Volume 33, Number 4, August 29, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 139-182

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.

- **CRIMINAL LAW—SPEEDY TRIAL—WAIVER. A trial court erred in discharging a defendant after the defendant waived her right to a speedy trial and obtained two continuances, it was discovered on the eve of the trial that an information had not been filed, and the state subsequently filed an information 137 days after the defendant's arrest. The two speedy trial waivers were valid, contrary to the defendant's argument that the waiver was a nullity because the trial court lacked jurisdiction before an information was filed. The speedy trial period runs from the date a defendant is taken into custody, not the date an information is filed, and the defendant in the instant case made two explicit waivers of speedy trial.** *STATE v. COOPER. Circuit Court, Seventh Judicial Circuit (Appellate) in and for Volusia County. Filed July 12, 2011. Full Text at Circuit Courts-Appellate Section, page 140a.*
- **INSURANCE—HOMEOWNERS—COVERAGE—REPLACEMENT COST VALUE. An insurer's obligation to pay replacement cost value was not triggered where the express terms of the policy required the insureds to perform home repairs related to the loss and submit proof of costs incurred in making the repairs, and insureds did not perform the repairs and can no longer perform the repairs because the home has been sold. The insureds could not meet their burden to show that the actual cash value payment was insufficient or that any breach of the contract occurred where insurer timely acknowledged coverage and paid the only ACV estimate it received, and insureds failed to submit valid competing ACV estimate prior to suit being filed or proof of incurred repair costs.** *CALELLO v. FLORIDA PENINSULA INSURANCE COMPANY. Circuit Court, Twentieth Judicial Circuit in and for Lee County. Filed June 9, 2025. Full Text at Circuit Courts-Original Section, page 161a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

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

Bold denotes decision by circuit court in its appellate capacity.

TABLE OF CASES TREATED (continued)

TABLE OF CASES TREATED (continued)

* * *

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Revocation—Fourth DUI—Hardship license—Due process—Licensee whose application for hardship license was denied was afforded due process where he was given opportunity to be heard, ask questions, and present evidence—No due process violation resulted from agency's enforcement of requirements that applicant for hardship license not have driven vehicle or consumed alcohol for five years prior to hearing although agency did not notify licensee of revocation for more than five years after fourth DUI—Licensee's testimony established that he had, in fact, driven vehicle and had consumed alcohol within preceding five years—Further, even if licensee was correct that hearing officer misapplied no-driving requirement because licensee had a valid driver's license at the time he drove, licensee was nonetheless ineligible for hardship license because of his consumption of alcohol

HOWARD KEVIN WILSON, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 1st Judicial Circuit (Appellate) in and for Okaloosa County. Case No. 2024-CA-1923. Division 1. Original Proceeding. April 28, 2025. Counsel: Luke Newman, for Petitioner. Kathy Jimenez-Morales, Chief Counsel, Driver Licenses, Office of General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(LACEY POWELL CLARK, J.) THIS CAUSE came before the Court upon the Petition for Writ of Certiorari filed on July 8, 2024, by the Petitioner, Howard Kevin Wilson (hereinafter "Wilson"), against the Respondent, Florida Department of Highway Safety and Motor Vehicles (hereinafter "DHSMV"), pursuant to Florida Rule of Appellate Procedure 9.100 and s. 322.31, Florida Statutes (2024). Wilson seeks review of DHSMV's denial of his application for a hardship license on June 5, 2024.

The Court has reviewed the Petition; the Appendix to the Petition; the Response to Petition for Writ of Certiorari filed by DHSMV on November 1, 2024; the Supplemental Appendix to the Response; the Petitioner's Reply to Respondent's Response filed on November 21, 2024; the Notice of Supplemental Authority filed on January 27, 2025; and the relevant legal authority. The Court hereby **FINDS, ORDERS, AND ADJUDGES:**

DHSMV issued Wilson a Florida driver's license on May 18, 2018. Wilson's Florida driver's license has been permanently revoked because he has been convicted of DUI on four occasions. All four convictions occurred in Georgia. Wilson was convicted of his fourth DUI on October 23, 2018, about five months after he was issued a Florida driver's license. DHSMV sent Wilson a letter on February 13, 2024, stating that his driver's license was revoked for one year as a result of his DUI conviction on October 23, 2018. On March 26, 2024, DHSMV sent Wilson another letter titled "Notice of Order of Revocation and Final Order" informing him that his license was permanently revoked effective October 23, 2018, because his DUI conviction on October 23, 2018, was his fourth conviction. After receiving the letter dated March 26, 2024, Wilson requested a hearing in accordance with s. 322.271, Fla. Stat., to obtain a hardship license.

The hearing was conducted on June 5, 2024, by a DHSMV hearing officer. During the hearing, Wilson testified that the last time he drove a motor vehicle was on February 26, 2024, and that the last time he consumed alcohol was on December 15, 2023. The hearing officer advised Wilson that there was an issue because he had operated a motor vehicle and consumed alcohol within five years prior to the hearing. The hearing officer informed Wilson that he would look at the law and that Wilson would receive a letter from DHSMV informing him of whether his request for a hardship license was approved or denied. Wilson received a Final Order from DHSMV dated June 5, 2024, stating that his application for a hardship license was denied "[d]ue to the operation of a motor vehicle on February 26, 2024. . . ."

In accordance with s. 322.31, Fla. Stat., Wilson filed his Petition for Writ of Certiorari in the circuit court to appeal DHSMV's decision to deny his request for a hardship license. This Court has jurisdiction to review DHSMV's decision pursuant to Article V, Section 5(b), of the Florida Constitution and s. 322.31, Fla. Stat. (2024).

"[A] circuit court conducting first-tier certiorari review of an administrative decision is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Florida Dep't of Hwy. Safety & Motor Vehicles,* 209 So. 3d 1165, 1170 (Fla. 2017) [42 Fla. L. Weekly S85a].

In his Petition, Wilson alleged that he was denied due process by DHSMV's failure to conduct the hearing in a fair and impartial manner and failure to timely notify him of the revocation of his driver's license. He also alleged that DHSMV departed from the essential requirements of law by denying his application for a hardship license based on the hearing officer's misreading of s. 322.271(5)(a)2. of the Florida Statutes.

Section 322.271(5)(a), Florida Statutes (2024), states,[1]

> ". . .a person whose driving privilege has been permanently revoked because he or she has been convicted four or more times of violating s. 316.193 or former s. 316.1931 may, upon the expiration of 5 years after the date of the last conviction or the expiration of 5 years after the termination of any incarceration under s. 316.193 or former s. 316.1931, whichever is later, petition the department for reinstatement of his or her driving privilege.
>
> (a) Within 30 days after receipt of a petition, the department shall provide for a hearing, at which the petitioner must demonstrate that he or she:
>
> 1. Has not been arrested for a drug-related offense for at least 5 years prior to filing the petition;
>
> 2. Has not driven a motor vehicle without a license for at least 5 years prior to the hearing;
>
> 3. Has been drug-free for at least 5 years prior to the hearing; and
>
> 4. Has completed a DUI program licensed by the department."

Having reviewed the record provided in the Appendix to the Petition and the Supplemental Appendix to the Response, the Court does not find that Wilson was denied due process during the hearing on June 5, 2024. DHSMV concedes that the hearing officer "may not have been a model of decorum." Although a review of the transcript reflects that the officer interrupted Wilson on several occasions, Wilson was provided with an opportunity to be heard and present evidence. The hearing officer explained the reason Wilson's license was revoked and the reason for the delay in notifying him of the revocation. He informed Wilson that there were issues with his operation of a motor vehicle and consumption of alcohol within five years prior to the hearing. Before concluding the hearing, the hearing officer asked Wilson if he had any questions, and Wilson said no. The hearing officer certainly could have been more patient and polite, but the record does not reflect that the officer was unfair or biased against Wilson.

Wilson argued that the DHSMV's failure to promptly notify him that his license was permanently revoked deprived him of the opportunity to comply with the requirements of s. 322.271(5)(a), and as a result of DHSMV's delayed notification, DHSMV should be equitably estopped from strictly enforcing the statute. The Court does

not find that DHSMV denied Wilson due process by enforcing the statute despite the fact that DHSMV did not notify him of the permanent revocation of his license for more than five years after his fourth DUI conviction. DHSMV is required to apply and enforce Florida law. According to Wilson's testimony, he drove a vehicle within four months prior to the hearing and he consumed alcohol within six months prior to the hearing. Wilson's lack of knowledge of the statutory requirements when he applied for a hardship license does not equate to a denial of due process by DHSMV, nor does the hearing officer's decision to deny reinstatement of Wilson's license after Wilson's testimony established that he had consumed alcohol within the past five years and driven a vehicle within the past five years.

Wilson also argued that DHSMV departed from the essential requirements of law by denying his application for a hardship license based on the hearing officer's misreading of s. 322.271(5)(a)2. (requiring Wilson to demonstrate that he "[h]as not driven a motor vehicle without a license for at least 5 years prior to the hearing"). The hearing officer advised Wilson that there was a problem because Wilson had operated a motor vehicle and had consumed alcohol, and the hearing officer stated he needed to look at the law before deciding whether Wilson could be approved for a hardship license. The hearing officer explained that Wilson was required to be "five years without operation of a motor vehicle and five years without consumption of alcoholic beverages or controlled substances prior to the hearing." DHSMV's Final Order dated June 5, 2024, states that Wilson's hardship license was denied because he had operated a motor vehicle within five years prior to the hearing, but the Final Order does not mention Wilson's consumption of alcohol within five years prior to the hearing. Section 322.271(5)(a)3. requires a person seeking a hardship license to have been "drug-free" for at least five years prior to the hearing. Alcohol is included within the term "drug-free" in s. 322.271(5)(a)3. *Dep't of Hwy. Safety & Motor Vehicles v. Walsh,* 204 So. 3d 169 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2648b]. Wilson testified that he had consumed alcohol on December 15, 2023, which was less than six months prior to the hearing. Although the hearing officer's Final Order does not include Wilson's consumption of alcohol as a basis for the denial of Wilson's hardship license, DHSMV's decision to deny Wilson a hardship license is supported by competent, substantial evidence that he is not eligible for a hardship license due to his consumption of alcohol within five years prior to the hearing. Even if Wilson is correct that the hearing officer misconstrued or misapplied s. 322.271(5)(a)2. because Wilson had a valid license when he drove during the five years prior to the hearing, Wilson is not eligible for a hardship license based on s. 322.271(5)(a)3. His unequivocal testimony established that he had not been "drug-free" for at least five years prior to the hearing; as a result, he does not meet the statutory criteria to obtain a hardship license. "The written final judgment by the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it." *Applegate v. Barnett Bank of Tallahassee,* 782 So. 2d 343, 359 (Fla. 1979).

In sum, the Court does not find that Wilson was denied due process, nor does the Court find that DHSMV failed to observe the essential requirements of law. The Court finds that DHSMV's denial of Wilson's application for a hardship license was supported by competent, substantial evidence. Accordingly, the Petition for Writ of Certiorari is **DENIED.**

[1]The most recent amendment to s. 322.271 was in 2013. The current statute is identical to the statute that was in effect when Wilson was convicted of his fourth DUI on October 23, 2018, and during his hearing on June 5, 2024.

* * *

Criminal law—Misdemeanor battery—Speedy trial—Trial court erred in discharging defendant who had waived speedy trial and obtained two continuances after it was discovered on eve of trial that information had not been filed and information was subsequently filed 137 days after defendant's arrest—No merit to argument speedy trial waiver was a nullity because trial court lacked jurisdiction before information was filed—Speedy trial period ran from date defendant was taken into custody, not date information was filed, and defendant made two explicit waivers of speedy trial

STATE OF FLORIDA, Appellant, v. MICHELLE COOPER, Appellee. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2009-10030-APCC. L.T. Case No. 2009-36743-MMAES. July 12, 2011. Appeal from the County Court, Volusia County, Florida. Belle B. Schumann, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Daytona Beach, for Appellant. David S. Morgan, Assistant Public Defender, Public Defender's Office, Daytona Beach, for Appellee.

OPINION

(J. DAVID WALSH and RICHARD S. GRAHAM, JJ.) The State of Florida appeals from an order dismissing the case against appellee on speedy trial grounds. Appellant filed its Initial Brief on February 8, 2010, and filed its Amended Final Version of Initial Brief on April 1, 2010. The appellee, Michelle Cooper, by and through appellate counsel, filed an Answer Brief on April 12, 2010. The appellant, State of Florida, filed its Reply Brief on June 2, 2010.

FACTS AND PROCEDURAL HISTORY

On April 10, 2009, appellee Michele Cooper was arrested for a misdemeanor simple battery. Appellee posted bond and was released from custody. On April 24, 2009, Attorney Michael Lambert filed a "Notice of Appearance of Counsel, Request for a Copy of Charge, Waiver of Personal Appearance at Arraignment and Written Plea of Not Guilty" and several other pleadings. A pretrial conference was held on June 9, 2009, at which time the appellee requested a continuance and waived her right to a speedy trial.[1] The state did not object, and the request for a continuance was granted by the trial court. The court granted appellee a second continuance without objection on July 7, 2009. On August 24, 2009, at docket sounding just prior to trial, counsel for appellee brought to the trial court's attention that the state had not filed an information. Neither the state, the defense, nor the trial court had been aware of that fact. The court continued the case, and the state filed its information on the following day, one hundred thirty-seven (137) days after arrest. The defense filed a Motion for Discharge on September 9, 2009. On September 16, 2009, the trial court issued an Order to Show Cause to State Attorney's Office Why the Motion for Discharge Should Not be Granted. A hearing was held on the Motion for Discharge on October 13, 2009, and the trial court issued the Order Granting Motion for Discharge and Dismissing Case on November 4, 2009. On November 19, 2009, the state timely filed a Notice of Appeal.

ANALYSIS AND RULING

The appellee argued to the trial court that all proceedings leading up to the belated filing of an information were "nullities." Essentially, the appellee argued below and to this court that until an information has been filed, the trial court has no (or limited) subject matter jurisdiction. Therefore, the appellee argues that the purported waiver of speedy trial itself was a nullity and cannot be deemed to toll the speedy trial clock. Appellant claims that the county court erred in holding that appellee's waivers of speedy trial were nullities. Specifically, appellant argues that: (1) a waiver of speedy trial would be valid prior to the state filing an information and before the court has trial jurisdiction, (2) the county court confused subject matter jurisdiction

with jurisdiction over the person, and (3) a formal charging affidavit is not necessary in order to "vest" a county court with jurisdiction over a misdemeanor case.

At the outset, the court must address the jurisdictional issue. This had been argued by the parties (and touched on by the esteemed trial judge).

Subject matter jurisdiction is conferred upon the county court by the Florida Constitution, Article V, s.6 and by Florida Statutes, Chapter 34. The county court has subject matter jurisdiction to try criminal charges within its jurisdiction "upon indictment by the grand jury, upon information filed by the prosecuting attorney, *or upon affidavit or complaint*." Fla. Stat. s. 34.13(1) (emphasis added). Furthermore, "*upon complaint made on affidavit to any county court that any misdemeanor has been committed,* the county court judge may issue a warrant on the usual form, making it returnable before himself or herself or another county court judge." Fla. Stat. s.34.13(4) (emphasis added). And the county court may accept voluntary pleas of guilty "in all criminal cases pending therein on information, indictment, *affidavit, or complaint*. . . . ." Fla. Stat. s.34.131 (emphasis added). This court finds no authority for the proposition that the county court lacks subject matter jurisdiction until an information has been filed. Indeed, the county court must have subject matter jurisdiction to deal with the many preliminary matters that lead up to a trial including a defendant's custody and pretrial supervision, discovery issues, evidentiary hearings, and defense motions for discharge. Clearly, the county court had subject matter jurisdiction in this cause from the time of arrest.

Personal jurisdiction over the defendant is conferred upon her being served a Notice to Appear in lieu of physical arrest in accordance with Fla. R. Crim. P. 3.125, or upon being served with an arrest warrant in accordance with Fla. R. Crim. P. 3.121, or upon being arrested without a warrant in accordance with Fla. Stat. s.901.15. The county judge is a "committing judge" for the purpose of issuing summons or warrants for the arrests of persons against whom a complaint has been made. Fla. Stat. s.901.01 and Fla. R. Crim. P. 3.120. In the case at bar, the record reflects that the appellant was arrested by the Daytona Beach Police and, after booking, was released on bond with the condition of appearing in court to address the charge. The county court had personal jurisdiction over the appellant from the time of arrest.

The speedy trial rule is a procedural device to protect an accused's substantive constitutional right to speedy trial. *Bulgin v. State,* 912 So.2d 307, 309 (Fla. 2005) [30 Fla. L. Weekly S368a]. See the excellent discussion of the evolution of the rule in Justice Wells' dissenting opinion.[2] The speedy trial (without demand) right is measured from the point when an accused is taken into custody, not when formal charges are first filed.

> Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime shall be brought to trial within 90 days of arrest if the crime charged is a misdemeanor or within 175 days of arrest if the crime charged is a felony. . . . Fla. R. Crim. P. 3.191(a).

See also, *Genden v. Fuller,* 648 So.2d 1183, 1184 (Fla. 1994) (Speedy trial period begins when a defendant is first taken into custody, not when charges are first filed).

A person arrested for a misdemeanor must be given a trial within ninety days of arrest. *Brady v. State,* 934 So.2d 659, 661 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2071c]; Fla. R. Crim. P. 3.191(a). If the trial does not commence within that time period, the court shall grant a motion for discharge unless one of the exceptions to the rule applies. Fla. R. Crim. P. 3.191(j). Rule 3.191(j)(1) provides for an exception when "(1) a time extension has been ordered under subdivision (i) and that extension has not expired." Under subdivision (i) (1), the time period may be extended by "stipulation, announced to the court or signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced." Fla. R. Crim. P. 3.191(i)(1).

In the instant case, the record reveals that appellee expressly waived her right to a speedy trial under Rule 3.191(i). (R. 60, 95, 126, 136). Under *Bulgin, supra,* a legally binding speedy trial waiver can be obtained before an information is filed as long as the waiver is explicit. *Bulgin, supra,* at 311-12. Thus, this court finds that the two waivers of speedy trial were valid. Although consideration for a waiver of speedy trial may be given, it is not necessary. However, the court notes that appellee did receive a benefit from state's agreement to the two waivers of speedy trial herein: additional time to meet with her attorney to prepare a defense, and additional time for her attorney to investigate and prepare for trial or plea negotiations. She received a continuance and was given additional time to prepare in exchange for a waiver of speedy trial.

Accordingly, and for the reasons set forth above, the county court's order granting discharge and dismissal of the case is REVERSED and SET ASIDE. The charges in the state's Information are hereby reinstated, and the matter shall be scheduled for pre-trial conference and trial to commence within forty-five days from the date this order becomes final.

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[1]The court notes that attorney James Evans appeared on behalf of Appellee's retained counsel, Michael Lambert. (R-134-136).

[2]Interestingly, Justice Wells argues that the holding in *Bulgin* violates the legislature's right to set a specific period of limitations. He would measure the speedy trial time from the date of filing the information, not from arrest.

