provided testimony attesting to the reasonableness of the time he incurred, that such time was commensurate with that of similar attorneys in similar locale and field, that none of the time he incurred was duplicative, and that his hourly rate was reasonable given his prior experience, past successes, and years of practice.

7. Mr. Wayne's time and costs were also supported by a "Declaration" authored by Mr. Bryan Dangler, Esq. ("Mr. Dangler" or "fee expert") ("expert report"), a qualified attorney fee expert and active member of the Florida Bar. In addition to his expert report, Mr. Dangler, who has previously testified as a fee expert in other cases, provided testimony during the hearing in support of the reasonableness of Mr. Wayne's time and costs incurred, given the issues that were presented and the result that he ultimately achieved. Mr. Dangler's expert report and his testimony during the hearing affirmed the work and skill displayed by Mr. Wayne in undertaking the case and bringing it to a successful conclusion. He also affirmed Mr. Wayne's hourly rate as reasonable given his years of practice, experience, and success in prior cases, in combination with the customary fees charged for similar work by attorneys in the area, and the rates that Mr. Wayne has been awarded in prior cases.

8. The Court, acting in its fact-finding capacity, determines that the reasonable number of hours spent by Mr. Wayne in representing the Plaintiff in this case is 10.8 hours. No reduction in the amount of time spent is warranted.

9. The Court, acting in its fact-finding capacity, further determines that a reasonable hourly rate for Mr. Wayne's work in this case is $525.00. No reduction in the hourly rate is warranted.

10. These findings are based upon all the competent substantial evidence and testimony presented to the Court, together with all the factors enumerated both in the Florida Bar Code of Ethics 4-1.5, and *Florida Patient's Compensation Fund v. Rowe* [Editor's note: moved to corresponding case - 472 So. 2d 1145 (Fla. 1985)] and *Standard Guaranty Ins. Co. v. Quanstrom*, [Editor's note: listing correct citation - 555 So. 2d 828 (Fla. 1990)], and prior precedent finding Mr. Wayne's hourly rate reasonable. *Pabel Lima v. Edgewater of Homestead Condo. Assn, Inc.*, 30 Fla. L. Weekly Supp. 773b (11th Jud. Cir., Miami-Dade, Feb. 6, 2023); *Aklipse Asset Management, Inc., et al. v. Natalia Solange Font Pomales, et al.*, 30 Fla. L. Weekly Supp. 165a (11th Jud. Cir., Miami-Dade, May 8, 2022)

11. Accordingly, this Court finds that the reasonable hourly rate times the reasonable hours expended up through entitlement equal $5,670.00, which represents the "lodestar" for the attorney's fees to be awarded to Mr. Wayne in this case.

12. As for the Plaintiff's attorney fee expert, the Court finds that the contracted hourly rate of $450.00 is reasonable for the work performed by Mr. Dangler, and that the 3.5 hours he incurred were reasonably expended, for a total of $1,575.00. *Stokus v. Phillips*, 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c]

13. The Court finds that the costs of $400.85 for the filing fee and service of process expended by Plaintiff to be reasonable.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Robert Wayne, Esq., as counsel for the Plaintiff, ***shall recover from*** the Defendant, Mandarich Law Group LLP ("Judgment Debtor"), the following: **$5,670.00** for attorney's fees, **$400.85** for costs, and **$1,575.00** for expert witness fees, for a total sum of **$7,645.85**, all of which shall bear post-judgment interest at the statutory rate from the date this Final Judgment is signed and adjusted quarterly in accordance with the interest rate in effect on the date as set by the Chief Financial Officer, for which amount let execution issue.

IT IS FURTHER ORDERED that the Judgment Debtor, whose mailing addresses are PO Box 109032 Chicago, IL 60610 and 6300 Canoga Ave, Ste 1700, Woodland Hills CA 91367 shall complete under oath, Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the Judgement Creditor, Robert Wayne, Esq. ("Judgment Creditor"), at the Law Office of Robert Wayne, 1225 SW 87 Ave, Miami Florida 33174, within forty five (45) calendar days from the date of this Final Judgment, unless this Final Judgment is satisfied or post-judgment discovery is stayed.

IT IS FURTHER ORDERED that this Court reserves jurisdiction for purposes of enforcing this Final Judgment, to enter further orders that are proper and to compel the Judgment Debtor to complete Form 1.977, including all required attachments, and to serve it on the Judgement Creditor, and to award of any additional attorney's fees and costs that may be incurred to enforce this Final Judgment against the Judgment Debtor.

* * *

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MISCELLANEOUS REPORTS

Municipal corporations—Code enforcement—Building permits—Motion to vacate special magistrate order finding respondent guilty of completing work on apartment without obtaining city permits and approvals is denied—Magistrate lacks jurisdiction to reconsider final order where time for filing appeal has lapsed—Due process—No merit to respondent's claim that it was denied due process by not being allowed to attend hearing where respondent's agent knew date and time of hearing but appeared one hour late, arriving after respondent's case had been heard—Further, respondent has failed to provide any evidence to support claimed due process violations—No merit to claim that final order was not provided to respondent until after right to appeal had lapsed where order was timely sent by certified mail that was not picked up and was posted at apartment

CITY OF HALLANDALE BEACH, FLORIDA, Petitioner, v. NCBT GLOBAL, LLC, 8 THE GREEN STE A, DOVER DE, 19901, Respondent. City of Hallandale Beach, Special Magistrate Hearing. Case No. CEC-24-01176. November 11, 2024. [Final Order, August 5, 2024.] Harry Hipler, Special Magistrate. Counsel: Jennifer Merino, City Attorney, and Bryan Roget, Deputy City Attorney, Hallandale Beach, for Petitioner. Ari Pregen, Ft. Lauderdale, for Respondent.

[Editor's note: Petition for review denied as untimely: FLWSUPP 3302NCBT; 33 Fla. L. Weekly Supp. 47a.]

[Editor's note: Final Order published below.]

ORDER DENYING MOTION TO VACATE

THIS CAUSE came on to be heard before the undersigned Special Magistrate on November 7, 2024 pursuant to Respondent's Motion to Vacate Final Order. After considering the evidence and arguments presented, the Special Magistrate finds and orders as follows:

FINDINGS OF FACT

1. Respondent, a Delaware corporation, owns real property apartment at 600 Layne Blvd., Suite 131, Hallandale Beach, Florida. It has no corporate representative in the state of Florida according to the Division of Corporations. Respondent was charged and found guilty of violations of the city code as concerns work without building permits for a kitchen, bathroom which were completed in the dwelling located at 600 Layne Blvd, Suite 131 without obtaining city permits and approvals, which is a violation of City Code Section 8-31, FBC 105.1. A Final Order was entered by the Special Magistrate on August 5, 2024, which is attached as Exhibit A. Some of the information about the inside of the apartment flowed from Apartments.com which advertised photos and a narrative providing for "Brand new kitchen, lighting, bathroom, floors impact doors and windows. . . ." among other amenities that were provided to the unit.