* * *

Counties—Zoning—Special exceptions—Certiorari challenge to county commission's resolution granting special exception for operation of K-12 school on property zoned open use estate, 1 unit per 5 acres, is denied—Standing defense was waived where neither county nor developer contested petitioners' standing—Claim that application failed to include "consequences statement" discussing impact of noise produced by school lacks merit where application fulfilled format required by county to demonstrate that proposed use would be adequately buffered to separate traffic, visual impact, and noise from existing or intended nearby uses—County development code did not require either "consequences statement" or noise study—Voluntary stipulations agreeing that noise from use of outdoor PA system at sporting events would not exceed decibels allowed at property line by county noise ordinance did not conflict with noise ordinance and were enforceable through development code remedies —Fact that county noise ordinance exempts sporting events and school functions does not render stipulations unlawful—Failure of school to complete limited cultural assessment survey regarding recorded archeological site adjacent to property was waived where issue was not raised before county commission—Approval of special exception without completion of cultural assessment survey was not fundamental error where no egregious deprivation of constitutional right occurred and error did not go to heart of judicial process before commission—Competent substantial evidence—Application, staff report, and testimony was sufficient to support conclusion that proposed use was adequately buffered to effectively separate noise from nearby existing or intended uses—No merit to argument that record fails to contain competent substantial evidence regarding traffic impacts because of flaws in traffic study—Traffic study's proposed methodology was pre-approved by county staff, study accounted for 100% of maximum number of students permitted at school, and ingress and egress from school was via arterial road, not neighborhood street—Further, evaluating reliability of study's methodology approaches bar against appellate court reweighing, or judging credibility of, evidence

SARASOTA EAST-ENDERS FOR RESPONSIBLE DEVELOPMENT, INC., a

Florida Not-for-Profit, Corporation; BRENDA STOCKS, an individual; and STEVEN HIGGINS, an individual, Petitioners, v. SARASOTA COUNTY, a political subdivision of the State of Florida; and THE CLASSICAL ACADEMY OF SARASOTA, INC., a Florida Not-for-Profit Corporation, Respondents. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2023 CA 6382. July 16, 2024.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(STEPHEN M. WALKER, J.) THIS CAUSE is before the Court on the petition for writ of certiorari filed August 21, 2023, by Sarasota East-Enders for Responsible Development, Inc. ("SEERD", Brenda Stocks, and Steven Higgins (collectively, "Petitioners"), the responses of Sarasota County ("County") and The Classical Academy of Sarasota, Inc. ("TCA") filed respectively on November 13 and 29, 2023, and Petitioners reply filed December 19, 2023. Petitioners seek review of Resolution 2023-156 of the Sarasota County Board of County Commissioners ("Board") that granted TCA's special exception application for a K-12 school on property zoned OUe-1 (Open Use Estate, 1 uhit/5 acres). Petitioners request this Court issue a writ of certiorari quashing the Board's resolution. The Court has jurisdiction. *See* Article V, Sec. 5(b), Florida Constitution and Rules 9.030(c)(3) and 9.100(f), Fla. R. App. P. The Court has considered the filings of the parties, the record before the BOARD, and is otherwise advised in the premises.

Background

On March 15, 2023, TCA filed an application with the County for a special exception to operate an elementary, middle, and high school on property located at 8000 Bee Ridge Road in the unincorporated County, approximately 2.3 miles east of Interstate 75 (the "Property"). The Property is approximately 41.22 acres zoned OUe-1 (Open Use Estate, 1 uhit/5 acres) with direct access to the south side of Bee Ridge Road, an arterial roadway on the County's Thoroughfare Plan. The OUE district is intended to be comprised of a combination of residential and agricultural activity. An elementary, middle, or high school is only permitted through a grant of special exception. Through a previously granted special exception, the Property has been used as a place of worship, Grace Community Church, since 1985. A second special exception allowed the church to operate a pre-school. The Property is flanked to the east and the west by two other places of worship—Bayside Community Church of Sarasota and St. Patrick's Catholic Church. To the south of the Property is situated an RSF-1 (Residential Single Family, 2.5 units/acre) property known as the Heritage Oaks Golf and Country Club consisting of a golf course and single-family homes. Petitioners Brenda Stocks and Steven Higgins live in Heritage Oaks. To the northwest of the Property is a RE-2/PUD (Residential Estate, 1 unit/acre/Planned Unit Development) property known as the Laurel Oaks Estates which consists of a golf course and single-family homes. To the north of the Property, on the opposite side of Bee Ridge Road, is an RSF- I property known as The Hammocks which consists of single-family homes.

Through its application, TCA proposed to develop a multi-phased school campus with a first phase accommodating 300 students and then expanding to 1,310 students in phase two. The proposed construction includes a gymnasium, athletic buildings, and a track-and-field area. Bleachers are planned for the athletic areas, but not a stadium. The application included a binding development concept plan which was later incorporated into Resolution 2023-156.

On June 15, 2023, the Sarasota County Planning Commission conducted a public hearing on TCA's application and unanimously recommended approval. On July 12, 2023, the Board conducted a public hearing on TCA's application. At the hearing, SEERD president Roger Zacks testified in opposition to the application, as did Petitioner Stocks. Petitioner Higgins submitted written comments in opposition to the application. The Board unanimously approved the application. Petitioners' timely petition followed.

Standing

This order first addresses the threshold issue of Petitioners' standing to bring this action. *See Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1081 n.2 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D348b] ("Ordinarily, standing is a threshold issue that should be disposed of before addressing the merits of the case.").

Florida case law governs the question of whether standing exists to seek judicial review of local government land use decisions. The seminal case on standing is *Renard v. Dade County,* 261 So.2d 832 (Fla. 1972). *Renard* established three categories of zoning ordinance challenges and set standing requirements for each category. Under category 1, to enjoin the violation of a valid ordinance, the litigant must allege a special injury or damages different in kind from any injury suffered by other residents in the area. The test for category 2 is that the litigant must be aggrieved or adversely affected by the ordinance and must have a legally recognizable property or other interest so affected by the zoning action. Category 2 cases typically challenge zoning actions as not fairly debatable, and, therefore, substantively invalid. Proximity of the litigant's property to the property affected by the zoning or rezoning may be an important factor in such cases. *Renard* at 837. *Renard* category 3 standing is the broadest under Florida common law. Category 3 requires that in a challenge attacking an ordinance on grounds that it was not enacted in accordance with proper procedures, the litigant need only be an affected resident, citizen, or property owner of the local governmental jurisdiction in question. *Renard* at 838. Typically, category 3 standing has been recognized in cases alleging procedural violations, such as lack of proper notice, as opposed to substantive deficiencies. *See David v. City of Dunedin,* 473 So. 2d 304 (Fla. 2d DCA 1985).

Lack of standing is an affirmative defense and unlike the defense of lack of subject matter jurisdiction, under Florida law a standing defense can be waived. *See Corrigan v. Bank of America, N.A.,* 189 So. 3d 187, n.2 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D345b]; *Dage v. Deutsche Bank,* 95 So. 3d 1021, 1024 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2044b] ("Lack of standing is an affirmative defense that must be raised by the defendant and the failure to raise it generally results in waiver"). In the present case, Petitioners claim standing under the standards of *Renard* categories 2 and 3. Neither Respondent in its response contests Petitioners' standing. Accordingly, this defense is waived, and the Court addresses the merits of Petitioners' claims.

Standard of Review

On certiorari review, the Court is only required to determine (1) whether procedural due process was afforded, (2) whether the Board observed the essential requirements of the law, and (3) whether the administrative findings and judgment were supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

A failure to observe "the essential requirements of the law" has been held synonymous with a failure to apply "the correct law." *Heggs* at 530. The inquiry is very narrow and means "something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Heggs* at 527, quoting *Jones v. State,* 477 So. 2d 566, 569 (1985) (Boyd, C.J., concurring specially). The standard requires more than simple legal error or interpreting the law contrary to how the lower tribunal interpreted it. *Ivey v. Allstate Insurance Co.,* 774 So. 2d 679, 683 (Fla. 2000) [25 Fla. L. Weekly S1103a] (mere disagreement with the lower tribunal's interpretation of the applicable law is an

improper basis for common law certiorari). That is, applying the correct law incorrectly does not rise to the level of a departure from the essential requirements of the law. *Stranahan House v. City of Fort Lauderdale,* 967 So. 2d 1121 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2702a].

The Court cannot reweigh the evidence or substitute its own judgment for that of the Board. *Heggs,* 658 So. 2d at 530; *Wal-Mart Stores East L.P. v. Town of Davie,* 977 So. 2d 636, 638 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D482a] ("a circuit court is only to review whether competent substantial evidence existed for a lower tribunal's decision; it must not reweigh or consider the credibility of the evidence presented to the tribunal"); *Lee County v. Sunbelt Equities, II, Ltd. Partnership,* 619 So. 2d 996, 1003 (Fla. 2d DCA 1993) (determining whether the agency's findings are supported by competent substantial evidence "involves a purely legal question: whether the record contains the necessary quantum of evidence. The circuit court is not permitted to go farther and reweigh that evidence (*e.g.*, where there may be conflicts in the evidence), or to substitute its judgment about what should be done for that of the administrative agency"). If the Court determines the Board observed the essential requirements of the law and there was *any* competent substantial evidence in the record below to support its decision, then the Court must deny the petition for writ of certiorari, even if the Court would have reached a different conclusion. *See City of Ft. Lauderdale v. Multidyne,* 567 So. 2d 955, 957 (Fla. 4th DCA 1990).

Competent evidence is evidence sufficiently relevant and material to the ultimate determination "that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield,* 95 So.2d 912, 916 (Fla.1957). Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred. *Id.; Metropolitan Dade County v. Blumenthal,* 675 So.2d 598, 608 (Fla. 3rd DCA 1995) [20 Fla. L. Weekly D1445c]; *see also Pollard v. Palm Beach County,* 560 So.2d 1358, 1359-60 (Fla. 4th DCA 1990) ("evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.' ").

The Florida Supreme Court expounded on a circuit court's proper application of the competent substantial evidence standard in *Dusseau v. Metropolitan Dade County Bd. of County Com'rs,* 794 So. 2d 1270, 1275-1276 (Fla. 2001) [26 Fla. L. Weekly S329a]:

> We reiterate that the 'competent substantial evidence' standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience-and is inherently unsuited-to sit as a roving 'super agency' with plenary oversight in such matters.
>
> The sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful. The court's task vis-a-vis the third prong of *Vaillant* is simple: The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

In the present case, Petitioners argue the Board departed from the essential requirements of the law and its decision was not supported by competent substantial evidence. Petitioners do not claim they were denied procedural due process. With the foregoing standards in mind, the Court addresses Petitioners' claims.

Discussion

In their petition and reply, Petitioners argue several grounds for relief. Regarding the essential requirements of the law, they contend (1) TCA's application failed to include a "consequences statement" discussing the impact of noise produced by the proposed school upon nearby uses as required by § 124-43(c)(3) of the County's Uniform Development Code ("UDC"), (2) no noise study was prepared by TCA, (3) a special exception stipulation that activities on TCA's property must comply with limits set by the County's noise ordinance is unlawful or unenforceable; and (4) a limited cultural assessment survey required by County staff in a pre-application checklist form was not provided by TCA.

Regarding competent substantial evidence, Petitioners argue the record failed to contain competent substantial evidence supporting the Board's findings that (1) TCA's use of the property as a school was adequately buffered to separate noise from nearby uses and (2) special exception criteria relating to traffic and site access were [sic] satisfied because TCA's traffic study had numerous flaws.[1]

Essential requirements of the law

(1) Consequences statement

Requests for special exceptions in unincorporated Sarasota County are governed by the procedures set forth in UDC § 124-43. In support of the claim that TCA's application was insufficient regarding noise impacts from the proposed use, Petitioners cite UDC § 124-43(c)(3):

> ***Application Sufficiency.*** Applications for a Special Exception shall be accompanied by a clear statement and accounting that presents the applicant's purpose for the requested Special Exception. The statement shall include those facts that clarify the need for the Special Exception, the Special Exception application's context, and **the consequences of the Special Exception**. The application shall address how the Special Exception preserves the UDC's consistency with the Comprehensive Plan, and each of the findings within subsection (4) below.

(Emphasis added). Petitioners contend a sufficient special exception application requires a "consequences statement" that discusses the loudness, magnitude, or scope of impact of noise upon neighboring uses. Petitioners recognize "consequences" is not a defined term under the UDC and rely upon the common Merriam Webster Dictionary definition, "something produced by a cause or necessarily following from a set of conditions", to argue the lack of a consequences statement renders TCA's application insufficient and the Board's approval a departure from the essential requirements of the law.

Respondents respond that an applicant need only provide sufficient information that noise will not be injurious to the neighborhood or adjoining properties to show the consequences of the special exception. They argue this information can come from the application materials, aerial photographs, and the development concept plan that show the location of potential noise sources in relation to vegetation and structures on the Property and neighboring properties. Respondents contend the application and record contain sufficient information regarding the buffering of noise and stipulations addressing potential noise impacts caused by the special exception.

The determination of this claim turns on whether the Board applied the correct law in evaluating TCA's request for a special exception. In this instance, the correct law is the procedure set forth in UDC § 124-43. The record shows TCA used the application format described in

§ 124-43 and directed the narrative of its application to the specific findings listed in § 124-43(d)(1) that must be met as required by § 124-43(2)(a). Regarding buffering, § 124-43(d)(l)e. provides "[t]he proposed use must be adequately buffered to effectively separate traffic, visual impact and noise from existing or intended nearby uses." In response, TCA's application states that the residential development to the south, Heritage Oaks, is separated from the Property by a large existing County drainage right-of-way and dense vegetation and adds that to address noise impacts TCA is proffering stipulations regarding hours of use, lighting, and amplification for school and sporting events. Aerial photographs and the development concept plan submitted as part of the application depict the location of existing and proposed structures as well as the Property's buffering vegetation.

Petitioners ascribe undue significance to the term "consequences" within UDC § 124-43(c)(3). Applying the common definition of the term, the overall application required by the UDC is, in a manner of speaking, a statement of "consequences' in that the potential effects of a proposed special exception use are considered from multiple perspectives (e.g., noise, traffic, utilities, stormwater, and fire safety). In the present case, concerns over potential noise and traffic consequences appear most prominent. Construing UDC § 124-43 as requiring a specific "consequences statement" exalts form over substance. The Board applied the correct law. The Court finds this claim is without merit.

(2) Noise study

As part of their argument that the Board departed from the essential requirements of the law by not requiring TCA to present information on the noise consequences of the proposed use, Petitioners assert that. TCA did not prepare and submit a noise study. Respondents argue that no such requirement appears in the UDC's special exception criteria.

The law applied to special exception applications, UDC § 124-43, does not require preparation and submission of a noise study. The Court finds this claim is without merit.

(3) Noise stipulations

Petitioners allege the Board departed from the essential requirements of the law when it approved TCA's special exception based in part on proffered stipulations relating to noise mitigation that are unlawful or unenforceable. In support, Petitioners cite stipulations 3 and 4 contained in Resolution 2023-156:

> 3. Outdoor announcements or bell systems shall not be permitted on the school campus with the exception of a bell announcing the start and end of the school day. This does not prohibit the use of an outdoor public address (PA) system for sporting events associated with the athletic fields provided the PA system does not exceed the allowable decibels at the property line consistent with the Sarasota County Noise Ordinance.
>
> 4. Outdoor activities shall not be permitted after 10 pm and the athletic filed lighting shall be turned off by 10 pm.

Petitioners note, however, that sounds from school functions are specifically exempted from the maximum decibel limits set by the County's noise ordinance, which provides an exemption for sounds produced by "[l]awful noncommercial public gatherings including, but not limited to, parades, festivals, sporting events, and school functions. This shall also include nonamplified crowd sounds resulting from such public gatherings." UDC § 54-118(d)(4). Petitioners argue the stipulations are unlawful or unenforceable since the Board cannot authorize a stipulation that conflicts with an existing ordinance.

Respondents respond the stipulations are lawful and enforceable because TCA is voluntarily agreeing to apply the decibel level standard as a means of mitigating noise impacts and the stipulations do not otherwise implicate the noise ordinance.

The UDC requires a special exception applicant to demonstrate, among other things, that the special exception "will not be injurious to the neighborhood or to adjoining properties" and the proposed use is adequately buffered to effectively separate noise impacts from existing or intended nearby uses. UDC §§ 124-43(c)(2) & (d)(1)e. The UDC recognizes that the Board takes final action on special exception applications and after a public hearing shall either approve, approve with conditions or stipulations, or deny the application. UDC § 124-43(7). The decision of the Board is rendered through a resolution filed with the Clerk to the Board. If the application is approved with stipulations, the stipulations are recorded in the deed records of the County and become binding upon the applicant and any successors in interest. UDC §§ 124-43(c)(7)d. & (d)(3)b. Violations of restrictions, stipulations, conditions, or safeguards contained in a special exception approved by the Board constitute a violation of the UDC and shall be enforced as set forth in UDC Article 16. UDC § 124-43(d)(2). In turn, Article 16 (UDC §§ 124-290-295) provides the County a range of remedies in response to an applicant's violation of an approved stipulation, including civil code enforcement with fines, injunctive relief, and criminal proceedings.

The two stipulations at issue were proffered by TCA based on input received from the neighborhood workshop held February 6, 2023 (App. 77). Through portions of the stipulations, TCA agrees to limit noise sources in ways that it would not otherwise be required to do under the County's noise ordinance (UDC § 54-118). Regarding stipulation 3, the first sentence prohibits outdoor announcements or bell systems on the school campus with the exception of a bell announcing the start and end of the school day. As the twice a day bell does not relate to noncommercial public gatherings, the exemption under UDC § 54-118(d)(4) is inapplicable. Arguably, an outdoor public address (PA) system for sporting events is exempt because it relates to a noncommercial public gathering. However, TCA agrees to limit the decibel level of the PA system as measured at the property line. The objective standard used to set the maximum decibel level is derived from the noise ordinance. In stipulation 4, TCA agrees to end outdoor activities at 10:00 pm. This voluntary limitation does not implicate the noise ordinance.

Contrary to Petitioners' assertion, the Board did not engage in an unauthorized exercise of legislative power by accepting these voluntary stipulations and incorporating them into Resolution 2023-156. Instead, the Board exercised its discretion under special exception procedures to limit the approved special exception for the purpose of noise mitigation. The stipulations do not conflict with the noise ordinance and are subject to enforcement should TCA fail to comply with them in the future. The Court concludes the Board did not depart from the essential requirements of the law regarding the noise stipulations.

(4) Cultural assessment survey

Petitioners argue the Board departed from the essential requirements of the law by approving the special exception application without requiring TCA to prepare and submit a limited cultural assessment survey under § 66-76(b), Sarasota County Code. In support, Petitioners note that in a pre-application review form the County's Historical Resources staff stated that a recorded archeological site lies adjacent to the east of the Property. Because the potential significance of the Property was indeterminate, staff commented that TCA should prepare and submit a limited cultural assessment survey. Because the record does not contain the required cultural assessment survey Petitioners contend the Board failed to follow the correct law in approving the special exception.

Respondents respond that the lack of a cultural assessment survey was not raised as an issue or objection before the Board and is therefore not preserved for review by the Court. Further, TCA notes

the written County staff report provided for the Board's hearing states under the heading "Historical Resources" that, "Staff has reviewed and has no comment." Petitioners reply that the case authorities cited by Respondents are distinguishable since they pertain to *applicants'* failure to preserve their rights and Petitioners did not have a meaningful opportunity to raise the cultural assessment survey until after the Board hearing was concluded. Finally, Petitioners contend that even if they failed to preserve the cultural assessment survey issue for review, the Court should use its inherent authority to correct fundamental errors to review this departure from the essential requirements of the law.