2. The instant matter was one of many code enforcement hearings set for 9:00 am on August 1, 2024 at the city. Even though Respondent's agent, one Mr. Myron Brandwine, knew the correct time and date, he showed up late at the code enforcement hearings chambers sometime at or around 10:00 am when he attempted to gain entrance into the hearings chambers. After knocking at the door, Mr. David Kissinger, advised him that the matter had already been heard by the Special Magistrate before his late arrival. While Mr. Brandwine claims that he was either told to leave or kept out of the chambers, the facts adduced at the hearing indicate the contrary. For one, there are two doors to the hearings chambers, one permits staff to enter which is where the knocking occurred, while the other door is nearby and permits Respondents and the public to gain entrance if they desire to check in and appear or merely watch. Mr. Brandwine, the agent of Respondent, who knocked on the door at chambers spoke with Mr. Kissinger, who advised him of the status of the case. At no time did Mr. Kissinger tell Mr. Brandwine to leave or that he could not enter, instead, Mr. Brandwine after being told that the case had been heard decided to leave on his own.

3. Mr. Brandwine had been in contact with the City a number of times before his late arrival on August 1, 2024, including a request he made for a court reporter or a recommendation of one, which the City does not provide. Thus, the facts are indisputable that Mr. Brandwine knew of the time and arrived after his case was heard. Interestingly, neither Respondent, nor Respondent's counsel, have provided any sworn to evidence or documents to support any claim that the violations were not correct or anything to support Mr. Brandwine's position, rather, the Motion to Vacate is counsel's representations without the benefit Mr. Brandwine. Thus, Respondent's sole claims at this hearing are that he was denied due process by not being allowed to attend, which is inaccurate, as he concedes that he showed up late, and although Respondent admits that the city provided adequate notice of the hearing, Respondent still claims that it was not provided with an opportunity to attend, and alternatively, that by not providing a Final Order in a timely fashion,[1] Respondent's right to appeal has lapsed thereby jeopardizing its fundamental due process of law.

4. There is no testimony or evidence that was presented by Respondent's counsel of any evidence that could be used to refute the charges that were proved by the City, nor did Mr. Brandwine provide an affidavit of anyone; and further, the Motion to Vacate is not sworn to. It was only representations of counsel which was considered by the Special Magistrate, whereas the City's witnesses and evidence was provided via Mitch Posner, Code Compliance Official, and Mr. Kissinger, who were present and testified that upon reviewing photographs of the unit that was up for rent, the city had no such permits filed and existing as to the bathroom and kitchen renovation which occurred.

5. Mr. Brandwine had been in prior contact with the City and knew that the time and date of the hearing was set for August 1, 2024 at 9:00 am. While Mr. Brandwine makes claims by and through his counsel that he was deprived of fundamental due process including a denial of access to the hearings chambers, see above, the city chambers are open to the public for public hearings and may be attended by him or the public, and based on the evidence presented and the credibility of the evidence and the lack of evidence presented by Respondent, he was never told that he could not enter chambers after Mr. Kissinger advised him that his case had been heard, and that a Final Order would be entered. Other than admitting that he arrived an hour late, he could have entered the hearings chambers if he desired and if he had requested entrance into city chambers either by way of the door opened by Mr. Kissinger or the nearly adjacent door that is specifically provided for Respondents and the public for entry. And further, contrary to Respondent's claim that he did not receive the Final Order, or if he did, it was late received, it is fundamental that the Final Order is a public record, and he could have requested copies of any Final Order or returned after the episode and asked Mr. Kissinger or staff to retrieve a signed copy after the Final Order was executed on August 5, 2024 which apparently he did.[2] From the evidence or lack of evidence presented by Respondent, the evidence is unrefuted that Mr. Brandwine did appear late, he knew of the hearing, he failed to contact the city that he was going to be late, he could have gained entry to the public hearings if he timely appeared as well as after the fact, but for purposes known to himself, he arrived an hour late and apparently departed the scene.

6. As is the case in code enforcement hearings, the standard for notice is to send a certified mail, return receipt requested, for Notice purposes, and here in accordance with fundamental due process, the

Final Order was sent to Respondent (no pickup of the certified mail) and it was also posted at the subject dwelling as per the testimony of David Kissinger and the affidavit of posting that specifically states that it was posted on August 19, 2024, which was time enough to act. See Chapter 162, Fla. Stats.

CONCLUSIONS OF LAW

7. The first question that needs to be raised and discussed is whether the Special Magistrate has jurisdiction to consider the Motion to Vacate? There is nothing pursuant to Chapter 162, Florida Statutes (2024) that grants the Special Magistrate the right to vacate a Final Order anytime he is asked to do so after the 30 day time limit to appeal. Here, the Final Order was entered on August 5, 2024 and was mailed to Respondent at or around the same time and was posted on the Respondent's apartment on August 19, 2024 within the 30 days from the date of entry of the Final Order on August 5, 2024.[3] Florida law provides that there is no basis for Reconsideration, absent a local government code provision, and for that matter a motion that concerns the merits of a decision in code enforcement matters. There is no statutory provision or rule in Florida that authorizes a motion to vacate or reconsider a final order from a code enforcement board. In as much as the city does not provide for post hearing motions for rehearing or such other requests as to the merits of a case by motion, the question of jurisdiction has to be raised. However, if timely made, the Special Magistrate may be able to reconsider the situation, but there is nothing in the Florida Statutes that requires such a process, nor is the Special Magistrate required to do so, and if the Special Magistrate does reconsider the matter, this will not toll the appeals process. *See John Fisher v. Pinellas County*, Code Enforcement Board, No. 14-000056A-88AP (Fla. 6 Cir. Appt. Ct. September 8, 2014) [22 Fla. L. Weekly Supp. 497a]; *Smull v. Town of Jupiter*, 854 So.2d 780 (Fla. 4 DCA 2003) [28 Fla. L. Weekly D2064a]; *City of Palm Bay v. Palm Bay Greens, LLC*, 969 So.2d 1187 (Fla. 5DCA 2007) [32 Fla. L. Weekly D2897b]. In essence, while a Special Magistrate may have the power to rehear a matter if he or she chooses, this must be done in a legally timely matter, not months after the fact when there is no jurisdiction to do so like here where the Motion to Vacate was filed on or about October 18, 2024. Further, the time to appeal an adverse ruling of a code enforcement board or Special Magistrate to the circuit court in its appellate capacity is within 30 days and there is nothing in the statutes or rules that will toll the time period beyond the 30 days that is strictly construed. *See City of Palm Bay v. Palm Bay Greens, LLC*, 969 So.2d 1187 (Fla. 5DCA 2007) [32 Fla. L. Weekly D2897b]. While no jurisdiction may exist under these facts and circumstances, if jurisdiction does exist within the 30 days for a rehearing, or if there is a question that pertains to in rem jurisdiction, which is not being raised here Respondent concedes that Respondent was served and was provided adequate notice for attendance at the hearing.[4] As such, the Special Magistrate concludes as to this point that the time to appeal lapsed 30 days after August 5, 2024. See the following cases holding that the Court lacks jurisdiction to review an Order if a Notice of Appeal is not filed within 30 days of the entry of the Final Order; Fla. R. App. P. Rule 9.100(c); *see also Kirby v. City of Archer*, 790 So.2d 1214, 1215 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1907h]; *City of Plantation v. Vermut*, 583 So.2d 393, 394 (Fla. 4th DCA 1991); *City of Ft. Lauderdale v. Bamman*, 519 So.2d 37, 38 (Fla. 4th DCA 1987). There is no statute, rule, or code provision which would have tolled the time for rendition of the Order. *See Rivers v. State, Department of Revenue,* 508 So.2d 360, 361 (Fla. 2d DCA 1987); *Reinhardt v. City of Dunedin Code Enforcement Board*, Case No. 14-000009AP-88B (Fla. 6th Cir. App. Ct. July 24, 2014) [22 Fla. L. Weekly Supp. 11b]. Therefore, most respectfully the Special Magistrate does not have jurisdiction.