The "rule of preservation" prohibits a reviewing court from considering new arguments for the first time on certiorari that were not raised and considered before the lower tribunal (in this case, the Board). The rule applies to both the arguments of applicants and their opponents. *See Fort Lauderdale Board of Adjustment v. Nash,* 425 So. 2d 578, 579 (Fla. 4th DCA 1983) (reversing circuit court because it considered argument first raised by applicant in certiorari proceeding but not previously argued to Board of Adjustment during quasi-judicial hearing); *First City Savings Corporation of Texas v. S & B Partners,* 548 So. 2d 1156(Fla. 5th DCA 1989) (circuit court on certiorari review erred by considering issues not raised by opponents before the county commission); *Miromar Development Corporation, et al. v. Lee County,* 2016 WL 4464076 (Fla. 20th Cir. Ct., June 30, 2016) (opponent's claim in certiorari proceeding challenging approval of rezoning not considered by circuit court because claim was not first presented before county commission).

In the present case, review of the record confirms that the cultural assessment survey issue was not raised during the Board hearing. Nevertheless, unpreserved issues are reviewed for fundamental error. *Terant v. Beltway Capital, LLC,* 147 So. 3d 1103, 1105 (Fla. 3rd DCA 2014) [39 Fla. L. Weekly D2086a]. "A fundamental error is one that 'involves an egregious deprivation of a constitutional right,' or one that 'goes to the foundation of the case or . . . the merits of the cause of action.' " *Interest of K.B.,* 371 So. 3d 975, 983 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D1802g] (quoting *Schroeder v. MTGLQ Inves., L.P.,* 290 So. 3d 93, 97 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D339a]). Error that goes to the foundation of a case or cause of action occurs at trial when the court permits a party to bring a cause of action that does not exist or is not available to the party. *See I.A. v. H.H.,* 710 So. 2d 162 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1063b] (although issue was not presented to trial court or argued on appeal, appellate court reversed judgment of paternity where it concluded biological father had no cause of action to establish paternity after the putative father married the child's mother); *See also Fleischer v. Fleischer,* 586 So. 2d 1253, 1254 (Fla. 4th DCA 1991) (" 'Fundamental' error. . . refers to error that goes to the very heart of the judicial process, not to mistakes as to which arguably correct law or rule to apply, or as to the application of such a rule of law to the facts in the case").

The Board's approval of TCA's application in the purported absence of the cultural assessment survey does not constitute fundamental error reviewable by this Court. No egregious deprivation of a constitutional right has occurred nor does the claimed error go to the heart of the judicial process before the Board. The record shows that County Historical Resources staff noted the need for a cultural assessment survey in the pre-application checklist form prepared for the pre-application meeting of December 17, 2020 (App. 158 & 161). The pre-application checklist was included as part of TCA's application submitted March 15, 2023 (App. 47-169). Later, when the staff report for the July 12, 2023, board hearing was prepared, Historical Resources commented that, "Staff has reviewed and has no comment" (App. 42). Thus, the record before the Board showed no continuing concern relating to historical resources.[2] Under these circumstances, the Board committed no error relating to the cultural assessment survey, let alone a fundamental one. Because the issue was not preserved for review, the Court cannot address the merits of the cultural assessment survey issue. Accordingly, this claim is dismissed.

Competent substantial evidence

(1) Noise buffering

Petitioners argue the record is devoid of any competent substantial evidence to support the requirement of UDC § 124-43(d)(1)e. that the "proposed use must be adequately buffered to effectively separate . . .noise from existing or intended nearby uses." They contend TCA's and County staff's discussion of noise impacts and buffering were conclusory and not factually based.

Respondents respond that the record contains sufficiently relevant and material evidence that a reasonable mind would accept as adequate to support the conclusion that TCA's proposed use is adequately buffered to separate noise from nearby uses. They argue this evidence appears in TCA's application, aerial photographs depicting the Property stipulations, and witness testimony.

As an initial matter, the Court observes that the UDC does not define the phrase, "adequately buffered to effectively separate" or offer objective standards of noise impacts to guide the Board's deliberation. Further, under the rubric of *Dusseau,* evidence contrary to the Board's decision is outside the scope of the Court's inquiry, for this Court above all cannot reweigh the "pros and cons" of conflicting evidence. If there was *any* competent substantial evidence in the record below to support the Board's decision, then the Court must deny the petition for writ of certiorari, even if the Court would have reached a different conclusion. *City of Ft. Lauderdale v. Multidyne,* 567 So. 2d at 957.

Upon careful review, the Court finds the record contains substantial competent evidence to support the Board's conclusion that TCA's proposed use is adequately buffered to effectively separate noise from existing or intended nearby uses. This competent substantial evidence appears in several places. First, TCA's application (App. 47-169) states: a) "The residential development to the south is separated by a large existing Sarasota County Drainage right-of-way and dense vegetation"; b) "To ensure this compatibility [buffering] the applicant is proffering stipulations regarding hours of use, lighting, and amplification for school and sporting events"; c) "The existing perimeter berms and landscape buffers will remain in place. Any new landscape buffers required will adhere to UDC Section 124-122. A 10-foot arterial street buffer will be provided along the Bee Ridge Road frontage"; and d) "The existing tree canopy around the perimeter of the site is intended to remain to provide screening and buffering, particularly along the east property line."

Second, the County staff report prepared for the July 12, 2023, Board hearing provides: a) "Buffers are utilized as one method to increase or assure compatibility between properties. The buffering includes both opacity (screening by vegetation or a fence/wall), as well as buffer width (an area within which the landscaping and fence, if proposed, is to be placed). The UDC requires buffering between two properties based upon the existing zone district of the abutting parcel and proposed zone district. The subject property is zoned OUE-1 (Open Use Estate, 1 unit/5 acres) and must meet the zone district's development and setback standards, and adjacent boundary buffer opacity standards. The OUE-1 district requires a perimeter setback of 50′ and when adjacent to developed RSF zoned properties, must have a 30% opacity barrier. The property will also have a ten-foot arterial buffer along Fruitville (sic) Road. The nearest residential dwelling unit to the Church [presently on the Property] is approximately 355 feet north and located within the Hammocks subdivision. To the south is a Sarasota County property drainage canal for the area and (sic)

creates a two-hundred-foot separation between the subject property and the Heritage oaks Golf and Country Club and The Knolls subdivisions to the south. The nearest residential dwelling unit from the existing church facilities is approximately 796 feet southwest located within the Knolls subdivision"; b) lists and recommends inclusion of stipulations three and four relating to noise mitigation; c) "The proposed project's use will be mitigated through the required buffer and setbacks"; d) an aerial photograph depicting the location of buildings presently on the Property, wooded perimeters of the Property, and the location of adjacent residences; and e) a drawing of the proposed binding development concept plan depicting the location of proposed improvements in relation to adjacent residences.

Finally, testimonial evidence was presented at the July 12, 2023, hearing by TCA's planner, Bo Medred, regarding the location of the Property and the proposed buildings in relation to surrounding uses and a forested wetland that provides screening for the side along Bee Ridge Road. He also discussed the County drainage right-of-way to the south with "natural buffering of mature trees" that separates the Property from Heritage Oaks (Tr. 8, 10-11, 18).

(2) Traffic and site access

Relating to the impact of the special exception upon traffic and access to the Property, Petitioners argue the record before the Board fails to contain competent substantial evidence satisfying criteria provided in UDC § 124-43(d)(1)d., e., & g.:

> d. The proposed use, singularly or in combination with other Special Exceptions, must not be detrimental to the health, safety, morals, order, comfort, convenience, or appearance of the neighborhood or other adjacent uses by reason of any one or more of the following: the number, area, location, height, orientation, intensity or relation to the neighborhood or other adjacent uses;
>
> e. The proposed use must be adequately buffered to effectively separate traffic, visual impact and noise from existing or intended nearby uses;
>
> . . .
>
> g. The ingress and egress to the subject parcel and internal circulation must not adversely affect traffic flow, safety or control;. . .

Although TCA submitted a traffic operational analysis report prepared by Stantec Consulting Services, Inc. ("Stantec Report", App. 79-139), Petitioners contend the report contained numerous flaws which cause it to fail to meet the standard for competent substantial evidence. Petitioners claim the flaws are described in a letter prepared by their traffic engineering expert, Alex Roark Engineering ("Roark Report", App. 1402-1405) and cite *First Baptist Church of Perrine v. Miami-Dade County,* 768 So. 2d 1114 (Fla. 3rd DCA 2000) [25 Fla. L. Weekly D1547a] in support of this contention. Because of this lack of competent substantial evidence, Petitioners argue TCA failed to discuss the consequences of the special exception upon the surrounding neighborhoods in terms of traffic and the Board's decision should be quashed.

Respondents respond that the assumptions used in the Stantec Report are reasonable and consistent with the manual of the Institute of Transportation Engineers (ITE) and Stantec's methodology was approved in advance by County Transportation staff. Further, they contend Petitioner's argument challenges the credibility of the Stantec Report and impermissibly invites the Court to reweigh the evidence before the Board.

In *First Baptist Church of Perrine,* a church applied for special exceptions and variances to permit expansion of a kindergarten through sixth grade school on its property to add seventh and eighth grade, increasing enrollment from 500 to 650 students. Before a zoning board the church presented testimony and studies that concluded only a minimal potential traffic congestion increase could be expected in the neighborhood surrounding the church if the expansion was permitted. Neighbors opposing the application testified the church's traffic study was invalid because its projections of future neighborhood traffic congestion were based on figures which took into account less than 100% of the number of additional students permitted at the school under the application and because it showed that the most frequently used ingress and egress from the school was by way of a non-arterial neighborhood street, rather than the county arterial street which bounded the church property. The zoning board denied the application. On first-tier certiorari review, the circuit court summarily denied certiorari. On second-tier certiorari review, the Third District Court of Appeal denied certiorari, reasoning the cited flaws in the traffic study resulted in the church's failure to meet County criteria which require consideration of the neighborhood traffic impact arising from a requested special exception. *First Baptist Church of Perrine* at 1115.

Upon review of the record, the Court finds *First Baptist Church of Perrine* distinguishable and thus not controlling in the present case. Before conducting its operational analysis, Stantec submitted its proposed methodology to County Transportation staff for approval, which was received on February 24, 2023 (App. 102-106). There is no indication in *First Baptist Church of Perrine* whether the methodology of the church's traffic study was approved in advance by the county. Further, the Stantec Report, unlike the traffic study in *First Baptist Church of Perrine,* did take into account the effect of 100% of the maximum number of students permitted at the school (*i.e.,* 1,310) under the application (App. 86). The present facts are further distinguished from *First Baptist Church of Perrine* because ingress and egress from the Property is only by way of direct access to Bee Ridge Road, an arterial roadway and not a neighborhood street. The Stantec Report does not suffer from the type of flaws discussed in *First Baptist Church of Perrine.*

From a broader perspective, the Court is concerned that an exercise in evaluating the reliability of Stantec's methodology and essentially excluding the report based on perceived flaws falls very near, if not over, the line that bars a reviewing court from reweighing or considering the credibility of the evidence presented to the lower tribunal. *Lee County v. Sunbelt Equities, II, Ltd. Partnership.* Here, the Board was presented with both the Stantec Report and the Roark Report and found the criteria of UDC § 124-43(d)(1)d., e., & g. were satisfied. The Court cannot substitute its own judgment for that of the Board.

The record of the Board hearing also contains ample competent substantial evidence regarding the consequences to traffic flow, safety or control from TCA's proposed use of the Property. Testimony was presented by Frank Domingo of Stantec (App. 12-15, 101-103) and Paula Wiggins, the County's Transportation Planning Manager (App. 21-27).

Mr. Domingo testified that analysis of a special exception's effect on roadway level of service is no longer a consideration under County procedures. He discussed the on-site queuing of vehicles during student drop-off and pick-up far exceeds the County's requirements for both phases of the TCA campus. In rebuttal, Mr. Domingo testified that the ITE manual supported Stantec's methodology of evaluating the peak hour traffic of the generator (*i.e.,* the Property) rather than the peak hour of the adjacent street as advocated by the Roark Report.

Paula Wiggins testified that transportation analysis of concurrency and level of service were eliminated by ordinance from the Board's consideration when evaluating a special exception application. Transportation staff does review safety and operational issues that may arise from proposed special exceptions and require design stipulations to address those concerns. In the present case, stipulations five through ten incorporated into Resolution 2023-156 set limitations and requirements for vehicle ingress and egress from the property during both phases of the school's operation, including extension of

the right-turn lane into the Property for eastbound vehicles and construction of either a roundabout or a traffic signal at the Property entrance, all at TCA's expense. The Court concludes competent substantial evidence in the record supports the Board's findings regarding the application's effect upon traffic flow, safety or control as they impact neighboring uses or intended uses.

Based on the foregoing, it is thereupon

ORDERED that the petition for writ of certiorari is **DENIED**.

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[1]Respondents' responses to these claims are discussed below.

[2]In their reply and supplemental appendix, Petitioners note the discovery made after filing their petition that TCA completed the cultural assessment survey in May 2023, but County staff did not receive or review it until after the Board hearing. As the Court's review is limited to the record before the Board, this supplemental information is not considered.

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Volume 33, Number 4
August 29, 2025
Cite as 33 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Paternity—Child custody—Parental responsibility and parenting plan—Sole parental responsibility—Best interests of child—Abandonment by parent—Father abandoned child when child was a toddler by failing to establish or maintain substantial and positive relationship and failing to make any significant contribution to child's care and maintenance—Family ordered to comply with parenting plan that does not include shared parental responsibility between mother and father—Reunification with father is not viable option, and there will be no time-sharing—It is in child's best interests to remain with mother and not return to El Salvador where father resides

YESICA ELIZABETH MERINO RIVAS, Petitioner/Mother, v. DIEGO EDGARDO AVALOS SANCHEZ, Respondent/Father. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 24-000860-DRA. Family Division. April 15, 2025. David M. Frank, Judge. Counsel: Erika Britt Nyborg-Burch, Public Interest Law Center, Florida State University College of Law, Tallahassee, for Plaintiff. Diego Edgardo Avalos Sanchez, Pro se, Respondent/Father.

FINAL JUDGMENT OF PATERNITY, PARENTAL RESPONSIBILITY, AND BEST INTEREST ORDER

This case came before this Court for a hearing on a Verified Petition to Determine Paternity and for Related Relief, under Chapter 742, Florida Statutes. The Court, having reviewed the file and heard the testimony, makes the following findings of fact and conclusions of law:

SECTION I. JURISDICTION:

1. This Court is authorized and has jurisdiction to determine paternity and parental responsibility and to establish a parenting plan regarding the Minor Child identified in paragraph five, below. Chapter 742, Florida Statutes grants this Court jurisdiction to make such findings upon the petition of "[a]ny woman who is pregnant or has a child, any man who has reason to believe that he is the father of a child, or any child . . . when paternity has not been established by law or otherwise." § 742.011, Fla. Stat. Pursuant to that same provision, a parent may also "request a determination of parental responsibility" as well as "the creation of a parenting plan and time-sharing schedule pursuant to chapter 61." *Id.* Petitioner has filed a Petition asking this Court to make such findings. *See In re.* Amended Petition, *Merino Rivas v. Avalos Sanchez,* No. 24-000860-DRA (Fla. Cir. Ct., 2nd Jud. Cir., Gadsden County) [hereinafter *In re* Petition].

2. In entering an order regarding respective parental responsibility, time-sharing or visitation, and a parenting plan, the Court determines the custody arrangement that furthers the best interest of minor children based on the evidence before it. *See* §61.046(14)(c), Fla. Stat. (". . . a judgment or order incorporating a parenting plan under this part is a child custody determination. . ."). *See also id.* §61.046(18) (defining "sole parental responsibility" as "a court-ordered relationship in which one parent makes the decisions regarding the minor child" where Florida no longer uses the term "sole custody"). Once the Court has entered such an order, the Court retains jurisdiction to enter further orders as circumstances of the parties may in justice and equity require. *See id.* §742.06.

3. As a state court that adjudicates paternity, parental responsibility, and parenting plans, this Court has jurisdiction to make findings of parental abandonment under Chapter 39, Florida Statutes. *See* § 61.13(2)(c)(2)(C), Fla. Stat. (requiring court to order sole parental responsibility when in the best interests of the minor child, including where one parent's "abandonment" renders shared parental responsibility detrimental to the child); *see also id.* § 39.01(1) (defining abandonment under Florida law).

4. The purpose of this Order is to define the relationship between Petitioner, Respondent, and the Minor Child, such that the Petitioner is awarded sole parental responsibility for the Minor Child, and the best interests of the Minor Child are protected.

5. The minor child at issue in this matter is:

Name: C.A.A.M. [Editor's note: Child's name in Initial Caps]
Date of Birth: [Editor's note: Date of birth redacted]
Current Address: [Editor's note: Address redacted] Quincy, Florida 32351

6. Respondent Diego Edgardo Avalos Sanchez conceded that this Court has jurisdiction over the instant Petition. *See* Acceptance and Waiver of Service of Process of and Answer to *In re.* Petition, *Merino Rivas v. Avalos Sanchez,* No. 24-000860-DRA (Fla. Cir. Ct., 2nd Jud. Cir., Gadsden County) [hereinafter Avalos Answer].

SECTION II. FINDINGS

7. Petitioner and Respondent had a relationship as partners for approximately five years, from 2006 until 2011. Pet'r's Aff. ¶¶ 4-5. During that time, they conceived the Minor Child, who was born on October 14, 2010, in San Salvador, El Salvador. *Id.* ¶ 2; *In re* Petition ¶ 15; Avalos's Answer ¶ 3. While Petitioner and Respondent were not married, they are both identified as the Minor Child's parents on her birth certificate. The Minor Child's birth certificate is admitted to the record as Exhibit A.

8. When the Minor Child was first born, Petitioner and Respondent lived together in Respondent's mother's home. Pet'r's Aff. ¶ 5. During that time, the Respondent committed acts of abuse against the Petitioner. *Id.* Because of that abuse, Petitioner and the Minor Child moved to the home where Petitioner was raised with her maternal grandmother and grandfather, about five minutes by foot from where Respondent lived. *Id.* ¶¶ 5-7. Beginning around 2011, Petitioner raised the Minor Child in this home with the Minor Child's great grandparents and maternal aunts and uncle. Pet'r's Aff. ¶ 7. *In re* Petition ¶ 17. *See* Avalos Answer ¶ 3 (admitting facts in Petition as to Respondent's conduct).

9. Ever since the Petitioner and the Minor Child moved in with Petitioner's grandparents around 2011, Petitioner and her family have been the sole financial supporters of the Minor Child. Pet'r's Aff. ¶ 10. Respondent has been employed at a supermarket during this time, but he has not contributed any of his income to the Minor Child's care. *Id.*; *In re* Petition ¶ 18; Avalos Answer ¶ 3.

10. When Petitioner and Respondent first separated, Respondent would visit Petitioner and the Minor Child one or two times each month. *In re* Petition ¶ 17. Each visit lasted for a few minutes. *Id.*; Pet'r's Aff. ¶ 8. Petitioner believes that Respondent's visits were a tactic to manipulate her into dating him again. *Id.* ¶ 9. Petitioner recalls being upset by the Respondent's lack of care for the Minor Child, including when Respondent kicked the Minor Child with his foot while she was learning to crawl. *Id.* ¶ 8. In public, Respondent also denied that the Minor Child was his daughter. *Id.* He has since admitted in these proceedings that he is the biological father of the Minor Child. *See* Avalos Answer ¶ 3.

11. As time passed, Respondent visited Petitioner and the Minor Child less and less frequently. Pet'r's Aff. ¶ 9. By 2015, Respondent had stopped coming to visit the Minor Child at the house where she lived with her mother, her great-grandparents, and her aunt and uncle. *Id.*; *In re* Petition ¶ 17. He also did not try to contact the Minor Child through Petitioner, and even blocked Petitioner's phone number when he found out that Petitioner was dating someone else years after she separated from Respondent. Pet'r's Aff. ¶¶ 9, 11.