8. Based upon the evidence presented, procedural due process was afforded. The problem is that Respondent's representative failed to appear on time, nor did he contact the City to advise staff that he was running late. The amount of due process required in a quasi-judicial haring is not the same as that to which a party to a full judicial hearing is entitled and such hearings are not controlled by the rules of evidence and procedure. A quasi-judicial hearing meets basic due process requirements if parties are provided notice of hearing and opportunity to be heard. Opportunity does not mean that there must be actual evidence presented, it is that an opportunity is given when notice has been duly provided; it means a time in which a party may present evidence, which was provided to Respondent. Here, Respondent had that opportunity but failed to avail itself at the time set for this hearing. Further, while local government code enforcement matters are quasi-judicial proceedings, the amount of due process required here is not controlled by any set procedure. *See Elaine Morris, Trustee, Truliet Investments, LLC v. City of Orlando, Florida* Case No. 2014-CV-52-A-O (Fla. 9th Cir. App.Ct. Feb, 19, 2015) for an excellent discussion of fundamental due process and availability. For example, providing notice to a party does not require that the government prove it was received, only that there was an opportunity to do so. *Reinhardt v. City of Dunedin Code Enforcement Board*, Case No. 14-000009AP-88B (Fla. 6th Cir. App. Ct. July 24, 2014) [22 Fla. L. Weekly Supp. 11b].

9. At the hearing, Respondent's counsel argued in paragraph 11 that: ". . .NCBT did not receive timely notice of the Order entered on August 5, 2024, because it was not timely received." Yet on September 5, 2024, NCBT did in fact file a Petition for Writ of Certiorari, and it filed a Notice of Appeal on September 7, 2024. None of this was acknowledged by counsel for Respondent, and in fact nothing was even mentioned by counsel at the hearing. Instead, it was suggested and argued that Respondent did not have sufficient time to file an appeal. Still, based on paragraph 6, above, and the arguments made in the Motion, the Final Order was entered on August 5, 2024, and the Petition for Writ of Certiorari was filed with the Clerk on September 5, 2024, which is the 31st day and not within 30 days of the entry of the Final Order and the Notice of Appeal, which is the sole avenue of appeal in code enforcement matters, see Fla. Stat. 162.11 which provides that an appeal must be filed within 30 days of the execution of the Final Order. As such, the Petition for Writ of Certiorari is not a vehicle for appeal, a Notice of Appeal is appears to also be filed after 30 days. See the following cases holding that the Court lacks jurisdiction to review an Order if a Notice of Appeal is not filed within 30 days of the entry of the Final Order; Fla. R. App. P. Rule 9.100(c); see also *Kirby v. City of Archer*, 790 So.2d 1214, 1215 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1907h]; *City of Plantation v. Vermut*, 583 So.2d 393, 394 (Fla. 4th DCA 1991); *City of Ft. Lauderdale v. Bamman*, 519 So.2d 37, 38 (Fla. 4th DCA 1987); see also "The Appealing Nature of Local Code Enforcement Board Decisions." The *Fla. Bar Journal.* Vol. 82, No. 5. May 2008, at page 42. The article is dated, but the principles still apply. Therefore, there is questionable jurisdiction upon filing a Petition for Writ of Certiorari on the 31st day, not the 30th day, and the Notice of Appeal filed on September 7, 2024 was also filed late.

10. The sworn to evidence provided at the hearing included City staff, Code Compliance Official Mitch Posner and David Kissinger, who are part of code staff and had first hand knowledge of the facts of the case. Testimony was presented by them to refute the due process claims of Mr. Brandwine as well as to support the sworn to evidence presented at the hearing on August 1, 2024 which was replayed and thereby allowing counsel to cross examine those witnesses as they testified at the hearing and were then were available at the instant hearing on the Motion to Vacate. Respondent's Mr. Brandwine failed to appear, nor did he swear to any facts via an affidavit so that he

might be cross-examined. *See Echevarria v. Lennar Homes, LLC,* 306 So. 3d 327, 329 n.2 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1567a] (observing that "unsworn legal argument of counsel is not evidence"); *Chase Home Loans LLC v. Sosa,* 104 So. 3d 1240, 1241 (Fla. 3d DCA 2012) [38 Fla. L. Weekly D59a] ("[U]nsworn representations of counsel about factual matters do not have any evidentiary weight in the absence of a stipulation"); *Certain Underwriters at Lloyd's, London v. Gables Court Condo. Ass'n, Inc.,* 357 So. 3d 759 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D461a].

Respondent also failed to state what the facts and circumstances were that existed to support a meritorious claim by Respondent and that supports facts that no violations existed. For purposes of fundamental due process, Respondent could have provided sworn to testimony not only as to his claimed due process violations, but also in order to support a meritorious defense by providing an affidavit or sworn to in person statements at the hearing on the Motion to Vacate, not merely a naked claim that due to Mr. Brandwine's not showing up timely (based upon counsel's representations that is not under oath), in that he was entitled to have the matter re-heard. A mere naked claim that due process was violated is insufficient to support a Motion to Vacate. There must be more and nothing was presented other than the Motion to Vacate that was provided without supporting affidavit(s), documents, in person testimony under oath, and a meritorious defense which did not occur here.