12. Around 2016, Petitioner and the Minor Child fled El Salvador for the United States. *Id.* ¶ 12. There, Petitioner met her current

husband, who is Minor Child's stepfather. *Id.* ¶ 13. In 2019, the family moved to Quincy, Florida, to be closer to Petitioner's husband's family. *Id.* Petitioner and her husband were married in 2021. *Id.*

13. In Quincy, the Minor Child lives with her mother, her stepfather, and her younger sister, near her grandmother, her aunts, her step-grandmother, and her step-aunts. Pet'r's Aff. ¶¶ 13, 22. The Minor Child considers her stepfather to be her father, and she has no memories or contact with Respondent, her biological father. *Id.* ¶ 14.

14. Since moving to Quincy, Petitioner enrolled the Minor Child in James Shanks Middle School. *Id.* ¶ 16; *In re* Petition ¶ 22. There, the Minor Child is excelling in her studies and pursuing her current dreams of becoming an engineer. *Id.* Petitioner provides a safe home environment and attends to the Minor Child's needs so the Minor Child can focus on her studies and channel her passions for science and art. *Id.* ¶¶ 16, 19. At home, Petitioner and her husband support the Minor Child's other dream of becoming a chef and foster opportunities for her to engage with her art projects. Pet'r's Aff. ¶¶ 16, 17; *In re* Petition ¶ 22.

15. Petitioner has also invested in the Minor Child's spiritual growth. Petitioner and her family attend St. Thomas the Apostle in Quincy, Florida, where the Minor Child is studying catechism. Pet'r's Aff. ¶ 17. Petitioner has observed how the Minor Child's faith has helped her through challenges. *Id.*

16. When Minor Child went through one such challenging period, Petitioner identified her daughter's struggles and sought help. *In re* Petition ¶ 23; Pet'r's Aff. ¶ 18. Since the Minor Child was diagnosed with adolescent depression, Petitioner has arranged for therapy and psychiatry appointments. *Id.* She also plans activities to bring distractions and joy to the Minor Child in accordance with the therapist's recommendations. *Id.* Petitioner reports that the Minor Child's treatment team is hopeful for the Minor Child's prognosis. *Id.* She also reports the Minor Child to be as a caring and sensitive teen and attentive big sister, who is looking forward to the arrival of a baby sister soon. Pet'r's Aff. ¶¶ 15, 17, 18.

17. Petitioner credibly expressed reasonable concerns about what would happen to the Minor Child in a medical emergency or a difficult situation at school. *Id.* ¶ 20. Given Respondent's abandonment, she worries that the Minor Child is at risk of harm should a hospital or educational institution demand both parents' consent. *Id.* Respondent does not communicate with Petitioner, and even if he responded to her communication, Respondent's abandonment makes him ill-suited to make decisions in the best interests of the Minor Child. *Id.* The Minor Child is too young to remember any role Respondent played in the first year of her life and she considers her mother and stepfather to be her parents and caretakers. *Id.* ¶¶ 11, 14. Petitioner also worries that the Minor Child will miss out on opportunities at school or in her extracurriculars because of a presumed shared responsibility between Petitioner and the Minor Child's biological father, who has not fulfilled his parental obligations for over a decade. *Id.* ¶ 21.

18. Petitioner's maternal grandfather who raised her in El Salvador passed away about a year ago. Pet'r's Aff. ¶ 22. Her only family remaining in El Salvador is her grandmother, the Minor Child's great-grandmother. *Id.*

19. Petitioner also submitted record evidence regarding the risk of gender-based violence and discrimination that her daughter could face as a young woman in El Salvador. That evidence is admitted to the record as Exhibit B.

SECTION III. PATERNITY

20. The Court finds that Petitioner Yesica Elizabeth Merino Rivas is the natural and biological mother of the Minor Child.

21. The Court finds that Respondent Diego Edgardo Avalos Sanchez is the natural and biological father of the Minor Child, based on the Minor Child's birth certificate, Petitioner's testimony, and Respondent's admissions. Respondent signed a Waiver of Service of Process and an Answer wherein he concedes this Court's jurisdiction over the Petition, and admits the allegations set forth therein with respect to his paternity and his acts and omissions towards the Minor Child. *See* Avalos Answer ¶ 3.

SECTION IV. PARENTAL RESPONSIBILITY AND PARENTING PLAN

22. No Court in the United States or El Salvador has granted legal custody of the Minor Child to an adult or relative, including since her arrival in the United States. No adult or relative, apart from the Petitioner, has initiated proceedings to obtain legal custody of the Minor Child, including since her arrival to the United States.

23. Having no prior, legally compelled parental agreement between the Petitioner and the Respondent for parental responsibility of the Minor Child, it is in the Minor Child's best interests that this Court award sole parental responsibility to the Petitioner. While public policy generally favors shared parental responsibility, Florida law requires the Court to "order sole parental responsibility for a minor child to one parent, with or without time-sharing with the other parent if it is in the best interests of the minor child." § 61.13 (2)(c)(5), Fla. Stat. In determining whether shared parental responsibility would be detrimental to the child and whether the child's best interest instead favor sole custody for one parent, the court considers whether the minor child is a victim of parental abuse, abandonment, or neglect, as those terms are defined in Chapter 39, along with any factors that bear on the detriment of shared parental responsibility. *Id.* § 61.13 (2)(c)(2)(C), (D).

24. This Court finds that Respondent abandoned the Minor Child when the Minor Child was a toddler. Section 39.01(1), defines abandonment as "a situation in which the parent or legal custodian of a child . . . while being able, has [1] made no *significant contribution* to the child's care and maintenance or [2] has failed to establish or maintain a *substantial and positive relationship* with the child, or both." § 39.01(1), Fla. Stat. (emphasis added). Failure to "establish or maintain a substantial and positive relationship" includes failure to maintain "frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and the exercise of parental rights and responsibilities." *Id.* While the forms of abandonment are disjunctive, and proof of only one is required, the Court finds the Respondent has abandoned the Minor Child under either prong.

25. In support of this conclusion as to Respondent's abandonment, this Court finds that Respondent has not made contributions to the Minor Child's care and maintenance since the Petitioner moved out of the Respondent's mother's home to escape Respondent's mistreatment when the Minor Child was about a year old. *In re.* Petition ¶ 17; Pet'r's Aff. ¶¶ 6, 10. While the Respondent sporadically visited Petitioner's home for a few minutes each month over the course of a few years, he did not help Petitioner to care for and maintain the Minor Child. Pet'r's Aff. ¶¶ 8, 10. At that time, Respondent was employed at a supermarket, and so had the financial means to contribute in some way to the Minor Child's care. *In re.* Petition ¶ 18; Avalos Answer ¶ 3; Pet'r's Aff. ¶ 10. In the absence of paternal support, Petitioner and her family have ensured that the Minor Child grows up in a safe and supportive environment where her mother and her mother's family attend to her needs with care. Pet'r's Aff. ¶¶ 7, 14, 16-19. Because the Respondent has failed to provide for the Minor Child's basic needs in any sustaining, meaningful way, he has abandoned the Minor Child. *See F.L.C. v. G.C.,* 24 So. 3d 669, 670-71 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D2593a] ("[T]he trial court's determination that the father had abandoned the children was amply

supported by the record. The evidence supported the trial court's findings that the father 1) had no meaningful relationship with the children, 2) had made less than marginal efforts to communicate with his sons, and 3) had failed to provide adequate support."); *see also in re Y.V.,* 160 So. 3d 576, 579 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D849a] (holding that conduct that occurred outside of the United States satisfied the statutory elements for abandonment under Chapter 39).

26. Respondent also has not maintained any relationship with the Minor Child at least since around 2015. After Petitioner moved with her one-year-old daughter to escape domestic violence, Respondent made minimal efforts to have contact with the Minor Child. Pet'r's Aff. ¶¶ 6-8. Even when he was physically present with the Minor Child, he did not maintain a positive relationship with the Minor Child. *Id.* ¶ 8. He also denied the Minor Child was his daughter, despite recognition of paternity on her birth certificate and his admission of paternity in these proceedings. *Id.*; *In re.* Petition, Ex. A; Avalos Answer ¶ 3. When the Minor Child was around four or five years old, Respondent ceased having any contact—and thus any relationship—with her. Pet'r's Aff. ¶ 9. That Respondent had the means to maintain a relationship with the Minor Child is evidenced by Petitioner's continued residence at her grandmother's house in El Salvador for many months after Respondent last visited the Minor Child, Petitioner's maintenance of her Salvadoran phone number in the United States on WhatsApp, and Respondent's mother and his aunt's continued ability to contact the Minor Child over Facebook. *Id.* ¶ 11.

27. Respondent's decision not to exercise his parental rights and responsibilities also supports a finding of abandonment. Respondent has not contributed to the Minor Child's daily care, shelter, food, clothing, or educational programming since around 2011. *In re.* Petition ¶¶ 17-18; Avalos Answer ¶ 3; Pet'r's Aff. ¶¶ 7, 9-10. As of March 2025, Respondent resides in San Salvador, El Salvador. *See* Avalos Answer, pg. 2.

28. Because the Respondent abandoned the Minor Child, this Court awards Petitioner, Yesica Elizabeth Merino Rivas, sole parental responsibility of the Child until the Minor Child reaches the age of majority, subject to this Court's continued jurisdiction. *See* §742.06, Fla. Stat.

29. Because Respondent abandoned the Minor Child, it is also in the best interests of the Minor Child that the Court order the family to comply with a Parenting Plan that does not include sharing of parental responsibility between Petitioner and Respondent. This Court has the broad authority to act in furtherance of the best interests of the child in determining respective custody over the child. Some of the factors the Court may consider when making this best interest determination regarding care of a minor child include "[t]he demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent," "[t]he demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities," [t]he length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity," the "anticipated division of parental responsibilities," and "developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs," "[t]he particular parenting tasks customarily performed by each parent," and evidence of "domestic violence" or "child abandonment" by one parent, §§ 61.13(3)(b), (c), (d), (m), (p), (s), Fla. Stat.

30. The Minor Child currently lives with and is cared for by the Petitioner and the Minor Child's stepfather. *In re.* Petition ¶ 16; Pet'r's Aff. ¶¶ 13, 14, 22. Petitioner and her husband provide the Minor Child with a safe, stable home in Quincy, where the Minor Child has grown into a creative, hardworking, and caring teenager. *In re.* Petition ¶¶ 16, 21; Pet'r's Aff. ¶¶ 14-19. Petitioner enrolled the Minor Child in James Shanks Middle School in Quincy, and the Minor Child is excelling at her studies. *In re.* Petition ¶ 22; *id.* Ex. B (recognition received from Gov. DeSantis and former Vice President Harris); Pet'r's Aff. ¶¶ 16. Petitioner has also built a community for the Minor Child at her church, St. Thomas the Apostle, where the Minor Child is studying catechism. Pet'r's Aff. ¶ 17. When the Minor Child began to experience depression, Petitioner took care to find a therapist and psychiatrist for the Minor Child and has involved the whole family in supporting her daughter through her diagnosis and treatment. *Id.* ¶ 18; *In re.* Petition ¶ 23. In Quincy, the Minor Child is surrounded by family—in addition to her mother and stepfather, she lives with her younger sister and has aunts and grandparents who are also invested in her wellbeing. Pet'r's Aff. ¶¶ 13, 14, 22.

31. In addition to these positive factors, additional adverse factors weigh against sharing custody with Respondent. Respondent abandoned the minor child about a decade ago, and before that time, he exposed Minor Child to violence against her mother. Pet'r's Aff. ¶¶ 5-6. Petitioner worries that her daughter could be exposed to further societal violence and discrimination should she live with Respondent in El Salvador. Pet'r's Aff. ¶ 24; Ex. B. Therefore, it is the best interest of the Minor Child that the Court does not award time-sharing with Respondent nor establish a visitation schedule.

32. The parties shall comply with the Parenting Plan which is attached hereto and incorporated herein as Exhibit C.

33. The Petitioner is authorized to make all reasonable and necessary decisions for the Minor Child, including but not limited to:

a) Consenting to all necessary and reasonable medical and dental care for the Minor Child, including nonemergency surgery and psychiatric care;

b) Securing copies of the child's records, held by third parties, that are necessary for the care of the child, including, but not limited to:

i. Medical, dental, and psychiatric records;

ii. Educational records;

iii. Birth certificates and other vital records.

c) Educational services for the Minor Child, including enrolling the Minor Child in school and granting or withholding consent for Minor Child to be tested or placed in special school programs, including exceptional education, and to participate in extracurricular activities; and

d) Taking all other actions necessary for the care and protection of the Child.

34. This award of sole parental responsibility to Petitioner without time-sharing with Respondent will ensure that Petitioner is not impeded in caring for and protecting the Minor Child by Respondent's abandonment of the Minor Child.

SECTION V. REUNIFICATION WITH RESPONDENT IS NOT A VIABLE OPTION

35. The Minor Child cannot be reunified with Respondent because Respondent abandoned the Minor Child when the Minor Child was a baby, and he has not made any attempt to care for the Minor Child in the ensuing decade. *See* § 39.01 (1), Fla. Stat. (defining parental abandonment under Florida law). Abandonment occurs when a parent fails to contribute to the child's care and maintenance despite having the means to do so or fails to maintain a substantial and positive relationship with the child, including by failing to have frequent and regular contact or visitation. *See id.*; *see also* Section IV, *supra* ¶ 24 (discussing disjunctive elements of abandonment under Florida law). Respondent had the financial means to care for the Minor Child, yet he has not contributed financially to the Minor Child's care since Petitioner moved out of the Respondent's mother's home in 2011. *See*

Sections II & IV *supra* ¶¶ 8-9, 25, 27. Respondent also failed to provide nonfinancial forms of care and failed to maintain a positive relationship with the Minor Child, including by denying that the Minor Child was his daughter, withholding love and attention for the short periods that he came to visit Petitioner, and ceasing to visit the Minor Child at all when she was around four or five years old. *See id., supra,* ¶¶ 10-11, 25-27. Petitioner ensured that Respondent could physically locate the Minor Child and that Respondent could contact the Minor Child, including after Petitioner and the Minor Child left El Salvador, but the Respondent did not make any efforts to communicate with the Minor Child. *See id., supra,* ¶¶ 11, 26. Now, a decade after these acts of abandonment, the Minor Child has no memories her biological father and considers her stepfather as her sole paternal figure. *See id., supra,* ¶¶ 13, 17, The Court thus finds that Respondent's abandonment of the Minor Child prevents the Minor Child from being reunified with her biological father, Respondent.

36. The Court's finding that the Minor Child's reunification with her biological father is not a viable option due to abandonment, as defined in Chapter 39, is final until the Child reaches the age of majority and/or until further order from this Court, if any.

SECTION VI. TIME-SHARING WITH MINOR CHILD

37. Respondent shall have no time-sharing with the Minor Child. As set forth in Paragraphs 28 & 29, *supra,* this finding is supported by the Court's determination that Respondent abandoned the Minor Child. It is further supported by Respondent's waiver of participation in these proceedings.

SECTION VII. BEST INTEREST OF THE CHILD TO REMAIN WITH PETITIONER AND NOT RETURN TO EL SALVADOR

38. It is in the Minor Child's best interest that the Petitioner be granted sole parental responsibility of the Minor Child until the Minor Child reaches the age of majority.

39. It is in the Minor Child's best interest to remain with her mother, Petitioner, in the United States. The Minor Child currently lives with and is cared for by Petitioner and the Minor Child's stepfather at her home in Gadsden County, Florida. *See* Section II, *supra* ¶ 13. Petitioner ensures that the Minor Child receives health care, including mental health care, and that she grows up surrounded by supportive family members. *Id.* ¶¶ 13-16. Petitioner supports the Minor Child financially without assistance from Respondent, the Minor Child's biological father. *Id.* ¶9. Petitioner also ensures that the Minor Child's educational, emotional, and spiritual needs are met in her current environment. *Id.* ¶ 14-16. It is thus in the best interest of the Minor Child that Petitioner be awarded sole parental responsibility of the Minor Child without any parental responsibility or time-sharing for the Minor Child's biological father in El Salvador.

40. It would not be in the Minor Child's best interest to return to El Salvador, the country of Respondent's nationality, because Respondent has completely abandoned the Minor Child. *See* Section IV, *supra* ¶ 24-28. Respondent has not lived with or cared for the Minor Child since 2011 and has not maintained any relationship with the Minor Child for about a decade. *See* Sections II & IV, *supra* ¶¶ 10-12, 25-26. The Minor Child has no relationship with Respondent and considers her stepfather as her father. *See* Section IV, *supra* ¶ 17. Should the Minor Child return to El Salvador, Respondent's abandonment would leave the Minor Child without a parent to shelter and care for her.

41. Additionally, a custodial placement in El Salvador would not be in the best interest of the Minor Child, as there is no suitable placement for the Minor Child in El Salvador. The Minor Child's maternal aunts and grandmother are in the United States. *See* Section II, *supra* ¶ 13. The only family member with whom the Minor Child maintains a relationship who remains in El Salvador is the Minor Child's maternal great-grandmother, who recently lost her husband, the Minor Child's great-grandfather. *Id.* ¶ 18. The Minor Child's great-grandmother does not have the physical strength to care for the Minor Child at her advanced age. Without family to care for her, the Minor Child is vulnerable to violence, including gender-based violence, in El Salvador. *Id.* ¶¶ 19. This risk, coupled with the absence of any suitable caretaker in El Salvador further supports the Court's conclusion that it is not in the best interest of the Minor Child to return to El Salvador.

42. This Court makes the following findings pursuant to this Court's authority to make findings as to the care, custody, and best interest of the child. *See* §§ 61.13(2)(c), 744.371, Fla. Stat. It is not in the Minor Child's best interest to return to her country of nationality, El Salvador, because in El Salvador the Minor Child was abandoned by her biological father, the Respondent. *See* § 39.01 (1), Fla. Stat. (defining parental abandonment under Florida law). The Minor Child also does not have another caretaker to raise her and protect her from the risk of violence she faces there without an adult caregiver. The Minor Child's best interest is to remain in the United States with her mother, Petitioner, where Petitioner can continue to care for all of the Minor Child's emotional, physical, and economic needs, with the help of Petitioner's family.

SECTION VIII. CHILD SUPPORT

43. The Petitioner did not request the establishment of child support.

SECTION IX. METHOD OF PAYMENT

44. A method for and timing of payments is not ordered as child support has not been requested.

SECTION X. ATTORNEY'S FEES, COSTS, AND SUIT MONEY

45. The Petitioner did not request attorney's fees, cost, or suit money. Counsel for the Petitioner has likewise not requested fees, costs, or suit money.

SECTION XI. OTHER PROVISIONS

46. The Court reserves jurisdiction to enforce this Order for Custody until the Minor Child reaches the age of majority, and to enter orders for the welfare of the Child. *See* §742.06, Fla. Stat. This Order may only be modified by petition of the parties, and upon the consent of this Court.

* * *

Torts—Negligence—Automobile accident—New trial—Verdict against manifest weight of evidence—Jury's verdict in favor of defendant cannot be said to be against manifest weight of evidence where evidence on issue of fault was conflicting—Court will not speculate as to whether verdict demonstrated that jury misunderstood the law governing evidence and/or liability where it is at least as likely that jurors understood law and concluded that plaintiff had not met his burden of proof—Evidence—Defendant's statements about vehicle speed did not violate pretrial order prohibiting testimony, suggestion, or reference to speed of plaintiff's vehicle by defendant or defense counsel—Moreover, new trial would not be warranted where testimony was not so prejudicial as to vitiate entire trial and was invited error—Amended motion for new trial denied

RODNEY ONEAL MACKEY, II, Plaintiff, v. MICHAEL PORTA, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2024 CA 000242. May 28, 2025. David Frank, Judge. Counsel: Tyler B. Everett, Morgan & Morgan, P.A., Tallahassee, for Plaintiff. Craig A. Dennis and Shannon Duggar, Tallahassee, for Defendant.