11. Respondent claims that there was not substantial competent evidence presented at the hearing by the City, yet the audio and video say the contrary. It has been held that where a party fails to appear at a code enforcement hearing, a Special Magistrate may rely solely upon a Code Investigator's fact sheet, photographs, and notice of violation. *Nelson v. City of St. Petersburg, Code Enforcement Board*, No. 12-000063 AP-88B (Fla. 6th Cir. App. Ct. September 20, 2013) [21 Fla. L. Weekly Supp. 2a]. When Respondent failed to appear, it was appropriate for the Special Magistrate to consider the evidence presented, which included photographs, City's evidence that no such permits were issued and that failed to allow permitting for the bathroom and kitchen, and the fact that whoever did these renovations, it is the owner of the real property who is responsible for any violations, which occurred here. Thus, current real property owners have been held responsible for bringing their real property into compliance with local governments' code regulations and have been subject to the payment of liens, interest, attorney fees, and costs if land owners fail to comply with code violations. This is a form of strict liability that holds owners strictly liable for code violations no matter who caused the violations. *See Henley v. MacDonald*, 971 So. 2d 998, 1000 (Fla. Dist. Ct. App. 2008) [33 Fla. L. Weekly D198c]; *Monroe Cty. v. Whispering Pines Assocs*., 697 So. 2d 873, 875 (Fla. Dist. Ct. App. 1997) [22 Fla. L. Weekly D1434a]; *see City of Gainesville Code Enf't Bd. v. Lewis*, 536 So. 2d 1148, 1150 (Fla. Dist. Ct. App. 1988). Here, the testimony of the hearing held on August 1, 2024 was presented as recorded, Mitch Posner and David Kissinger under oath testified about what happened on August 1, 2024 as well as to refute Mr. Brandwine's claims of due process violations as well as to show the evidence presented. As such, based upon the facts and circumstances, there was substantial competent evidence to support the City's claim.

ORDER

12. THEREFORE, BASED UPON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE SPECIAL MAGISTRATE DENIES THE MOTION TO VACATE AND SUSTAINS THE FINAL ORDER ENTERED ON AUGUST 5, 2024 AS IS. HEARING ON PETITIONER'S MOTION TO IMPOSE FINES AND LIEN IS HEREBY CONTINUED TO FEBRUARY 6, 2025, WHICH IS BEING PROVIDED BY A SEPARATE ORDER BY THE SPECIAL MAGISTRATE. IN ALL RESPECTS THE FINDINGS OF FACTS AND FINES IMPOSED VIA THE FINAL ORDER AND THAT PROVIDE FOR FINES ON A PER DIEM BASIS WILL CONTINUE TO ACCRUE UNTIL COMPLIANCE OCCURS.

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[1]More will be mentioned later in this Order in as much as Respondent's representative, Mr. Brandwine, did in fact obtain the Final Order from the city shortly after the hearing as will be discussed later, yet this was never mentioned by counsel or Respondent at the instant hearing.

[2]The City liberally provides courtesy copies of Final Orders and Notices that are involved in these proceedings with little or no charge to a party. Time and time again, the Special Magistrate states that at hearings and upon their conclusion, courtesy copies can be and are frequently requested by counsel and tenants and parties, even though they are sent to the owner or emailed upon demand to counsel or a representative or the party. There was no evidence presented by counsel or Mr. Brandwine that such a request was ever made even though Mr. Brandwine knew he could obtain a copy of the Final Order if he desired. Regardless, as will be mentioned later in this Order, the Final Order was mailed by certified mail, return receipt requested, to Respondent, who has to date failed to sign for the Final Order, and further the affidavit of posting and the first hand testimony of David Kissinger states that Mr. Kissinger posted the Final Order at the subject dwelling and recalls doing so on August 19, 2024. Thus, while further facts that will be discussed in this Order suggests that Respondent did in fact receive timely notice of the Final Order by way of Mr. Brandwine's attendant Petition for Writ of Certiorari, there is no basis in law or fact that the Final Order was received late; and in any event none of these pleadings were even brought to the attention of the Special Magistrate at the hearing, nor are they part of the Special Magistrate hearing.

[3]At the hearing, Respondent's counsel argued in paragraph 11 of the Motion to Vacate that: ". . .NCBT did not receive timely notice of the Order entered on August 5, 2024, because it was not timely received." Yet on September 5, 2024, NCBT did in fact file a Petition for Writ of Certiorari, Case No. CACE24012818 Broward Circuit Court, and it filed a Notice of Appeal on September 7, 2024. None of this was acknowledged by counsel for Respondent, and in fact nothing was even mentioned by counsel for Respondent at the hearing. Instead, it was suggested and argued that Respondent did not have sufficient time to file an appeal. Still, based on paragraph 6, above, and the arguments made therein, the Final Order was entered on August 5, 2024, and the Petition for Writ of Certiorari was filed with the Clerk on September 5, 2024, which is the 31st day from the date of the Final Order and not within 30 days of the entry of the Final Order and the Notice of Appeal. As such, the Special Magistrate believes that he is required to point out jurisdictional questions and does so based upon the above. Further, the sole avenue of appeal in code enforcement matters is timely filing a Notice of Appeal, which was filed well after 30 days of the entry of the Final Order. See Fla. Stat. 162.11 which provides that an appeal must be filed within 30 days of the execution of the Final Order. As such, the Petition for Writ of Certiorari is not a vehicle for appeal, a Notice of Appeal is). See the following cases holding that the Court lacks jurisdiction to review an Order if a Notice of Appeal is not filed within 30 days of the entry of the Final Order; Fla. R. App. P. Rule 9.100(c); *see also Kirby v. City of Archer*, 790 So.2d 1214, 1215 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1907h]; *City of Plantation v. Vermut*, 583 So.2d 393, 394 (Fla. 4th DCA 1991); *City of Ft. Lauderdale v. Bamman*, 519 So.2d 37, 38 (Fla. 4th DCA 1987); see also "The Appealing Nature of Local Code Enforcement Board Decisions." The *Fla. Bar Journal.* Vol. 82, No. 5. May 2008, at page 42. The article is dated, but the principles apply, which is that if an aggrieved party seeks to obtain appellate review, a Notice of Appeal must be filed within 30 days of the entry of the Final Order, which did not occur. Therefore, there is questionable jurisdiction upon filing a Petition for Writ of Certiorari on the 31st day when the vehicle to be used is a Notice of Appeal, and further neither of these were filed within 30 days.

[4]Respondent argues that the Administrative Procedure Act (APA) standard of inherent jurisdiction may apply. APA does not apply to decisions made by local code enforcement boards and magistrates because they are considered "quasi-judicial" in nature.

FINAL ORDER

THIS CAUSE came on to be heard before the undersigned Special Magistrate on August 1, 2024 after service and due notice was provided to Respondent as provided by law. After considering the evidence and arguments presented, the Special Magistrate finds and orders as follows:

VIOLATIONS

WORK WITHOUT BUILDING PERMITS. SUBMIT PLANS WITH APPLICATION TO SECURE THE REQUIRED PERMITS FOR KITCHEN AND BATHROOM RENOVATIONS. AFTER THE FACT PERMITS NEED TO BE SUBMITTED AND

ACCEPTED BY CITY. OBTAIN ALL INSPECTIONS INCLUDING THE FINAL INSPECTION COMPLIANCE. CITY CODE SECTION 8-31. FBC 105.1.

Subject real property: 600 LAYNE BOULEVARD #131, HALLANDALE BEACH FL 33009-6556

1. Respondent is charged with a violation of the aforementioned code of the CITY OF HALLANDALE BEACH, FLORIDA.

FINDINGS OF FACT

2. The evidence provided that Respondent is the owner of real property in the city of Hallandale Beach, Florida, Broward County, and that is located at 600 LAYNE BOULEVARD #131, HALLANDALE BEACH FL 33009-6556. The subject real property is more particularly described as follows: PASADENA GARDEN APARTMENTS CO-OP UNIT 131. Folio/ID number is 5142 26 PU 0310.

3. At the hearing, Petitioner, CITY OF HALLANDALE BEACH, presented evidence regarding the existence of the violation stated herein above.

4. Based on the sworn to personal knowledge of the Code Compliance Officer that included testimony, photographs, and the evidence presented and that was entered into the record, the Special Magistrate finds that there was a violation of the above cited code section(s). Respondent was served and notified of this hearing as provided by law, but Respondent was not present at the hearing, and accordingly the sworn to testimony and evidence provided by the Petitioner was not contested.

CONCLUSIONS OF LAW

5. Based upon the evidence presented by Petitioner that is stated above, Petitioner met its burden of proving by substantial competent evidence that the violation as alleged in the Notice of Violation does in fact exist on the subject real property.

ORDER

6. THEREFORE, BASED UPON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE SPECIAL MAGISTRATE FINDS RESPONDENT GUILTY OF VIOLATING CITY CODE SECTIONS. RESPONDENT IS GIVEN UNTIL NOVEMBER 6, 2024 TO REMEDY AND BRING THE VIOLATION INTO COMPLIANCE, OR FACE A PER DIEM FINE OF TWO HUNDRED FIFTY DOLLARS ($250.00) FOR EACH DAY RESPONDENT'S REAL PROPERTY REMAINS IN VIOLATION BEYOND THE COMPLIANCE DATE. IF THE SUBJECT PROPERTY IS NOT BROUGHT INTO COMPLIANCE BY THE DATE SET OUT ABOVE, THIS MATTER SHALL BE REFERRED BACK TO THE SPECIAL MAGISTRATE FOR AN ORDER IMPOSING FINE AND THE SPECIAL MAGISTRATE IS HEREBY AUTHORIZED TO ENTER A FINAL ORDER CERTIFYING THE CODE ENFORCEMENT FINE THAT SHALL BE RECORDED IN THE PUBLIC RECORDS OF THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR BROWARD COUNTY, FLORIDA AND SAID FINAL ORDER IMPOSING FINE AND LIEN SHALL CONSTITUTE A LIEN.

7. A FINE AND LIEN IMPOSED BY THE A SPECIAL MAGISTRATE SHALL CONTINUE TO ACCRUE UNTIL THE RESPONDENT AND VIOLATOR COMES INTO COMPLIANCE WITH THE FINAL ORDER. RESPONDENT SHALL NOTIFY THE CITY'S CODE COMPLIANCE SPECIALIST, WHO SHALL INSPECT THE PROPERTY TO DETERMINE IF COMPLIANCE HAS OCCURRED.

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Gifts—A judge may receive compensation for reasonable expenses incurred for extra-judicial activities, subject to Canons governing such activities and reporting requirements for such compensation

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-08. Date of Issue: April 6, 2025.

ISSUE

May a judge receive compensation via sponsorship or reimbursement for expenses related to extrajudicial activities?

ANSWER: Yes. A judge may obtain financial compensation for reasonable expenses incurred for extrajudicial activities, subject to the Canons otherwise governing such activities, and the reporting requirements for such compensation.

FACTS

The inquiring judge is a former Assistant U.S. Attorney (AUSA) and has been invited by former colleagues to participate in a trip to Israel, to be partially sponsored by three non-profit organizations that each focus on Jewish-related issues. These sponsoring organizations pay for all hotel and other "on-the-ground" travel costs by participants, except for airfare expenses which are paid for by the participants. The stated purpose of the trip is for the participants to meet with various government and non-government officials, with a goal of raising awareness of the challenges and concerns faced by the Israeli people and otherwise combatting antisemitism through education. Approximately 15-20 people will be participating in the trip, comprised of current and former AUSAs, however the sponsoring organizations note that they do also sponsor other academic and professional groups for such trips.

DISCUSSION

As an overview, Canon 5B of the Code of Judicial Conduct generally encourages judges "to speak, write, lecture, teach and participate in other extrajudicial activities concerning non-legal subjects, subject to the requirements of this Code." However, while judges may participate in extrajudicial activities, such as the proposed trip to Israel, in doing so, Canon 5A(1) prohibits any involvement with various advocacy organizations that may "cast reasonable doubt on the judge's capacity to act impartially as a judge." (Fla. JEAC Ops. 98-08 [5 Fla. L. Weekly Supp. 705a], 04-02 [11 Fla. L. Weekly Supp. 266a], and 06-17 [13 Fla. L. Weekly Supp. 1118a]). Furthermore, to avoid the appearance of impropriety, Canon 2B states "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."

In the present case, the proposed trip to Israel does not appear to involve any type of advocacy on the part of the sponsors that would potentially prohibit the inquiring judge's participation; engaging in antisemitism awareness events and related activities as educational endeavors would not appear to raise concerns of resulting bias on the part of the participating judge. Nor would the sponsors, as non-profit organizations, be likely to appear as parties before the inquiring judge in the future. Therefore, the Canons would permit the inquiring judge to participate in the proposed trip to Israel as an extrajudicial activity.

Regarding financial compensation for extrajudicial activities, the Committee has given its prior approval, under several different factual scenarios, for judges to accept compensation for expenses related to lecturing, or even merely attending, various law-related functions. For example, the Committee has approved of judges receiving free meals for attending county bar association meetings, as well as receiving compensation for hotel and food costs related to a speaking engagement with a lawyers' association (Fla. JEAC Op. 91-09), for expenses related to a lecture to non-attorneys on landlord-tenant law (Fla. JEAC

Op. 82-06), and for expenses related to speaking at continuing legal education panel discussions, whether conducted by a private nongovernmental organization (Fla. JEAC Op. 07-09) [14 Fla. L. Weekly Supp. 694b] or a private corporation (Fla. JEAC Op. 92-45).