ORDER DENYING PLAINTIFF'S AMENDED MOTION FOR NEW TRIAL

This cause came before this Court on Plaintiff's Amended Motion for New Trial, and the Court having considered the amended motion

and the court file, Defendant's response, all supplemental filings, heard argument of counsel, reviewed the trial transcript and authorities presented, and being otherwise fully advised in the premises, finds and concludes as follows.

I. Findings of Fact

A. Introduction and Procedural History

On April 9, 2024, Plaintiff filed a one-count complaint against Defendant for negligence pertaining to a motor vehicle accident that occurred on November 7, 2023.

Jury selection was March 14, 2025. The trial was March 17-18, 2025.

Somewhat surprisingly, the only evidence offered on liability was in-court testimony from the two drivers—the plaintiff and the defendant. The jury heard hours of their testimony giving slightly different versions of how the collision occurred, or at least different aspects and perspective.

Plaintiff testified that he was driving at a normal speed in the left lane of a two-lane roadway when Defendant's vehicle, which was in the right lane even with Plaintiff's vehicle and driving at the same normal or low speed, abruptly turned into Plaintiff's vehicle, causing the collision. Plaintiff described the sideswipe with the obvious implication that the defendant did not use reasonable care in changing lanes.

Defendant vigorously disputed the allegation that he operated his motor vehicle negligently. Among other things, he asserted that the crash was caused by Plaintiff because of the location of damage to the vehicles, along with the inferred high rate of speed Plaintiff must have been traveling (defendant looked for oncoming cars in his side mirror before initiating the lane change and saw no vehicles), and the possibility of Plaintiff driving for an extended period of time in a blind spot when he should have known better. *See* Trial Tr. 192:13-21, 194:24-25, 195:1-4.

Following closing statements, the jury deliberated for roughly forty-five (45) minutes before presenting its sole written question to the Court, stating: "We don't see any information on cause of accident. So no way of determining fault." Trial Tr. 288:23-289:1.

In response to the jury question, the Court proposed, and the lawyers agreed, to give the following: "You have all the exhibits and have heard all the testimony to complete the verdict form." Trial Tr. 293:16-18.[1]

Within approximately five minutes after the Court answered the jury question, the jury returned with a defense verdict by answering "no" to the first question—whether there was negligence on the part of the defendant.

Plaintiff filed a Motion for New Trial on March 28, 2025. The Court entered a Final Judgement in favor of Defendant on April 3, 2025. Plaintiff filed his Amended Motion for New Trial on April 23, 2025. The hearing on the motion was held on May 2, 2025.

B. Jury Instructions on the Law

All prospective jurors were asked by Plaintiff's counsel whether they would give oral testimony evidence the same weight as tangible documents evidence. All prospective jurors, including all of those chosen for the jury, expressly agreed that they would give oral testimony the same weight as tangible documents when considering the evidence presented by the parties. The Court then read instructions to the empaneled jury regarding what constitutes evidence.

Florida Standard Jury Instructions (Civil) 202.2 and 601.1 were included in the jury instructions the Court read to the jury. Both instructions address what constitutes evidence and the weighing of evidence and make it abundantly clear that in-court testimony is evidence that must be considered by the jury.

C. The Motion in Limine Matter

Prior to trial, Plaintiff moved in limine to limit the Defendant's testimony regarding the speed of Plaintiff's vehicle due to Defendant testifying at deposition that he had not seen Plaintiff's vehicle until impact, and the lack of any other factual basis. The Court granted the motion and ordered, "During trial, there shall be no testimony, suggestion, or inference by Defendant or Defendant's counsel as to the speed of Plaintiff's vehicle."

Before the direct examination of the Defendant at trial began, and with more context after hearing the actual evidence presented up to that point, the motion in limine issue was revisited outside the presence of the jury. The discussion resulted in a stipulation that modified the order as follows:

> THE COURT: How about this? How about the witness can say, yes, based on the impact and everything, the car must have—had to be going fast. But that on cross, the correct answer would be, but you can't know that he was going over a certain speed limit?
>
> MR EVERETT: Yeah I'd like to—I my concession is we'll allow that if we can sav, and you don't have any information that would lead you to believe that he was going at un impermissible speed or speeding?
>
> THE COURT: What about that?
>
> MR DENNIS: That's agreeable, Your Honor.

Trial Tr. 169:18-170:5.

During his direct examination, defense counsel did not question Defendant about the specifics of Plaintiff's speed and otherwise met all terms of the stipulation.

On cross-examination, however, plaintiff's counsel asked Defendant the following:

> Q. All right. I want to be sure that I'm also clear. You have no information, and you're not suggesting in any way that Mr. Mackey was speeding at the time of this crash, right?
>
> A. I never saw that. No, sir
>
> Q. But that's a correct statement, isn't it?
>
> A. Well, to me, my impact, and—and what 1 felt and where I saw the vehicles, and the way he spun around to me, I felt that he was.

Trial Transcript 192:13-2.1.

At first, Defendant attempted to answer the question as agreed, stating he did not have information to conclude that Plaintiff was "speeding." However, when plaintiff's counsel chose to pursue the matter, Defendant was clearly confused by the follow up question which was different than what was discussed during the stipulation, and he struggled with his answer. He attempted to draw a fine line between the more technical and precise "speeding" while trying to preserve his conclusion that Plaintiff was "going fast."

The Court immediately allowed plaintiff's counsel to ask Defendant additional questions that clarified defendant did not see Plaintiff's vehicle before the crash, did not have technical evidence Plaintiff was speeding, and was not telling the jury that Plaintiff was "speeding." Trial Tr. 196:20-197:7, 198:4-6.

II. Plaintiff's Argument

The Plaintiff challenges the jury verdict by arguing the verdict is against the manifest weight of the evidence, the jury was deceived as to the force and credibility of the evidence, and Defendant violated a stipulation agreed to at trial which prejudiced Plaintiff.

Essentially, Plaintiff asserts that the evidence on liability—the verbal testimony of the two parties—was so terribly one-sided in favor of the plaintiff, that a jury should not be permitted to return a verdict for the defendant. He argues that, because the jury did not apportion any percentage of fault to the defendant, the jury must have been confused about the law; they must not have understood that verbal in-court testimony is evidence they must consider.

Plaintiff also contends that Defendant's violation of an evidentiary stipulation further contributed to the erroneous verdict.

III. Conclusions of Law

In deciding whether or not to grant a new trial, the trial judge should not sit as a seventh juror, thereby substituting his or her resolution of the factual issues for that of the jury.

Emmons v. Akers, 187 So.3d 900, 902 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D591a], quoting *Poole v. Veterans Auto Sales & Leasing Co., Inc.*, 668 So.2d 189, 191 (Fla.1996) [21 Fla. L. Weekly S69a]

A. Whether the Verdict Was Against the Manifest Weight of the Evidence

"A jury's verdict is generally not against the manifest weight of the evidence if the record shows conflicting testimony from two or more witnesses. For a verdict to be against the manifest weight of the evidence to warrant a new trial, the evidence must be clear, obvious, and indisputable; where there is conflicting evidence, the weight to be given that evidence is within the province of the jury." *City of Gainesville v. Rodgers*, 377 So.3d 626, 631 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D2257a] (internal quotations and citations omitted).

Importantly, apportionment is the domain of the jury. ". . .[T]he very purpose of a comparative fault determination is to allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury. . . ." *Whitney v. R.J. Reynolds Tobacco Co.*, 157 So.3d 309, 313 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2537a] (internal quotations and citations omitted). It was "within the province of the jury" to find that the negligence of the Plaintiffs was the "sole proximate cause of the injuries." *Cabrera v. Wal-Mart Stores E., LP*, 314 So.3d 570, 572 FN1 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2812a] (citation omitted).

Here, there was conflicting evidence on the issue of fault for the accident. Plaintiff of course disagrees with the jury's apportionment of fault. But considering the strength and credibility of the drivers' testimony, this Court cannot conclude that Defendant's fault was indisputable.

B. Whether the Jury Was Deceived as to the Force and Credibility of Evidence

Plaintiff contends that the jury question demonstrably confirmed that the jurors were deceived as to the force and credibility of the evidence on liability.

Since plaintiff does not suggest that any attorney, or the Court, actively "deceived" the jury by misstating the applicable law or otherwise, the only logical contention would be that, despite this, the jurors just did not understand the law governing evidence and/or liability.

This issue is closely related to the issue of juror interviews. When it comes to the revered right of trial by jury, there are some things we cannot control nor investigate. We must simply accept. The Fourth District recently explained it:

> As our supreme court explained in *McAllister Hotel, Inc. v. Porte*, 123 So. 2d 339, 344 (Fla. 1959), "the law does not permit a juror to avoid his [or her] verdict for any reason which essentially inheres in the verdict itself," such as misunderstanding or confusion in following the instructions of the trial court. Thus, the trial court could not consider the testimony from the jury foreperson indicating her belief that the verdict did not reflect the jury's intent because some of the jurors may have misunderstood the trial court's instructions when they answered the questions on the verdict form. As a matter of law, any misunderstanding or confusion jurors may have had in arriving at their collective verdict is inherent in the jury's internal deliberative process, which cannot be challenged after the jury has rendered its verdict.

Blue Water Coast Services, LLC v. Maize, 385 So.3d 150, 153 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D856a].

Plaintiff assumes the jurors misunderstood the law. However, it is at least as likely, if not more likely, that, after applying the correct law that was provided to them, the jurors concluded the plaintiff simply had not met his burden to prove negligence by the greater weight of the evidence. This Court declines the invitation to speculate that the jurors in this case misunderstood the law.

Indeed, if simply assuming a jury did not understand the (properly conveyed) law were ground for new trial, every case would be retried, with no end in sight.

C. The Motion in Limine / Stipulation Issue

As a threshold matter, the exact statement Plaintiff challenges is not a clear violation of the stipulation. "Feeling" like a car is going fast, even if the word used is speeding, is different from claiming to have a foundation to firmly conclude that the Plaintiff was driving over a specific speed limit.

Even if we assume it was a violation, not every violation of an order in limine results in a new trial:

> By our decision, we do not mean to suggest that every violation of an order granting a motion in limine should result in a mistrial. *See Leyva v. Samess*, 732 So. 2d 1118, 1121 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D533b] ("Not every violation of a pretrial order in limine should automatically result in a new trial."). What mandates our decision here is the combination of the four compelling factors which we have described above. This combination has caused an error "so prejudicial as to vitiate the entire trial, such that a mistrial is necessary to ensure that the defendant receives a fair trial."

Nebergall v. State, 293 So.3d 517, 535-36 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D85d].

The comments must have been, ". . .so prejudicial as to vitiate the entire trial. . . ." *Universal Ins. Co. of N. Am. v. Sunset 102 Office Park Condo. Ass'n, Inc.*, 388 So.3d 181, 186-87 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D2329a]; *See also Olsen v. Philip Morris USA, Inc.*, 343 So.3d 172, 174 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1582a] (The trial court should grant a new trial only if the comments were so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial.)

The subject statement by the Defendant does not rise to this level.

Even if the Court were to believe that the statement constitutes a violation of the stipulation, and also believe that it rises to the level of prejudice that warrants a new trial, a new trial would not be granted based on the invited-error doctrine.

Defendant's statements were in response to plaintiff's counsel's specific questions. A party may not invite error and then seek to benefit from it. *Sanchez v. State*, 81 So. 3d 604, 608 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D562a]; *Norton v. State*, 709 So.2d 87, 94 (Fla.1997) [23 Fla. L. Weekly S12a]; *Buggs v. State,* 640 So.2d 90 (Fla. 1st DCA 1994) (holding that arresting officer's objectionable comment during cross-examination was invited error because the objectionable comment was in response to defense counsel's question).

Finally, Plaintiff argues that it is not just the alleged violation of the stipulation that warrants a new trial, but the cumulative effect of all alleged errors.

"Although preserved and unpreserved error may be considered in a cumulative error analysis, where the alleged errors urged for consideration in a cumulative error analysis are individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *State Farm Mut. Auto. Ins. Co. v. Medina*, 300 So.3d 177, 184 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1597a] (internal quotations and citation omitted).

To the extent Plaintiff is suggesting that the jury would never have

been presented with the idea that Plaintiff may have been speeding at the time of impact, that idea did not depend on the alleged violation; it was conveyed several other ways.

A direct quote from *Medina* applies to the present case: "Here, having concluded that the comments were either proper, invited by Plaintiff's counsel, or not so prejudicial so as to warrant a new trial, it cannot be said that the cumulative effect of the comments denied Plaintiff a fair and impartial trial." *Id*.

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

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[1]The Court was somewhat perturbed by the juror, who turned out to be the foreperson, making faces and hurrying back to the jury room when told the answer to the jury question and excused to resume deliberations. Hearing Tr. 47:9-24. However, that behavior by itself did not rise to the level of, or significantly contribute to, a new trial issue.

* * *

Civil procedure—Summary judgment—Response—Timeliness—Extension of time—Plaintiff's response to motion for summary judgment filed less that twenty-four hours before hearing was untimely—Motions for continuance and extension of time were not properly noticed for hearing and do not provide a basis for delaying entry of summary judgment—Defendant's motion for summary judgment granted

VEVIAN WAHBA, Plaintiff, and AMERICAN TRADITIONS INSURANCE COMPANY, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-CA-011899-O. Division 39. February 13, 2025. Michael Deen, Judge. Counsel: Alejandra Ares, Cordova Law Firm, PLLC, Orlando, for Plaintiff. Lanzce A. Francis, Salehi, Boyer, Lavigne Lombana, P.A., Coral Gables, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on February 13, 2025, on Defendant, AMERICAN TRADITIONS INSURANCE COMPANY's Motion for Final Summary Judgment. The Court, having considered the motion, the applicable law, the arguments of the parties, and being otherwise fully advised in the premises, finds as follows:

1. Defendant filed its Motion for Final Summary Judgment on April 11, 2024.

2. Plaintiff's response was untimely, having been filed late in the evening on February 12, 2025—less than 24 hours before the hearing.

3. Additionally, Plaintiff failed to present admissible evidence to establish a genuine dispute of material fact at the hearing or in the court file.

4. Plaintiff, instead argued that this case had been previously settled for $50,000. However, Plaintiff failed to file a motion to enforce settlement and instead attempted to raise the issue in response to summary judgment. This issue is not properly before the Court and does not create a genuine dispute of material fact.

5. Plaintiff's Motion for Continuance and Motion for Extension of Time were not properly noticed for this hearing and do not provide a valid basis for delaying summary judgment.

6. Because Plaintiff has failed to meet the burden of establishing a genuine issue of material fact, and Defendant has demonstrated its entitlement to judgment as a matter of law, summary judgment in favor of Defendant is warranted under Fla. R. Civ. P. 1.510.

THERFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT the Defendant's Motion for Final Summary Judgment is GRANTED.

* * *

Arbitration—Enforceability of arbitration clause—Motion to compel arbitration in suit regarding injuries sustained by rider in ride-share vehicle is granted—Valid arbitration agreement existed between rider and companies that supply rider app, claims arising from use of services available through companies' rider app fall squarely within scope of agreement, and companies did not actively participate in lawsuit or waive right to arbitrate

JULIETA DALLE NOGARE, et al., Plaintiffs, v. MAXON ELIBERT, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2025-000536-CA-01. Section CA06. May 19, 2025. Charles Johnson, Judge. Counsel: Cassandra Zayne and Angelo Mancini, Roig Lawyers, Tampa, for Uber Technologies, Inc. and Rasier-DC, LLC, Defendants.

ORDER GRANTING DEFENDANTS, UBER TECHNOLOGIES, INC. AND RASIER-DC, LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

THIS CAUSE having come before the Court on Uber Technologies, Inc. ("Uber") and Rasier-DC, LLC's (incorrectly sued herein as Rasier, LLC) ("Rasier") (collectively "Defendants") hearing on their March 21, 2025 Motion to Compel Arbitration and Stay Plaintiffs Julieta Dalle Nogare, Franco Dalle Nogare, Gonzalo Sozzo and Ignacio Huber's (collectively "Plaintiffs") Action, and after hearing arguments, reviewing the parties' submission, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

Factual and Procedural Background

Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided marketplace platforms. Rasier, LLC is a wholly owned subsidiary of Uber, and Rasier-DC, LLC is a wholly owned subsidiary of Rasier, LLC. On one side of the marketplace, businesses and individuals utilize Uber's platforms in order to connect with customers and obtain payment processing services. One of Uber's multi-sided platforms is the Rides platform. Riders, like Julieta Dalle Nogare ("Ms. Nogare"), download the rider version of the Uber App ("Rider App"), and drivers, like Maxon Elibert ("Mr. Elibert"), download the driver version of the Uber App ("Driver App"); together, the Apps allow users to access the platform that facilitates the connection of individuals in need of a ride with individuals willing to provide transportation services, and after completing all the necessary steps required to gain access to the Rider App, the Rider App enables Riders and Drivers to connect.

Plaintiffs initiated this action in Miami-Dade County Florida state court alleging injuries arising from a July 11, 2024 accident when they were riders in Mr. Elibert's vehicle. Plaintiffs claim that they were injured as a result of the accident and that Mr. Elibert was at fault for causing the accident.

Prior to the accident, and according to Uber's business records, Plaintiff Ms. Nogare signed up to utilize the rider version of the Uber App on or about March 25, 2018. (See Declaration of Jacqueline Pare, attached to Uber's Motion to Compel Arbitration.) On April 14, 2023, Plaintiff Ms. Nogare was presented with an in-app blocking pop-up screen and expressly agreed to Defendants' January 2023 Terms of Use ("January 2023 terms"), which included an arbitration provision. As such, Plaintiff Ms. Nogare agreed to Uber's terms, which required Plaintiff Ms. Nogare to resolve any claims that she may have against Defendants in arbitration and included a delegation clause, which gave the arbitrator *exclusive authority* to determine threshold questions of arbitrability.

Legal Standard

Where a party to an agreement to arbitrate refuses to submit to arbitration, Florida law permits the aggrieved party to move for an order compelling arbitration. *See* Fla. Stat. § 682.03(1). Pending determination of such a motion, the Court should stay any related judicial proceedings. *See* Fla. Stat. § 682.03(6); *Open MRI of Okeechobee, LLC v. Aldana*, 969 So. 2d 589, 590 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2920b] ("It is clear that the statute

[§ 682.03] mandates a stay while a motion for arbitration is pending"); *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So. 2d 288, 290 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1902a]. "In ruling on a motion to compel arbitration, Florida courts should resolve all doubts in favor of arbitration rather than against it." *Medanic v. Citicorp Inv. Servs.,* 954 So. 2d 1210, 1211 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1007a]. Florida courts routinely find that "arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts." *See e.g*., *Royal Caribbean Cruises, Ltd. v. Universal Employment Agency*, 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2711a].

Legal Conclusions

A "trial court's jurisdiction is limited to three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether arbitrable issues exist; and (3) whether the right to arbitrate has been waived." *Seifert v. U.S. Home Corp*, 750 So. 2d 633 (Fla. 1999) [24 Fla. L. Weekly S540a]. Here, the Court finds that Defendants satisfied the three-part test and Plaintiff Ms. Nogare's claims are subject to Defendants' arbitration clause.