Turning to the issue presented, whether a judge may ethically receive financial compensation associated with participation in other extra judicial activities that are not specifically law-related, such as the proposed trip to Israel, Canon 6A of the Code of Judicial Conduct specifically addresses, and generally authorizes, such compensation associated with the judge's participation—provided the source of the compensation does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety. Again, as the sponsors in the present case are non-profit organizations that do not engage in legal advocacy or partisan activities, and are unlikely to appear before the inquiring judge, the judge may receive compensation from those sponsors for expenses related to the proposed trip to Israel.

However, Canon 6A(1) provides that any such compensation "shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive," and Canon 6A(3) specifies that any compensation "shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, to the judge's spouse. Any payment in excess of such an amount is compensation and is reportable as income under Canon 6B(1)." Consequently, the inquiring judge shall not receive any compensation exceeding the actual costs that were reasonably incurred, nor any additional compensation from that provided to the other participants, and any compensation received by the judge exceeding such reasonable amounts must be reported as income on the annual public report filed by the judge. Notably, in addition to these limitations on compensable expenses, Canon 6A(3) further directs that any such compensation from sources other than the state or a judicial branch entity exceeding $100 shall be reported pursuant to Canon 6B(2), and therefore the inquiring judge must report the financial compensation received from the non-state, non-judicial branch, sponsors of the trip.

Finally, while it is in the opinion of the Committee that a judge may receive reasonable financial compensation for participating in extrajudicial activities, subject to the foregoing analysis, judges are advised to consider the time required for participation in such activities. The sponsored trip in the present case may require the judge to spend a considerable amount of time away from the court, during business hours. Excessive time commitments to extrajudicial activities may potentially violate not only Canon 5A(4), which states that a judge shall conduct quasi-judicial activities so that they do not interfere with the proper performance of judicial duties, but also Article V, Section 13 of the Florida Constitution, which states that all "judges shall devote full time to their judicial duties" (Fla. JEAC Op. 92-45).

REFERENCES

Florida Constitution, Article V, Section 13

Fla. Code of Jud. Conduct, Canons 2B, 5A(1), 5A(4), 5B, 6A, 6A(1), 6A(3), 6B(1), 6B(2).

Fla. JEAC Ops. 82-06, 91-09, 92-45, 98-08 [5 Fla. L. Weekly Supp. 707a], 04-02 [11 Fla. L. Weekly Supp. 266a], 06-17 [13 Fla. L. Weekly Supp. 1118a], and 07-09 [14 Fla. L. Weekly Supp. 694b].

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—A judge may serve as a volunteer in Florida State Guard

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-09. Date of Issue: April 16, 2025.

ISSUE

May a judge serve as a volunteer in the Florida State Guard?

ANSWER: Yes.

FACTS

The inquiring judge asks if they may serve as a volunteer in the Florida State Guard. Chapter 251, Florida Statutes (2023), entitled "Florida State Guard Act," creates the Florida State Guard (hereinafter "FSG"). The FSG is "created to protect and defend the people of Florida from all threats to public safety and to augment all existing state and local agencies [and is] activated only by the Governor, and is at all times under the final command and control of the Governor as commander in chief of all military and guard forces of the state." § 251.001(2), Fla. Stat. (2023). The members of the FSG are considered volunteers. § 251.001(5), Fla. Stat. (2023). The Florida State Guard, by component units or in total, may be activated by order of the Governor:

> 1. During any period when any part of the Florida National Guard is in active federal service and the Governor has declared a state of emergency;
>
> 2. To preserve the public peace, execute the laws of the state, enhance domestic security, respond to terrorist threats or attacks, protect and defend the people of Florida from threats to public safety, respond to an emergency as defined in s. 252.34 or imminent danger thereof, or respond to any need for emergency aid to civil authorities as specified in s. 252.38;
>
> 3. To augment any existing state or local agency; or
>
> 4. To provide support to other states under the Emergency Management Assistance Compact as provided for in part III of chapter 252.

§ 251.001(8)(a), Fla. Stat. (2023).

The FSG has a "specialized unit" which is vested with the authority to "bear arms, detect and apprehend while activated." § 251.01(6), Fla. Stat. (2023).

DISCUSSION

The inquiry seeks advice regarding volunteer service that is an extra-judicial activity. Canon 5A of the Code of Judicial Conduct provides:

> A judge shall conduct all of the judge's extra-judicial activities so that they do not:
>
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
>
> (2) undermine the judge's independence, integrity, or impartiality;
>
> (3) demean the judicial office;
>
> (4) interfere with the proper performance of judicial duties;
>
> (5) lead to frequent disqualification of the judge; or
>
> (6) appear to a reasonable person to be coercive.

As the commentary to Canon 5A states: "Complete separation of a judge from extra-judicial activities is neither possible nor wise. . . . [and] judges are encouraged to participate in extrajudicial community activities."

Canon 4A states:

> A judge shall conduct all of the judge's extra-judicial activities so that they do not:
>
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
>
> (2) undermine the judge's independence, integrity, or impartiality;
>
> (3) demean the judicial office;
>
> (4) interfere with the proper performance of judicial duties;
>
> (5) lead to frequent disqualification of the judge; or
>
> (6) appear to a reasonable person to be coercive.

Canon 2A states that: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence

in the integrity and impartiality of the judiciary."

The FSG may be activated by the Governor for a broad range of assignments. Recent deployments have been to support emergency management, aid in public safety operations and to erect fencing at the southern border of Texas. As the FSG may be mobilized by the Governor for a broad range of assignments, the judge must avoid participating in those that could create an appearance that the judge's impartiality was compromised. The Committee bases this opinion upon the inquiring judge's assurance that a member of the FSG may decline an assignment. For example, delivering supplies after a natural disaster would not cause the same concern as enforcing a curfew while patrolling during a time of civil riots. In the latter scenario the judge may be a witness to activity that could lead to recusal or disqualification if the judge were become a witness to activity that could come before the court over which the judge presides.

Further, because the FSG can be activated to provide emergency aid to civil authorities, the participation of the judge could potentially result in violations of Canons 4 and 5A. In Fla. JEAC Op. 91-31, the Committee was asked if a criminal court judge could ride as an observer with law enforcement on an infrequent basis. The majority felt that such activity was permissible if it was done on a limited basis and the judge disqualified himself or herself from any criminal case involving events that he or she witnessed. However, two committee members felt this behavior should be avoided, as it could cast doubt on the judge's impartiality, could interfere with judicial duties, and might detract from the dignity of the office. Likewise, having a judge "execute the laws of the state" when volunteering with the FSG and then adjudicating matters involving those same laws when serving as a judge would undermine the independence and impartiality of the judge. For that reason, volunteer service within the "specialized unit" of the FSG must be declined by the inquiring judge if they were requested to serve in that unit.

As the FSG may be activated during a state of emergency, the deployment of the judge could result in interference with the proper performance of judicial duties and obligations of their circuit. Judges are advised to consider the time required for participation in extra-judicial activities and service in the FSG may require the judge to spend a considerable amount of time away from the court, during business hours. Excessive time commitments to extra-judicial activities may potentially violate not only Canon 5A(4), which states that a judge shall conduct quasi-judicial activities so that they do not interfere with the proper performance of judicial duties, but also Article V, Section 13 of the Florida Constitution, which states that all "judges shall devote full time to their judicial duties." See Fla. JEAC Op. 92-45.

Service in the FSG, on its face, seems akin to service in the Army National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve and the Coast Guard Reserve. We have previously addressed specific tasks within a reserve unit.

In Fla. JEAC Op. 74-06, the question posed was whether a judge's service as a reserve officer in a federal court proceeding as a Staff Judge Advocate representing the Army, would conflict with his duties as a circuit judge. The majority of the Committee found that no conflict existed and that the service was permitted so long as it would not interfere with the judge's duties as a circuit judge.

In Fla. JEAC Op. 75-03, another divided opinion, the committee found that no conflict existed which would prevent a judge from continuing to serve as an Air Force Reserve Officer who reviewed court martial records as to legal sufficiency, prepared post-trial clemency reports and lectured to JAG officers about Air Force Regulations and military law.

Of note, those prior opinions did not to address questions of whether participation in a military reserve unit was permitted, but rather whether certain activities (specifically, serving as a JAG officer or reviewing court martial records) violated the version of the judicial code of conduct in existence at that time.

The Code encourages a judge to engage in volunteer activity that does not conflict with any other provisions in the Code. We find no conflict in participation as a volunteer in the FSG within the constraints of the Canons, Commentary, factors, and opinions listed above.

Three members of the Committee dissent finding there would be a conflict with the canons for a judge to also serve as a Florida State Guard for the following reasons:

1) Doing so would create a conflict with judicial duties in that having a judge "execute the laws of the state" while also potentially adjudicating matters involving those same laws as a judge would undermine the independence and impartiality of the judge. These actions could also cast doubt on the judge's impartiality.

2) There was further concern that Florida State Guard members do not meet the "military officer" exemption requirements of Article II, Section 5 and its prohibition on holding more than one office in the state.

3) Finally, if the judge is activated during a state of emergency, the deployment would interfere with judicial duties. Excessive time commitments to extra-judicial activities during work hours would violate Article V, Section 13 of the Florida Constitution, which states that all "judges shall devote full time to their judicial duties."

The three members of this Committee who have joined in this dissent would also find that this opinion is in conflict with Fla. JEAC Op. 06-29 [14 Fla. L. Weekly Supp. 193a], where a judge was advised that service as a Trooper in the Florida Highway Patrol Auxiliary, even though the judge's activities may be restricted to administrative matters was prohibited.

REFERENCES

Florida Constitution, Article V, Section 13
Sections 251.001(2), (5), (6) and (8)(a) Florida Statutes (2023).
Fla. Code of Judicial Conduct, Canons 2A, 4A (1)-(6), 5A(1)-(6) and Commentary to Canon 5A.
Fla. JEAC Ops. 06-29 [14 Fla. L. Weekly Supp. 193a], 92-45, 91-31, 75-03, and 74-06.

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—A judge may not appear in a documentary film about high conflict family cases

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-10. Date of Issue: April 16, 2025.

ISSUES

1. May a judge appear in a documentary film about high conflict family cases where the judge would speak about trends in high conflict cases in general and also his experiences witnessing the effects on children of high conflict custody disputes. The judge would not discuss any specific cases pending in any court nor would the judge accept any payment for time or reimbursement of expenses. The documentary film may possibly be shown at a location where tickets are sold, or the film itself could be sold (such as to Netflix) for profit.

ANSWER: No.

2. May a judge allow the filmmaker to film the judge in chambers, or in the judge's courtroom?

ANSWER: No.

FACTS

The inquiring judge has been approached by a documentary

filmmaker to appear in a film about the effects on children of high conflict custody cases. After speaking to the filmmaker, it is the judge's understanding that the intent of the film is to be educational; providing families who are heading into court proceedings an opportunity to learn about the negative effects on children of high conflict disputes. The filmmaker theorizes that by watching this film it would encourage parties to mediate their disputes.

The filmmaker intends to also include mental health professionals, attorneys, and guardian's ad litem in his interviews. The filmmaker would like the inquiring judge to speak about trends in high conflict cases in general and the impact of familial conflict on children, however there would be no discussion of any of the inquiring judge's specific cases pending in any court. The inquiring judge stated that they would eschew any payment for time or any reimbursement of expenses. The filmmaker has told the inquiring judge that the film could possibly be shown at locations where tickets are sold, or the film itself could be sold (such as to Netflix) for profit, however the inquiring judge would not benefit financially from such efforts, but would merely be providing a public service. The filmmaker has told the inquiring judge that the judge has "no connection" to the filmmaker nor does it appear to the presiding judge that the filmmaker has had any case pending in his circuit.

The inquiring judge has also requested an opinion on the advisability of allowing the filmmaker to film the judge in either chambers, the courtroom or should such filming only take place off the courthouse grounds?

DISCUSSION

As noted in JEAC Op 19-02 [26 Fla. L. Weekly Supp. 919b], this Committee has, in the past, dealt with numerous inquiries in which the contemplated conduct involved the judge's appearance on television or radio programs, or involved speeches, writings or lectures.

A plethora of opinions issued by this Committee have supported a judge speaking to the public on law and judicial administration related topics for educational purposes, for instance in its opinion JEAC Op. 11-04 [18 Fla. L. Weekly Supp. 703a] this Committee opined:

> However, the committee has allowed judges to participate in panel discussions at seminars sponsored by a private organization, so long as the judge's participation was educational in nature. Fla. JEAC Op. 07-09 [14 Fla. L. Weekly Supp. 694b]. Likewise, the committee has consistently held that a judge does not violate the Code by lecturing or writing articles on the law or law related areas. In Fla. JEAC Op. 06-30 [14 Fla. L. Weekly Supp. 193b], the Committee found no impropriety in the conduct of the judge addressing community groups regarding the dangers of on-line predators.

Furthermore, in Fla. JEAC Op. 07-21 [15 Fla. L. Weekly Supp. 295a], this Committee allowed a judge to write an informative article about the divorce process, so long as the article was educational in nature and did not imply the judge's endorsement of any products, persons, services or materials.

The caveat to this general position can be found in the seminal opinion given by this Committee found in Fla. JEAC Op. 96-25, wherein:

> The inquiring judge wishes to enter into an arrangement with a television station. Under this arrangement he would, for compensation, appear on various segments to 'comment about, explain to, and educate the public concerning diverse legal matters including explaining and clarifying the proceedings during high publicity trials such as the O.J. Simpson civil trial.' He believes that such a news forum would serve to educate the public and explain the procedures and workings of the court system. . . . . .whether the station may reference his credentials and title, and whether the station may reference his appearance in any pre-news promotional spots or other promotional materials.