A valid written agreement to arbitrate exists between Plaintiff Ms. Nogare and Defendants. Plaintiff Ms. Nogare expressly agreed to Defendants' January 2023 terms. The January 2023 terms provide that Plaintiff Ms. Nogare was "required to resolve any claim that [she] may have against Uber on an individual basis in arbitration as set forth in this Arbitration Agreement." (See Pare Affidavit attached to Defendants' Motion to Compel Arbitration at Ex. C). The Court finds that the Arbitration Agreement is not unconscionable. The Court further finds that the Arbitration Agreement is not a contract of adhesion and was not offered to Plaintiff Ms. Nogare on a ""take-it-or-leave-it" basis. There is no record evidence to support a claim that Defendants coerced Plaintiff Ms. Nogare into accepting the Arbitration Agreement.

Likewise, prong two is satisfied as Plaintiff Ms. Nogare's claims clearly arise from and relate to Plaintiff Ms. Nogare's use of the services available through the Rider App, and as a result, fall squarely within the scope of the Arbitration Agreements. The Agreement states ". . .**any dispute, claim, or controversy in any way arising out of or relating to. . . (iii) incidents or accidents resulting in personal injury to you or anyone else that you allege occurred in connection with your use of the Services. . . will be settled by binding individual arbitration between you and Uber, and not in a court of law."** This includes the July 11, 2024 accident from which this case emanates. In so doing, Plaintiff Ms. Nogare waived her right to a jury trial.

The Court further finds that Defendants did not actively participate in this lawsuit or waive their right to arbitrate. Defendants filed their Motion to Compel Arbitration as their responsive pleading. Plaintiffs received notice of Defendants' intent to arbitrate Plaintiff Ms. Nogare's claims when Defendants filed their Motion to Compel Arbitration on March 21, 2025. Further, Defendants' January 2023 terms contain a delegation clause that evince the parties' intent to delegate issues, including threshold issues, to the arbitrator. *See Suarez v. Uber Technologies, Inc*., 2016 WL 2348706 at *4 (M.D. Fla. May 4, 2016) ("Defendants' motion [to compel arbitration] should be granted on this basis alone and adjudication of Plaintiff's attacks on Arbitration Provision should be left to the arbitrator because it is clear and unmistakable that the parties agreed to arbitrate arbitrability").

Based on the foregoing, it is thereby **ORDERED and ADJUDGED** as follows:

Defendants Uber Technologies, Inc. and Rasier-DC, LLC's Motion to Compel Arbitration and to Stay Litigation is **GRANTED.**

It is further **ORDERED** that Plaintiff Ms. Nogare shall initiate arbitration within thirty (30) days of this order and all remaining issues in this action as to all parties are **STAYED** for three (3) months pending completion of arbitration pursuant to the terms of the Arbitration Agreements in this case. The parties shall notify the Court upon completion of arbitration, and either party shall have the right to resolve any remaining issues of contention in this case.

* * *

Mortgages—Foreclosure—Deficiency judgment—Service of process—Deficiency judgment is void as matter of law where defendant was not personally served or provided notice and opportunity to be heard on motion for deficiency judgment

TAYLOR BEAN & WHITAKER MORT. CORP., Plaintiff, v. MAGALIS CEPERO, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012-027938-CA-01. Section CA27. April 25, 2025. William Thomas, Judge. Counsel: Jacqueline C. Ledón, Ledón Law, P.A., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S VERIFIED MOTION TO VACATE DEFICIENCY JUDGMENT

THIS CAUSE having come before the Court on Defendant Magalis Cepero's Verified Motion to Vacate the Deficiency Judgment, and the Court having conducted a hearing on the motion on March 25, 2025, at 8:30 AM, with all parties having been duly heard, and the Court having reviewed the motion, the file, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

1. Defendant's Verified Motion to Vacate the Deficiency Judgment is hereby **GRANTED**.

2. The Court finds that the Defendant was served by publication in the underlying mortgage foreclosure case. Defendant was not personally served nor provided notice or an opportunity to be heard on the motion for the deficiency judgment. Accordingly, the deficiency judgment is void as a matter of law. *Nationstar Mortg., LLC v. Diaz*, 227 So. 3d 726, 729 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2027b]; *Carter v. Kingsley Bank*, 587 So. 2d 567, 569 (Fla. 1st DCA 1991); *Lorie v. Calderon*, 982 So. 2d 1199, 1202 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1376b]; *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662, 666 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D944a]; *Metnick v. Right of the Dot, LLC*, 347 So. 3d 475, 478 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1816a].

3. Accordingly, the Summary Final Judgment of Deficiency Against Defendant(s), Magalis Cepero entered on or about April 8, 2015, in the amount of $464,020.93 plus interest is void as a matter of law, and is hereby **VACATED**.

* * *

Estates—Creditors' rights—Fraudulent transfer—Civil procedure—Summary judgment—Opposition—Timeliness—Summary judgment entered in favor of personal representative in action alleging that now-deceased former personal representative, who was found liable for civil theft of stock in estate, fraudulently conveyed real property to defendant, who was his longtime significant other—Affidavit of defendant in opposition to personal representative's motion for summary judgment was untimely where affidavit was filed less than 20 days before hearing on motion—Opposing affidavit of attorney who facilitated property transfer is not untimely where, although affidavit was filed less than 20 days prior to initial hearing date, hearing was continued before parties presented any argument, and affidavit was filed more than 20 days before date of continued hearing—Personal representative made prima facie showing of six badges of fraud in transfer of property where defendant was insider to transfer, former representative was being sued before property was transferred, property was substantially all of former representative's assets, consideration paid was not reasonably equivalent to value of property, former representative became insolvent shortly after transfer, and transfer occurred shortly before substantial debt was incurred—Defendant's argument that she took property in good faith is unavailing where her payment of $10 does not constitute reasonably equivalent value for property—No merit to argument that defendant was in putative marriage with former representative where marriage does not rebut presumption of fraudulent transfer

ESTATE OF JOHN F. TRUE, SR., by and through Joseph Guzzardi, Personal Representative, Plaintiff, v. ROBIN L. O'DAY, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2019-CA-016085-XXXX-MB. Civil Division IA. April 24, 2025. Samantha Schosberg Feuer, Judge. Counsel: Harold E. Wolfe, Jr., Harold E. Wolfe, Jr. P.A., West Palm Beach, for Plaintiff. Matthew Z. Karim, Law Offices of Matthew Karim, PLLC, Ft. Lauderdale, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTIONS TO STRIKE AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court for an April 8, 2025 hearing on Plaintiff's Motion for Summary Judgment on Complaint for Fraudulent Transfer, filed October 17, 2024, as well as on Plaintiff's Motion to Strike Affidavit of Ryan S. Shipp, Esq., filed February 25, 2025, and Plaintiff's Motion to Strike Affidavit of Robin L. O'Day, filed April 1, 2025. Defendant filed her Response in Opposition to Defendant's Motion for Summary Judgment on March 7, 2025, after which Plaintiff filed a Reply. Both parties filed supplemental materials. Having reviewed Plaintiff's Motions and Reply, Defendant's Response, the court record, the applicable law, the parties' supplemental materials, the arguments of counsel, and being otherwise duly advised in the premises, the Court finds and rules as follows:

This case is set against the backdrop of a separate probate proceeding involving the death of John F. True, Sr. (the "Decedent") in Case No.: 50-2009-CP-005335-XXXX-MB (the "Probate Case"). The history of the Probate Case is lengthy, but is relevant to this civil action. On or around August 19, 2009, the Decedent died. Under the terms of his Will, the Decedent named his son, John B. True, Jr. ("True Jr."), personal representative of his estate. However, on March 11, 2015, the Court in the Probate Case entered an Order removing True Jr. as personal representative. Subsequently, the Court appointed the Decedent's nephew, Plaintiff Joseph Guzzardi, successor personal representative.

Shortly after his appointment, Plaintiff filed a Petition against True Jr. in the Probate Case on March 22, 2018, alleging True Jr. committed a civil theft of certain shares of stock in the Decedent's estate. During pendency of that litigation, True Jr. executed a Quitclaim Deed on July 18, 2018 (the "Quitclaim Deed"), conveying his real property located at 1411 North M Street, Lake Worth, Florida 33460 (the "Property") to Defendant Robin L. O'Day. Although the precise nature of their relationship is unclear, it is undisputed Defendant was True Jr.'s longtime significant other. The Quitclaim Deed is notarized and signed by two attesting witnesses.

On December 18, 2019, Plaintiff initiated this civil action by the filing of his Complaint for Fraudulent Transfer in connection with True Jr.'s transfer of the Property to Defendant. Also in this civil action, Plaintiff filed a Notice of Lis Pendens, which Defendant thereafter sought to dissolve. By Order entered May 27, 2022 in this civil action, the Court denied Defendant's Amended Motion to Dissolve Lis Pendens, holding in pertinent part:

> 3. Plaintiff has made a prima facie showing of the elements of the four "badges" of fraudulent conveyance as follows: (i) a lack of reasonably equivalent value or consideration for the transfer by the transferee, Robin L. O'Day, (ii) a close family relationship between the transferor and transferee, iii) that there was pending litigation against the transferor, James B. True, at the time he made the transfer, and iv) insolvency or substantial indebtedness of the transferor, James B. True.

On January 23, 2019, True Jr. died. After True Jr.'s death, Plaintiff moved for partial summary judgment in the Probate Case. On March 23, 2022, the Court entered its Amended Order in the Probate Case finding True Jr. liable for civil theft and, by separate Order, assessed damages against True Jr. and the Estate of True Jr. in the amount of $1,978,973.89. Plaintiff's Motion for Summary Judgment and Motions to Strike followed.

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(a). The crux of this lawsuit is the allegation that True Jr. fraudulently transferred the Property to Defendant in an attempt to thwart Plaintiff's recovery as a creditor. Plaintiff argues Defendant was a knowing insider to the Property's fraudulent transfer. Having prevailed in the Probate Case, Plaintiff now seeks to recover the underlying asset from the transferee, Defendant. *See* §726.102(5), Fla. Stat. (broadly defining creditor as "a person who has a claim"). In her Response, Defendant maintains she lacked intent to defraud Plaintiff and, otherwise, took the Property in good faith.

However, the Court first addresses Plaintiff's two Motions to Strike, which are directed at certain affidavits filed by Defendant as support for her Response: (1) the Affidavit of Ryan S. Shipp, Esq. and (2) the Affidavit of Robin L. O'Day. Plaintiff seeks to strike the aforesaid Affidavits as untimely under Rule 1.510(c). To clarify, the Florida Supreme Court recently amended Rule 1.510(c)(5) "to tie the deadline to respond to a motion for summary judgment to the date of service rather than to the hearing date." *In re Am. to Fla. R. Civ. P. 1.510,* 397 So. 3d 1018, 1019 (Fla. 2024) [49 Fla. L. Weekly S291a]. Under the newly-amended Rule 1.510(c)(5), a response must be filed "[n]o later than 40 days after service of the motion for summary judgment." *Id.* Notably, the effective date for this amendment was January 1, 2025. "[T]he provisions of amended rule 1.510 . . . will govern motions filed on or after the effective date, but will not apply to motions filed before that date." *Id.* Plaintiff filed its Motion for Summary Judgment on October 17, 2024, prior to the effective date. Under the prior iteration of Rule 1.510(c)(5), a nonmovant was required to file its response and factual support at least twenty days before the hearing date.

The Court finds the Affidavit of Robin L. O'Day ("O'Day") untimely filed. While O'Day's Affidavit is dated March 10, 2025, Defendant did not file it until March 28, 2025, less than twenty days before the April 8, 2025 hearing. Accordingly, the Court grants Plaintiff's Motion to Strike the Affidavit of Robin L. O'Day (D.E.

116). However, the Court denies Plaintiff's Motion to Strike the Affidavit of Ryan S. Shipp, Esq. (D.E. 107). The record reflects the Affidavit of Ryan S. Shipp, Esq., was filed February 24, 2025. The record further reflects that Plaintiff's Motion for Summary Judgment was originally set for a hearing on February 27, 2025, but was continued due to the withdrawal of Defendant's former counsel. The Court did not hear any arguments on Plaintiff's Motion for Summary Judgment at that time. Nevertheless, Plaintiff argues the Court's continuance did not reset the twenty day period under Rule 1.510(c)(5), thus rendering the Affidavit of Ryan S. Shipp, Esq., untimely. As support, Plaintiff relies on *State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc.,* 368 So. 3d 1049 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1555a]. Plaintiff's reliance is misplaced.

In *Advanced X-Ray,* the trial court heard initial arguments on a motion for summary judgment, but the allotted time expired and the hearing was continued for resumption of the parties' arguments at a second hearing. *Id.* at 1051. In the interim, the nonmovant filed additional summary judgment evidence, which had not been filed at the time of the first hearing. *Id.* The Appellate Court found the nonmovant's belated filing prejudicial, holding "[a] party cannot evade the requirement to timely file based on a trial court's discretionary choice to continue a hearing *and allow more time for argument*." *Id.* (emphasis added). The present case is clearly distinguishable. Unlike *Advanced X-Ray,* neither Plaintiff nor Defendant raised summary judgment arguments at the February 27, 2025 hearing, and the Court's continuance was not to allow for the parties to resume argumentation already begun. The purpose of the Court's continuance was to afford newly-substituted counsel an opportunity to timely file a Response and factual support in anticipation of a forthcoming summary judgment hearing. The Affidavit of Ryan S. Shipp, Esq., was filed February 24, 2025, more than twenty days before the April 8, 2025 hearing. Plaintiff's Motion to Strike the Affidavit of Ryan S. Shipp, Esq., is denied.

With the above settled, the Court now turns to Plaintiff's Motion for Summary Judgment. A claim for fraudulent transfer is codified at §726.105, Fla. Stat., which pertinently provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor[.]

Id. (emphasis added). The Court preliminarily finds Plaintiff, True Jr. and Defendant fall within the statute's broad definition of creditors, debtors and transferees. *See* §726.102(5), Fla. Stat. (defining creditor as "a person who has a claim"); *see also* §726.102(7), Fla. Stat. (defining debtor as "a person who is liable on a claim"). In order to determine *actual intent, a* trial court may consider a non-exhaustive list of "circumstantial indicia of intent." *Mane FL Corp. v. Beckman,* 355 So. 3d 418, 426 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D86a]. Referred to as "badges of fraud," these indicia may include:

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all the debtor's assets.
>
> (f) The debtor absconded.
>
> (g) The debtor removed or concealed assets.
>
> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

§726.105(2)(a)-(k), Fla. Stat. The Fourth District Court of Appeal has recognized that, while one badge of fraud is insufficient, multiple badges of fraud can establish actual intent to defraud. *Mane FL Corp.,* 355 So. 3d at 426 (observing "[t]wo or three badges" may be sufficient). A movant is entitled to summary judgment on a fraudulent transfer claim where "the evidence is one-sided[.]" *Mane FL Corp. v. Beckman,* 355 So. 3d 418, 426 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D86a] (quoting *In re Bifani,* 2014 WL 12795661, at *6 (M.D. Fla. Feb. 13, 2014)), *affd in part, rev'd in part on other grounds,* 580 F. App'x. 740 (11th Cir. 2014).

As an initial matter, the Court adopts and reincorporates its May 27, 2022 Order finding Plaintiff made a prima facie showing of four "badges of fraud" of the fraudulent transfer by True Jr. to Defendant. Under the undisputed record, the Court now finds Plaintiff makes a prima facie showing of six "badges of fraud," which the Court more fully sets forth below:

> **First,** Defendant was an insider to the transfer between herself and True Jr. §726.105(2)(a), Fla. Stat. "A close relationship between a transferor debtor and a transferee is a factor equivalent to a badge of fraud which should be considered in determining fraudulent intent." *Mane FL Corp.,* 355 So. 3d at 427 (quoting *Gen. Trading Inc. v. Yale Materials Handling Corp.,* 119 F.3d 1485, 1499 (11th Cir. 1997)). In her Response, Defendant admits she was in a "long-term relationship" with True Jr. and that they resided together.
>
> **Second,** True Jr. was being sued before the Property was transferred. §726.105(2)(d), Fla. Stat. The undisputed record clearly establishes Plaintiff sued True Jr. in the Probate Case on March 22, 2018. Approximately four months later, True Jr. transferred the Property to Defendant.
>
> **Third**, the Property was substantially all of True Jr.'s assets. §726.105(2)(e), Fla. Stat. Appended to Plaintiff's Motion is the Affidavit of Sedric L. Johnson ("Johnson"), an administrator ad litem appointed in the probating of True Jr.'s estate. According to Johnson, his marshalling of True Jr.'s assets revealed the estate is "effectively insolvent." By contrast, Plaintiff attaches a website printout estimating the Property's value at $460,100.00.
>
> **Fourth,** the consideration paid by Defendant to True Jr. was not the reasonably equivalent value of the Property. §726.105(2)(h), Fla. Stat. The Quitclaim Deed, which is attached to Plaintiff's Motion, reflects Defendant paid $10.00 consideration for the Property. On its face, ten dollars is not the "reasonably equivalent value" for the Property, which is estimated at $460,100.00. *See Berdoll v. Sobik's Franchise, Inc.,* 681 So. 2d 1164, 1166 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2085b] (recognizing "under prior law, 'good consideration' was sufficient. The Uniform Law now requires 'reasonably equivalent value' to uphold the transfer").
>
> **Fifth,** True Jr. became insolvent shortly after the transfer was made. §726.105(2)(i), Fla. Stat. The record establishes True Jr. transferred the Property on July 18, 2018 and died on January 23, 2019, leaving behind an estate that is "effectively insolvent."
>
> **Sixth,** the transfer occurred shortly before a substantial debt was incurred. §726.105(2)(j), Fla. Stat. There is no dispute True Jr.'s debt arose in connection with Plaintiff's civil theft claims in the Probate Case, nor is it disputed the Property was transferred shortly after that lawsuit was initiated. The Court in the Probate Case ultimately found True Jr. liable for civil theft in the amount of $1,978,973.89.

Plaintiff has met his initial burden of making a prima facie showing of fraudulent transfer. "The existence of badges of fraud creates a

prima facie case, thereby raising a rebuttable presumption that the transaction is void." *Mane FL Corp.,* 355 So. 3d 426. The burden now shifts to Defendant "to show that [the transfer] was made without intent to 'delay, hinder or defraud creditors.' " *Id.* (quoting *Mejia v. Ruiz,* 985 So. 2d 1109, 1114 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1291a]).

In her Response, Defendant raises several arguments against summary judgment, none of which demonstrate her burden in rebutting a presumption that the transfer is void. At the outset, Defendant argues Plaintiff's Motion is noncompliant with Rule 1.110(f) and must be denied on that basis alone. This argument is without merit. Pleadings are governed by Rule 1.110, "but a motion is not a pleading." *Lucky Nation, LLC v. Al-Maghazchi,* 186 So. 3d 12, 15 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D139a]. "A motion for summary judgment necessarily proceeds upon the theory that the legal issues are fully settled by the pleadings, and there exists no genuine dispute as to a material fact." *White v. Fletcher,* 90 So. 2d 129, 131-32 (Fla. 1956). Similarly meritless is Defendant's broad contention that Plaintiff failed to carry his burden of individually refuting each of Defendant's twenty-four affirmative defenses. "A plaintiff need not disprove all affirmative defenses." *Lemano Invs., LLC v. RGF Athena, LLC,* 390 So. 3d 154, 160 (Fla. 3d DCA 2024) [49 Fla. L. Weekly D710a]. Pursuant to Rule 1.510, a movant carries the initial burden of showing "the nonexistence of a genuine fact[,]" after which the burden shifts to the nonmovant to "come forward with counterevidence sufficient to reveal a genuine issue of fact." *Custom Design Expo, Inc. v. Synergy Rents, Inc.,* 327 So. 3d 427, 430 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2020a]. Plaintiff has met his initial burden. With certain exceptions, Defendant's Response republishes verbatim her affirmative defenses, which is insufficient. The movant has the "burden is on defendant to adduce evidence supporting [an] affirmative defense, not upon movant to negate its existence." *Johnson v. Bd. of Regents of Univ. of Ga.,* 263 F.3d 1234, 1264 (11th Cir. 2001) [14 Fla. L. Weekly Fed. C1232a].