In this opinion the Committee found that the proposed arrangement would lend judicial prestige to the commercial interest of that station in violation of Canon 2B. In its rationale, the Committee relied upon Opinion 14-1991 of the South Carolina Advisory Committee on Standards of Conduct, wherein the South Carolina Committee considered the request of a family court judge to participate in a local radio talk show. In addressing the application of Canon 2B, the South Carolina Committee concluded that by associating himself with the radio talk show on a regular basis, the judge would clearly lend the prestige of his office to the advancement of the radio station in an area where the public perceives the judge to be an expert.

Likewise, in the question being considered here, the filmmaker has not implicitly renounced the possibility that the documentary film would be sold for profit or used to earn profits through ticket sales. Because the inquiring judge would be the most prominent authority on high conflict divorces appearing in the film, the chance that his appearance would be used to promote the film in advertisements is highly likely thereby running afoul of the Canons prohibition against lending the prestige of the office to advance the private economic interests of others. See, Fla. JEAC Ops. 07-21 [15 Fla. L. Weekly Supp. 295a]; 97-29; 82-01; and 97-16.

When looking to how other Jurisdictions handle this same question, this Committee finds that states are split on this question, for example in the Opinion 11-105 of the Advisory Committee on Judicial Ethics—Judiciary of New York, the committee considered an administrative judge's request to permit a for-profit video production company to film arraignment proceedings for a documentary, as long as the arraigning judge will merely perform his/her regular judicial duties while being filmed. The committee reasoned that:

> the Rules "forbid[ ]a full-time judge from being an active participant in any form of business enterprise organized for profit, which, in this case, would include serving as an advisor" (id. see also; 22 NYCRR 100.4[D][3]; Opinion 08-25 [a full-time judge should not advise a comedian on how to portray a judge on a commercial television show]). For similar reasons, the Committee advised that a full-time judge should not participate in a short interview for an educational video production that is being produced by a commercial television production company for sale to schools and libraries (see Opinion 01-86; see also Opinion 09-182 [a full-time judge should not participate in a videotaped interview to be used as part of a documentary that would accompany a criminal justice textbook, where the video will be produced by a for-profit organization]).

the California Supreme Court Committee on Judicial Ethics Opinions, CJEO Informal Opinion Summary No. 2014-004 "JUDICIAL APPEARANCE IN AN EDUCATIONAL DOCUMENTARY" the California Committee considered the question of a judge appearing in an educational documentary for public television exploring the work of tribal courts in California and whether the appearance in the film of one or more state court judges (in particular, judges who are members of the Tribal Court-State Court Forum (Forum)) violate canon 2(B)(2) or any other provision of the California Code of Judicial Ethics because the documentary might ultimately generate some downstream pecuniary or other personal benefit to the producer or her production company. The Committee concluded:

> that the potential for some downstream pecuniary or other personal benefit to the copyright holder does not constitute a commercial factor that would violate canon 2B(2). The educational content not only predominates, it is the sole purpose of the film. As described, the appearance of the state court Forum judges cannot reasonably be perceived as that of a salesperson for the copyright holder's product. The clear public benefit to be derived from sparking an interest in the cross jurisdictional legal issues that are to be documented far outweighs any remote possibility of personal or pecuniary gain. Judicial

> appearance in the documentary film would not lend the prestige of office to a predominately for-profit enterprise and is therefore not prohibited by the canons.

However, the California commission also opined:

> The state court judges are permitted under the canons to appear in filmed interviews in which they explain their work with the Forum and tribal courts, including discussing court procedures and legal issues that would promote public understanding and confidence in the administration of justice. However, they must be cautious not to answer questions in such a way that discusses the substance of pending cases, creates the appearance of political bias or prejudgment, or otherwise reveals facts from confidential proceedings.

Similarly, in JEAC Ops. 96-25 this Committee cautioned against a judge appearing on a television station to provide legal commentary because it may involve improper public comment upon a pending or impending proceeding in violation of Canon 3B; also such activity could cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial office, and interfere with the proper performance of judicial duties in violation of Canon 5. *In this particular inquiry,* the proposed interview of the inquiring judge's anecdotal stories about the detrimental effects of litigation on children falls outside of the permissible topics of law and legal administration and into the area of expertise held by psychologists and mental health professionals.

This Committee opines that such testimonials by the inquiring judge create two separate issues, firstly, that the inquiring judge would be relating actual stories of children in cases that the judge presided over thereby revealing confidential details of the families in his division which would be readily apparent to those families who viewed the documentary. Secondly, his personal accounts may appear to commit the judge to a particular position, namely that the party responsible for prolonging litigation would be acting against the best interest of their children. Furthermore, giving an opinion on the detrimental effects of litigation on a child's psyche as opposed to just a law related or administrative question ascribes to the judge an opinion as a child psychologist as opposed to a trier of fact. This in turn would cast reasonable doubt on the judge's ability to act impartially, thereby eroding public confidence in the impartiality of the judiciary and could lead to the judge's disqualification on the basis that the judge would inject his personal opinion or has otherwise foreshadowed how they might rule on their pending judicial cases. While this position may seem hyperbolic at first glance, any judge familiar with the highly contentious nature of family court, knows that parties are constantly searching for reasons to disqualify the sitting family court judge who may have ruled against their supposed interests.

In regards to the question of whether a judge allow the filmmaker to film the family court proceedings of the inquiring judge in chambers, or in the judge's courtroom, the Committee opines that this question should also be answered in the negative for several reasons. Firstly, protecting the process of a fair hearing for parties is imperative, litigating parties and attorneys may be intimidated knowing cameras are present, or worse may posture for the camera. Even if the parties were to consent, the meaningfulness of that consent to the inquiring judge's asking their permission to record, especially knowing that all matters—custody, equitable distribution, reasonable attorney's fees etc. being decided by that same judge, calls into question the voluntariness of that consent. Lastly, the children who are the subject of that commentary should be completely shielded from having opinions about their mental health being publicly discussed.

Consequently, this Committee concludes that for the reasons stated above, the commercial and entertainment aspects of a judicial appearance on documentary movie outweighs the legitimate public information aspects. Ultimately, both questions should be answered in the negative.

REFERENCES

Florida Constitution, Article V, Section 13
Sections 251.001(2), (5), (6) and (8)(a), Florida Statutes (2023).
Fla. Code of Jud. Conduct, Canons 2A, 4A (1)-(6), 5A(1)-(6) and Commentary to Canon 5A.
Fla. JEAC Ops. 92-45, 91-31, 74-06, 75-03.

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