Defendant next argues she took the Property in good faith and without intent to defraud. Pursuant to §726.109(1), Fla. Stat., "[a] transfer . . . is not voidable . . . against a person who took in good faith and for reasonably equivalent value or against any subsequent transferee or obligee." According to Defendant, True Jr. transferred the Property due to his declining health and not to avoid creditors. As support, Defendant relies on the Affidavit of Ryan S. Shipp, Esq. ("Attorney Shipp"), who facilitated execution of the Quitclaim Deed and who attests the transfer between True Jr. and Defendant was made in good faith. The problem with this defense is that it turns on whether Defendant took the Property in good faith *and* for reasonably equivalent value. Even assuming, *arguendo,* Defendant took the Property in good faith, the Court has already determined Defendant's payment of $10.00 does not constitute "reasonably equivalent value" for real property estimated at over $400,000.00. Defendant offers no evidence to refute these undisputed facts.

As a tertiary argument, Defendant maintains she was in a putative marriage with True Jr., yet it is unclear how said "marriage" establishes a defense under §726.109, Fla. Stat. The mere invocation of a putative marriage does not constitute sufficient evidence rebutting a presumption of fraudulent transfer in a summary judgment posture. Simply stated, Defendant fails to carry her burden by showing the transfer was not made to delay, hinder or defraud Plaintiff.

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

1. Plaintiff's Motion to Strike Affidavit of Ryan S. Shipp, Esq., filed February 25, 2025, is **DENIED**.

2. Plaintiff's Motion to Strike Affidavit of Robin L. O'Day, filed April 1, 2025, is **GRANTED**.

3. Plaintiff's Motion for Summary Judgment on Complaint for Fraudulent Transfer, filed October 17, 2024, is **GRANTED**.

* * *

Real property—Partition—Partial final judgment for partition and sale is granted—Plaintiff and defendant own real property as joint tenants with right of survivorship, property is not divisible and not subject to partition in kind, and clerk's default has been entered against defendant

LISETTE MARTIN, Plaintiff, v. JEAN FRANCOIS RAYMOND, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE24015787. Division 03. January 15, 2025. Daniel A. Casey, Judge. Counsel: Harry Hipler, Dania Beach, for Plaintiff. Jean Francois Raymond, Pro se, Defendant.

ORDER GRANTING

ORDER GRANTING PARTIAL FINAL JUDGMENT FOR PARTITION AND SALE

THIS CAUSE came before the Court on January 14, 2025 at 8:45 am on Plaintiff's Motion to Enter Partial Final Judgment for Partition and Sale as against the Defendant, JEAN FRANCOIS RAYMOND, who having been served with process (Doc. 6) and having failed to respond to Plaintiff's Complaint by the entry of a Clerk's Default (Doc. 7). Defendant, JEAN FRANCOIS RAYMOND, was also served with the Notice of Hearing and Motion by Plaintiff by regular mail and Federal Express (Doc. 8, 10, 11). Plaintiff's counsel appeared, but Defendant failed to appear at the hearing although he was duly noticed. After reviewing the court file, and being otherwise advised, the Court finds and orders as follows:

1. Plaintiff's Motion to Enter Partial Final Judgment for Partition and Sale is hereby GRANTED.

2. Plaintiff and Defendant jointly and equally own as joint tenants with rights of survivorship the following real property located at 1830 South Ocean Drive, #4112, Hallandale Beach, Florida, and which is legally described as follows: BEACH CLUB TWO CONDO UNIT 4112 PER CDO CIN# 106268982. Folio ID number is 5142 26 HG 3610. The parties also jointly own any personal property located in the subject real property. Further, in accordance with the Plaintiff's Complaint and pursuant to Chapter 64, Florida Statutes, the subject real property is not divisible, and is not subject to partition in kind without prejudice to the owner allowing for the entry of this Partial Final Judgment as to partition and sale of the subject real and personal property.

3. This Partition action as filed by Plaintiff has requested Partition, Sale, Attorney Fees, and other related matters involving the subject real and personal property, including but not limited to an accounting for any credits and debits in accordance with Chapter 64, Florida Statutes.

4. By virtue of the Plaintiff's Complaint and the entry of a default against Defendant, the instant Motion was considered by the Court, and pursuant to the Clerk's default against Defendant (Doc. 7), the Court finds that both parties seek Partition and Sale. See FLA STAT. §§ 64.041, 64.052 (2024); *Rose v. Hansell*, 929 So. 2d 22 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D601a]; *Brennan v. Brennan*, 122 So. 3d 923, 925-27 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2081a]; *Gulledge v. Gulledge,* 82 So. 3d 1113, 1114-17 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D504a]; *Pantuso v. Pantuso,* 335 So. 2d 361, 362 (Fla. 2d DCA 1976) (Partition is a matter of right). Accordingly, this Court by virtue of this Partial Final Judgment hereby orders both parties to list the subject real property for sale with a real estate broker within 60 days of the entry of this Order in order to list it for sale and sell the subject real property at fair market value. Upon sale, the net proceeds after payment of any mortgage(s), maintenance fees, assessments, and any other joint debts and obligations of the parties as concerns this real property including closing costs and realtor's fees shall be placed into Clerk of the Circuit Court Registry of the Court or

an attorney's trust account for safe keeping pending any claims either may have for an accounting of credits and debits should the parties disagree that they are both entitled to equally share in the net proceeds upon sale of the subject real and personal property.

5. This court specifically reserves jurisdiction to consider a claim for entitlement and amount of an award of attorney fees and costs in favor of Plaintiff's counsel and Defendant's counsel in accordance with Chapter 64, Florida Statutes, and more specifically Section 64.08, Florida Statutes, which provides the basis for an award of attorneys and costs.

6. This Court reserves jurisdiction to enforce this Order, and reserves jurisdiction for all remaining matters not decided herein, including but not limited to entitlement and amount of attorney fees and costs that may be awarded to Plaintiff's counsel and Defendant's counsel, consideration of an accounting claim as to credits and debits by either party, and the future entry of a Final Judgment that shall include all remaining matters not heretofore decided.

* * *

Real property—Partition—Sale—Special magistrate appointed to sign listing agreement and execute deeds and closing documents necessary to effectuate sale of subject property where plaintiff and defendant own real property as joint tenants with right of survivorship, court granted partial final judgment for partition and sale requiring both parties to execute listing agreement for sale of property, but defendant has failed or refused to execute agreement and participate in sale—Sale proceeds are to be deposited with clerk of court, and fees and costs of magistrate and attorneys will be paid from top of net sale proceeds

LISETTE MARTIN, Plaintiff, v. JEAN FRANCOIS RAYMOND, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE24015787. Division 03. April 15, 2025. Daniel. A. Casey, Judge. Counsel: Harry Hipler, Dania Beach, for Plaintiff. Jean Francois Raymond, Pro se, Defendant.

FINAL SUMMARY JUDGMENT

SUMMARY FINAL JUDGMENT FOR PARTITION AND SALE AND ATTORNEY FEES AND COSTS AND APPOINTMENT OF SPECIAL MAGISTRATE

THIS CAUSE came before the Court on April 14, 2025 at 8:45 am on Plaintiff's Motion to Enter Summary Final Judgment for Partition and Sale and Attorney Fees and Costs and other related matters as against the Defendant, JEAN FRANCOIS RAYMOND, who having been served with process (Doc. 6), having failed to respond to Plaintiff's Complaint by the entry of a Clerk's Default (Doc. 7), and having been served with Plaintiff's Motion for Summary Final Judgment for Partition and Sale and Attorney Fees and Costs and Notice of Hearing (Doc. 21, 22). Defendant, JEAN FRANCOIS RAYMOND, was served with the Notice of Hearing and Motion by regular mail and Priority Mail Express International (Doc. 21, 22, 23). Plaintiff's counsel appeared, but Defendant failed to appear at the hearing although he was duly noticed. After reviewing the court file, and being otherwise advised, the Court finds and orders as follows:

1. The above parties are sui juris, and this Court has jurisdiction over the subject matter and real and personal property and the parties herein as the subject real property is located in Broward County, Florida, and Defendant has been duly served with process (Doc. 6, 7).

2. Plaintiff's Motion to Enter Summary Final Judgment for Partition and Sale and Attorney Fees and Costs is hereby GRANTED. Based upon the record and pleadings and affidavit(s) on file there is no genuine dispute as to a material fact and the Plaintiff is entitled to judgment as a matter of law. The Court bases its ruling on materials in the record, including but not limited to depositions, documents, electronically stored information, affidavits or declarations, admissions, other materials, and by showing that the materials cited do not establish the absence or presence of a genuine dispute, and that the Defendant cannot produce admissible evidence to support anything to the contrary, therefore, allowing the Court to enter this Summary Final Judgment. Accordingly, the parties shall each receive 50% of the net proceeds upon sale as neither has requested credits or debits, subject to the terms and dictates of this Summary Final Judgment. This Court also grants entitlement to attorney fees and costs in accordance with Section 61.081, Florida Statutes, and for which the Court reserves jurisdiction to determine the amount to be paid to the attorneys of record.

3. Plaintiff and Defendant equally and jointly own as joint tenants with rights of survivorship the following real property located at 1830 South Ocean Drive, #4112, Hallandale Beach, Florida 33009, and which is legally described as follows: Condominium Unit No. 4112, in BEACH CLUB TWO, a CONDOMINIUM, according to the Declaration of Condominium thereof, as recorded in Official Records Book 42433, Page 1376, of the Public Records of Broward County, Florida. Parcel Identification Number: 514226-HG-3610. A copy of the Quit Claim Deed is either attached hereto and/or filed of record with the Clerk of the Circuit Court and is hereby incorporated herein as Exhibit A. The parties also jointly own some the personal property located in the subject real property.

4. In accordance with the Plaintiff's Complaint, Request for Admissions, affidavit of Plaintiff, the Motion for Summary Final Judgment, and the court file, and pursuant to Chapter 64, Florida Statutes, the subject real property is not divisible, and is not subject to partition in kind without prejudice to the owner thereby justifying this Court to grant and enter this Summary Final Judgment for Partition and Sale and Attorney Fees and Costs as to the subject real and personal property that is being partitioned.

5. This Partition action and Motion as filed by Plaintiff has requested Partition, Sale, Attorney Fees, Costs, and other related matters involving the subject real and personal property, including but not limited to an accounting for any credits and debits either party may claim, and for the appointment of a Special Magistrate to execute any and all documents necessary to effectuate a listing and sale of the subject real property in accordance with Chapter 64, Florida Statutes, and Florida law that is considered herein. By virtue of the Plaintiff's Complaint, the entry of a default against Defendant, Plaintiff's Motion for Summary Final Judgment for Partition and Sale and Attorney Fees and Costs and for the appointment of a Special Magistrate, Requests for Admissions, affidavit of Plaintiff, and the court file which was all considered, the Court finds that Summary Final Judgment is ripe and appropriate and is hereby GRANTED.

6. Partition is a matter of right. See FLA STAT. §§ 64.041, 64.052 (2024); *Rose v. Hansell,* 929 So. 2d 22 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D601a]; *Brennan v. Brennan*, 122 So. 3d 923, 925-27 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2081a]; *Gulledge v. Gulledge*, 82 So. 3d 1113, 1114-17 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D504a]; *Pantuso v. Pantuso,* 335 So. 2d 361, 362 (Fla. 2d DCA 1976). Accordingly, by virtue of the pleadings on file and the Order Granting Partial Final Judgment duly entered by this Court on January 15, 2025 (Doc. 14) wherein the Court has granted Partition and Sale, this court required both parties to execute a listing agreement with a real estate broker for the sale of subject real and personal property (Doc. 20). Plaintiff has executed the listing agreement, but Defendant has failed and/or has refused to do so, nor has he participated in these proceedings for unknown reasons in order to list the subject real property for sale of the subject real property and to sell it at fair market value based upon the realtor's listing agreement and any reasonable offers that will be made. Upon Defendant's failure to execute the listing agreement and participate in the sale of the subject real and personal property, the Court hereby appoints a Special Magistrate

and/or Attorney Ad Litem stated herein below, and hereby authorizes the Special Magistrate to sign listing agreement and to execute all Deeds and closing documents necessary to effectuate a sale of the subject real and personal property. Upon sale of the subject property, the attorney fees and costs expended by the parties and Special Magistrate fees and costs shall be determined from the top of the retained net proceeds upon sale in accordance with Section 64.081, Florida Statutes, which shall be ". . .determined on equitable principles in proportion to the party's interest." If the parties are unable to determine the amount of a reasonable attorney's fee to be awarded in this partition action to counsels for the respective parties, then the Court shall decide the amount which shall be based upon ". . .the service performed, the responsibility incurred, and nature of the service, the skill required, the circumstances under which it was rendered, the customary charges for like service, the amount involved, and the ability of the litigants to respond. . . ." See *Fernandez-Fox v. Mark Reyes,* 79 So.3d 895, 896-7 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D424a].

7. Based upon the record on file, neither party seeks an accounting or credits or debits, therefore, upon sale the net proceeds after payment of any mortgage, s, condominium maintenance fees, assessments (if any), closing costs and realtor's fees, shall be deposited and retained in the Clerk of the Circuit Court or attorney trust account before any equal (50%/50%) distribution is made to Plaintiff and Defendant upon sale. From those retained funds upon sale, the attorney fees and costs incurred by their respective counsel shall be paid off of the top before any distribution is made the parties.

8. At closing, the Court directs the closing agent upon sale to directly deposit to the Clerk of Circuit Court Registry or attorney's Trust Account the entirety of the net sales proceeds by cashier's check or direct deposit for safe-keeping before any distribution is made to either of the parties or for the payment of attorney fees and costs. From those net proceeds the attorney fees and costs and Special Magistrate's fees and costs shall be paid first from the top in accordance with the interests of the parties, and then the remaining portion shall be distributed upon the filing of a Motion to Disburse by the respective party.

9. This Court hereby appoints and authorizes DAVID CHARLES LEVINE, Esquire, 215 N Federal Highway, Dania Beach, Florida 33004, whose email is dlevine@attorneyadvocate.net, and whose Florida Bar Number is 47733, or such other person as the case may be, by the entry of this Summary Final Judgment or any separate order as is necessary, and the Court hereby authorizes and directs the Special Magistrate to complete the sale of the real and personal property by signing any and all documents for the sale of the subject real and personal property including but not limited to the Listing Agreement, Deeds, Bills of Sale and any other closing documents and otherwise necessary to effectuate a sale of the subject real and personal property, and as mentioned earlier herein all documents necessary to effectuate the sale of the real and personal property. As such, DAVID CHARLES LEVINE, as duly appointed Special Magistrate, shall have full power and authority to do and perform any and all lawful acts and things whatsoever necessary to be done in and about the premises as fully, and with all of the intents and purposes as Defendant, JEAN FRANCOIS RAYMOND, could do if personally present, and without the necessity for any further court order for the purposes stated herein for the sale of the real and personal property.

10. This Court reserves jurisdiction to enforce this Order, and reserves jurisdiction for all remaining matters not decided herein, including but not limited to enforcement of the Partition and Sale, determine the amount of attorney fees and costs that shall be awarded to the respective parties and their counsel for the partition action before, during, and after the entry of the Summary Final Judgment, appointment by separate order if necessary of a Special Magistrate and any further orders as is necessary for this purpose of appointment, and to award an amount of fees and costs incurred by the Special Magistrate all to be determined by affidavit of time spent on motion calendar, unless one of the parties objects, and for which this Court reserves jurisdiction to consider in order to determine the amount to be paid to counsel for the parties.

11. This Court also reserves jurisdiction to enforce any Attorney Fees and Costs Charging Liens filed to date.

* * *

Insurance—Homeowners—Coverage—Replacement cost value—Insurer's obligation to pay replacement cost value was not triggered where express terms of policy required insureds to perform repairs related to the loss and submit proof of costs incurred in making repairs—As a matter of law, insureds cannot recover RCV where they did not perform repairs and can no longer perform repairs because home has been sold—Insureds cannot meet burden to show that ACV payment was insufficient or that any breach of contract occurred where insurer paid the only ACV estimate it received, and insureds failed to submit valid competing ACV estimate prior to suit being filed—No merit to argument that insurer, by its conduct, waived right under policy loss settlement provision—Waiver and estoppel cannot be used to circumvent coverage restrictions or expand recovery rights

BRENNAN CALELLO AND ANTHONY CALELLO, Plaintiffs, v. FLORIDA PENINSULA INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 24-CA-000214. June 9, 2025. Cynthia Pivacek, Judge. Counsel: Michael A. Cassel, Cassel & Cassel, P.A., Fort Lauderdale, for Plaintiffs. Oscar Lombana, Salehi, Boyer, Lavinge Lombana, P.A., Coral Gables, for Defendant.

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

THIS CAUSE having come before the Court at hearing on May 30, 2025 on Defendant's Motion for Final Summary Judgment, filed on January 22, 2025 (hereinafter referred to as "Defendant's Motion"), and the Court having reviewed Defendant's Motion and Plaintiffs' Response thereto, filed March 3, 2025 (hereinafter referred to as "Plaintiffs' Response"), and all other relevant filings of record, and the Court having heard oral arguments from Oscar Lombana, Esq. on behalf of Defendant and Michael Cassel on behalf of Plaintiffs and otherwise being fully advised in the premises, it is hereby:

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

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

1. Under Florida's newly adopted summary judgment standard[1], the inquiry before the Court in ruling on Defendant's instant Motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 411 U.S. 242, 251-52 (1986). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 371, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). In Florida, the new Rule 1.510

"requires summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See, *In Re: Amendments To Florida Rule of Civil Procedure 1.510,* No. SC20-1490 (Dec. 31, 2020) [46 Fla. L. Weekly S6a] (per curiam) (internal quotations and citations omitted).

2. This is a breach of contract action involving a first party-property homeowner's insurance claim dispute wherein the reported date of loss is September 28, 2022, as the result of a covered loss, as alleged in paragraph 16 of the Complaint.

3. Based on the undisputed record evidence and uncontested material facts relevant to this summary judgment proceeding, it is conclusively established that prior to suit, Plaintiff made a claim by reporting the aforementioned loss event to Defendant on or about September 29, 2022, which was assigned claim number FPI227877. Thereafter, after investigating Plaintiffs' claim which included an inspection of the Plaintiff's Property (hereinafter referred to as "The Property"), Defendant issued an initial coverage determination to Plaintiffs, which extended payments based on its assessment of the Actual Cash Value ("ACV") of covered repairs, in the amount of $21,213.70 Coverage A Dwelling, and $991.45 Coverage B Other Structures, after the application of the Policy's $24,000.00 deductible. Subsequently, on or about April 26, 2023, Defendant issued a supplemental payment for the loss in the amount of $29,672.96 under Coverage A and $22.65 under Coverage B. Plaintiffs do not dispute the amounts or timing of these payments, nor do they contend the payments were untimely or unrelated to the claim.

4. Plaintiffs offered no record evidence that repairs were made prior to filing suit on January 5, 2024, that would substantiate additional payment under the Policy.

5. During oral argument, Plaintiffs' concede that they are not entitled to RCV as The Property has since been sold.

6. Defendant contends that prior to suit, the only estimate it received on behalf of Plaintiffs' was an RCV estimate, that did not adjust for depreciation, submitted by Floridian Public Adjusters for a net amount of $1,437,141.86 (hereinafter referred to as the "PA Estimate").

7. In Plaintiffs' Response, and during oral argument, Plaintiff contends that the PA Estimate is inadmissible hearsay and should not be considered.

8. Regardless of the admissibility of the PA Estimate, there is no record evidence that Plaintiffs submitted any estimate reflecting the actual cash value (ACV) of the claimed damages—i.e., an estimate that applies depreciation—prior to filing suit. Plaintiffs presented no documentation of depreciation, incurred expenses, or contractor verification to support any ACV dispute.

9. Defendant's instant Motion moves for final summary judgment in its favor arguing that it could not have conceivably breached the policy contract by acknowledging coverage for Plaintiffs' claim and issuing undisputed payments to Plaintiffs pursuant to the terms of the policy, and at no time thereafter, or prior to this suit being filed, did the Plaintiffs ever submit any competing ACV estimate so as to dispute Defendant's coverage determination and undisputed payment, or provide Defendant with any invoices or proof of completed repairs so as to give Defendant notice of Plaintiff making a supplemental RCV claim based on completed repairs of the damaged property. In other words, Defendant argues, that because Defendant indisputably acknowledged coverage and issued payments pursuant to the policy; and because Plaintiff only claimed and demanded RCV benefits before filing this suit, without ever giving Defendant any notice of repairs having been completed so as to file a proper supplemental claim for RCV based on proof of completed repairs; Defendant therefore could not have been in breach of the insurance policy contract as of the time of this suit being filed.

10. Defendant's policy issued to Plaintiffs provides replacement cost coverage for the dwelling under Coverage A, but expressly conditions the insurer's obligation to pay full replacement cost value (RCV) on the actual completion of repairs. The relevant language in the Loss Settlement provision states:

> **"We will initially pay at least the actual cash value of the insured loss less any applicable deductible. We shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred**. . ."[2]

11. Here, Plaintiffs offered no record evidence substantiating that they performed repairs related to the loss nor submitted proof of incurred costs, and thus never triggered the RCV payment obligation under the express terms of the policy.[3] This provision tracks the bifurcated payment structure imposed by Florida Statute § 627.7011(3)(a), which requires insurers to first pay actual cash value (ACV), and then pay RCV only as work is performed and expenses are incurred. Plaintiffs concede they are no longer entitled to RCV, in light of The Property being sold and thus unable to trigger RCV under the bifurcated framework.

12. The Florida Supreme Court's decision in *Trinidad*[4], although decided under a now-superseded version of the statute and is no longer controlling with respect to the timing of RCV payments, it remains instructive on a separate, continuing point: the interpretation of "actual cash value" (ACV) where undefined in the policy. The Court confirmed that ACV is generally understood to mean "replacement cost less depreciation."[5] In short, the concept of Actual Cost Value ("ACV") coverage, recognizes that the insurer is entitled to deduct reasonable depreciation from the value of [a] loss" and the purpose of ACV is to "place the insured back in the position they enjoyed prior to loss."[6]

13. In *Vazquez v. Citizens,* the Third DCA emphasized that the prior statutory language requiring insurers to pay replacement cost "whether or not the insured replaces or repairs the dwelling or property" had been deleted, and replaced with a two-tier structure referenced above.[7] The *Vazquez* court acknowledged *Trinidad*'s holding but correctly noted that it was based on outdated statutory language and thus inapplicable to claims governed by the current version of the statute.[8] Under the amended statute, and under the policy at issue here, which mirrors the revised statutory language, insurers are under no obligation to pay RCV unless and until repairs are performed and costs incurred. This statutory revision directly abrogated the foundation on which *Trinidad* was decided, reaffirming the insurer's right to condition payment of RCV on proof of actual repair, thereby returning Florida law to its traditional indemnity-based approach, i.e., an insured is only entitled to be reimbursed for what they actually lose, not for hypothetical or projected expenses.

14. The *Vazquez* Court, reaffirmed its decision in *Maspons* in finding that that actual cash value (ACV) is limited to damages to property that sustained *direct physical loss*[9] and does not include matching costs for undamaged items such as continuous tile or adjacent cabinets. The decision also reaffirmed that "direct physical loss" imposes a requirement of tangible, observable damage.[10] Furthermore, while the court declined to impose a presumption that the insurer's estimate reflects the correct ACV, it emphasized that any challenge to the insurer's valuation must be supported by competent evidence, mere estimates for unperformed matching or future repairs do not suffice. *Vazquez* thus confirms the enforceability of policies and statutes that condition RCV on actual repair and limits ACV to tangible loss, rejecting claims based on aesthetics or unincurred costs.

15. Nearly every Florida District Court of Appeal that has addressed the issue, has confirmed that under both § 627.7011(3)(a),

Florida Statutes, and standard replacement cost policy language as found in this case, insurers are not obligated to pay replacement cost value (RCV) unless and until the insured actually performs repairs and incurs expenses.

- The **First DCA**, in *Clark*,[11] reversed a jury award based on RCV where no repairs had been performed, holding that "RCV is recoverable only as reimbursement once expenses are actually incurred" and that "no breach occurs" where the insurer pays ACV and the insured fails to prove incurred costs.
- The **Third DCA** in *Salazar*[12], held that "[t]he insurer is only obligated to pay such [RCV] costs as the repairs are performed," and reversed a jury award where Plaintiff relied solely on an RCV estimate without evidence of repair or incurred costs.
- The **Fourth DCA**, in *Qureshi*[13], likewise reversed a judgment based on unrepaired RCV estimates and emphasized that § 627.7011(3)(a) and the policy's language "require payment only as work is performed and expenses are incurred".
- The **Sixth DCA** recently affirmed Judge Alane Laboda's summary judgment ruling in *Levy*[14], granting judgment where the insureds submitted only RCV estimates and performed no repairs. The lower court had found the policy clearly required expenses to be incurred before RCV was owed.[15]
- Federal courts interpreting Florida insurance law have likewise held that replacement cost benefits are not recoverable unless and until actual repairs are made and expenses are incurred. In *Metal Products Co., LLC*[16], the Eleventh Circuit affirmed summary judgment for the insurer where the insured sought RCV damages without making any repairs. The court enforced the policy's plain language conditioning RCV payment on completed repairs, rejecting the insured's attempt to rely solely on a replacement cost estimate. Quoting both *Ceballo* and *Somerset*[17], the court held that "no payment is made on a claim for replacement cost value [u]ntil the lost or damaged property is actually repaired or replaced," and that "an insurance company's liability for replacement cost does not arise until the repair or replacement has been completed".[18] Numerous of our state's trial courts have also affirmed the principle that supports the requirement that repairs be incurred and repairs made prior to RCV payment.[19]

16. In this case, the property has been sold. As a result, it is not merely that repairs have not been performed, it is that they can no longer be performed by Plaintiffs. Because the policy unambiguously requires that repairs be completed and expenses incurred before replacement cost value can be recovered, and because Plaintiffs are now permanently incapable of satisfying that condition precedent, they will never be entitled to RCV as a matter of law, a point which was conceded by Plaintiffs' during oral argument.

17. Florida law makes clear that once the insurer has paid an undisputed actual cash value (ACV) amount, the burden shifts to the insured to prove that the payment did not reflect the full value of the insured loss.[20]

18. In *Clark,* the court reversed a jury verdict because the plaintiffs failed to submit any *competent* evidence challenging the insurer's ACV calculation.[21] The insureds relied solely on a replacement cost estimate that did not separate out depreciation or provide any alternative ACV valuation.[22] As the court explained, "when (1) an insured's estimate and evidence provides only for RCV costs and (2) no evidence is presented to challenge the insurer's ACV payout, no breach of contract occurs."[23] This conclusion was consistent with holdings in *Salazar* and *Qureshi,* where courts likewise rejected breach claims based solely on unrepaired RCV estimates without proof that the ACV payment was insufficient.

19. In *Goldberg*[24], the Third DCA emphasized that while a unilateral ACV determination does not shield an insurer from liability when disputed, "***[t]he insurer should not be deemed to have breached the contract where it accepted coverage and paid the only estimate it received of the actual cash value of the loss***." Similarly, in *Metal Products Co., LLC*,[25] the Eleventh Circuit affirmed summary judgment where the insured submitted only an RCV estimate and performed no repairs, holding the insurer "was not obligated to pay the replacement cost value" where the policy required actual repair as a condition precedent. Likewise, Florida trial courts have consistently granted summary judgment where plaintiffs failed to provide a competing ACV estimate before suit.[26]

20. Just as the courts found in *Salazar, Clark* and *Qureshi,* when (1) an insured's estimate and evidence provide only for RCV costs and (2) no evidence is presented to challenge the insurer's ACV payout, no breach of contract occurs when the insurer fails to pay monies under the insured's estimate.[27]

21. The absence of any pre-suit ACV dispute is fatal to a breach of contract claim based on underpayment of ACV.

22. Under Florida law, "[t]he elements of a breach of contract action are (1) a valid contract; (2) a material breach; and (3) damages."[28] The burden of proving these three elements lies with Plaintiff.[29] Without its only evidence of damages, Plaintiffs cannot satisfy its burden of proving all three elements of this breach of contract action. The last element constituting the cause of action generally occurs, in insurance contract actions, at the time at which the insurance policy is breached.[30] And, in turn, a cause of action for breach of an insurance contract generally accrues, at the time at which the insurer denies the claim.[31]

23. In this case, it is undisputed that Defendant issued multiple payments to Plaintiffs based on its determination of actual cash value (ACV) of covered repairs in accordance with the terms of the policy. It is further undisputed that Plaintiffs have failed to submit a valid competing ACV estimate prior to suit. As such, they cannot satisfy their burden to show Defendant's ACV payment was insufficient or that any breach occurred.

24. Plaintiffs filed suit on January 5, 2024[32], at which point, the right of action for benefits under a contract of insurance is limited to those benefits that had accrued at that time.[33]

25. Indeed, in *Orlando Sports Stadium, Inc.,* this Court's precedent stated that:

> A cause of action must exist and be complete before an action can be commenced or, as sometimes stated, the existence or non-existence of a cause of action is commonly dependent upon the state of facts existing when the action was begun. As a general rule the plaintiff may not be permitted to cure the defect of non-existence of a cause of action when suit was begun, by amendment of his pleadings to cover subsequently accruing rights.[34]

26. Since there was only one ACV estimate, its own, Defendant is entitled to rely on same in investigating and adjusting Plaintiff's claim pursuant to *Goldberg.* Likewise, it also is undisputed that Plaintiffs never gave Defendant any notice or proof of completed repairs prior to suit, such as to trigger entitlement to RCV payment under the terms of the policy.

27. Plaintiffs suggest that Defendant waived its rights under the Loss Settlement provision based on its conduct. The Court does not find this argument persuasive.

28. Florida courts have repeatedly held that waiver and estoppel cannot be used to circumvent coverage restrictions or expand recovery rights.[35] The doctrine of waiver cannot be used to either establish ACV coverage when Plaintiff did not submit an ACV claim or to establish RCV coverage when Plaintiff estimated but did not incur repair costs.[36]

29. The First DCA in *Clark* reversed a jury award based on RCV where the insureds failed to provide a valid ACV estimate or prove that they incurred repair expenses. The court emphasized that submitting an RCV estimate labeled "ACV," without depreciation or

proof of actual loss, does not create a triable issue or establish breach.[37] Rather, "when (1) an insured's estimate and evidence provides only for RCV costs and (2) no evidence is presented to challenge the insurer's ACV payout, no breach of contract occurs."[38]

30. In sum, waiver and estoppel cannot be used to sidestep the express language of section 627.7011(3)(a) or the policy's Loss Settlement provision. Plaintiff's failure to submit a valid ACV estimate or to perform any repairs precludes additional recovery.[39]

31. Therefore, because there is no genuine dispute of material fact that Defendant did not, and is not in, breach of the clear and unambiguous terms of the subject insurance policy contract, Defendant is entitled to final summary judgment accordingly.

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

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[1]Effective May 1, 2021, Florida's amended Rule 1.510 now adopts the federal summary judgment standard articulated by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc., All* U.S. 242 (1986) (amongst two (2) other United States Supreme Court opinions) (citations omitted). *See specifically, In Re: Amendments To Florida Rule Of Civil Procedure 1.510*, No. SC20-1490 (Dec.31, 2020) [46 Fla. L. Weekly S6a] (per curiam). See also *Celotex Corp. v. Catrett,* 477 U.S. 317, 32223, 106 S. Ct. 2548, 2552 53, 91 L. Ed. 2d 265 (1986)

[2]Policy, FP HO 03 08 18, Section I—Conditions, ¶3(b)(4)

[4]*Trinidad v. Florida Peninsula Insurance Co.,* 121 So. 3d 433 (Fla. 2013) [38 Fla. L. Weekly S507a]

[5]*Id*.

[6]*Replacement Cost Coverage,* 34 Wake Forest L. Rev. at 296. "Since most property depreciates with time, the formula, replacement cost new less depreciation, has, from an insurance industry perspective, become synonymous with actual cash value." *Id*.;

[7]*Vazquez v. Citizens Prop. Ins. Corp.,* 304 So.3d 1280 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a]

[8]*Id*. at 1285

[9]See *Homeowners Choice Prop. & Cas. v. Maspons,* 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D203a] ("A 'loss' is the diminution of value of something. . . 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual."). This definition supports Defendant's position that actual cash value (ACV) must be tied to property that has sustained real, tangible damage and excludes aesthetic or speculative claims.

[10]*Id*.

[11]*Homeowners Choice Prop. & Cas. v. Clark,* 1D2023-1622, 2025 WL 1140119 (Fla. 1st DCA Mar. 19, 2025) [50 Fla. L. Weekly D648b]

[12]*Citizens Prop. Ins. Corp. v. Salazar,* 388 So. 3d 115 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1941a]

[13]*Universal Prop. & Cas. Ins. Co. v. Qureshi,* 396 So. 3d 564 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D1575a]

[14]*Levy v. United Prop. & Cas. Ins. Co.,* 363 So. 3d 117 (Fla. 6th DCA 2023)

[15]*Levy v. United Prop. & Cas. Ins. Co.,* 20-CA-001938, Lee County Circuit Court

[16]*Metal Products Co., LLC v. Ohio Security Insurance Co.,* 2022 WL 104618 (11th Cir. Jan. 11, 2022)

[17]*Fla. Ins. Guar. Ass'n v. Somerset Homeowners Ass'n, Inc.,* 83 So. 3d 850, 852 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2785a] (holding that under the plain language of the policy, an insurer "will not pay on a replacement cost basis for any loss or damage. . . [u]ntil the lost or damaged property is actually repaired or replaced," and rejecting the insured's invocation of the prevention of performance doctrine as inconsistent with binding precedent and the unambiguous contract terms).

[18]*Metal Products Co., LLC,* 2022 WL 104618, at *2 (11th Cir. Jan. 11, 2022)

[19]See Docket Entry 126, Defendant's First Notice of Filing and Intent to Rely Upon Supplemental Legal Authority in Support of Defendant's Motion for Final Summary Judgment.

[20]*Clark,* No. 1D2023-1622, 2025 WL 850677, at *10 (Fla. 1st DCA Mar. 19, 2025)

[21]*Id*.

[22]*Id*.

[23]*Id*.

[24]*Goldberg v. Universal Prop. & Cas. Ins. Co.,* 302 So. 3d 919 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2118b]

[25]*Metal Products Co., LLC v. Ohio Sec. Ins. Co.,* 2022 WL 104618 (11th Cir. 2022)

[26]*De La Riva v. Citizens* (2022 WL 6775177); *Carrillo v. Avatar* (2022 WL 1047472), both of which found no breach where plaintiffs submitted only RCV estimates or failed to supplement prior to litigation. See also Docket Entry 126, Defendant's First Notice of Filing and Intent to Rely Upon Supplemental Legal Authority in Support of Defendant's Motion for Final Summary Judgment

[27]See *Id.* ("Here, the homeowner did not produce any evidence to establish her damages exceeded Citizens' initial payment. Thus, Citizens was not yet obligated to pay any additional amount or matching costs." (emphasis supplied)); *Qureshi,* 396 So. 3d at 566 ("Universal argues that the trial court reversibly erred by allowing the insureds to introduce into evidence at trial the estimated repair costs for work that was never performed even though both the policy's terms and section 627.7011(3)(a) require payment by the insurer only 'as work is performed and expenses are incurred.' We agree." (emphasis supplied)); *id.* at 568 ("Because the trial court impermissibly allowed the jury to consider evidence of estimated but not yet incurred repair costs in determining recoverable damages, we reverse and remand[.]" (emphasis supplied)).

[28]*Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913, 914 (11th Cir. 1999)

[29]See *Carpenter Contractors of America, Inc. v. Fastener Corp. of America, Inc.,* 611 So.2d 564, 565 (Fla. 4th DCA 1992); *Xiang v. Ocala Heart Clinic II, LLC,* 379 So.3d 561, 565 (Fla. 5th DCA 2024) [49 Fla. L. Weekly D297b].

[30]*Linares v. Universal Prop. & Cas. Ins. Co.,* 141 So.3d 719 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1394a]

[31]*Luciano v. United Prop. & Cas. Ins. Co.,* 156 So.3d 1108 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D299a].

[32]See Complaint, Docket Entry 3.

[33]*Wolk v. National Union Fire Ins. Co. of Pittsburgh, PA,* 2012 WL 12952758 (M.D. Fla. 2012) (citations omitted); *see also, Aetna Life Ins. Co. v. Smith,* 345 So.2d 784 (Fla. 4th DCA 1977) (stating "the right of action based upon an insurer's failure to pay [ ] indemnity or benefits is limited to the installments which have accrued at the institution of the action"); *Klein v. John Hancock Mut. Life Ins. Co.,* 683 F.2d 358 (11th Cir. 1982); *Levenson v. Motor Union (Aviation) Orion Ins. Co.,* 176 So.2d 125 (Fla. 3d DCA 1965); *see also, e.g., Monsanto Co. v. Fuqua*, 280 So.2d 496 (Fla. 1st DCA 1973), *cert. denied,* 286 So.2d 205 (Fla. 1973); *Cruz v. Union Gen. Ins.,* 586 So.2d 91 (Fla. 3d DCA 1991); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.,* 316 So.2d 607 (Fla. 4th DCA 1975)

[34]*Orlando Sports Stadium, Inc*. . at 610. see also, *Hasam Realty Corp. v. Dade County,* 178 So.2d 747 (Fla. 3d DCA 1965) ("If a plaintiff has no valid cause of action on the facts existing at the time of filing suit, the defect cannot ordinarily be remedied by the accrual of one while the suit is pending. We do not find that this rule has been changed by the Rules of Civil Procedure which provide for amended or supplemental pleadings."); *Condor West Investments, LLC v. Cannabis Growth Indstr., Inc.,* 279 So.3d 1219 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2350a] ("[N]either a supplemental pleading nor an amended pleading can be used to create a cause of action where one did not exist at the inception of the suit") (citations omitted).

[35]See *Qureshi,* 396 So. 3d 564, 567 (Fla. 4th DCA 2024)

[36]*Id*. (quoting *Doe on Behalf of Doe v. Allstate Ins. Co.,* 653 So. 2d 371, 373 (Fla. 1995) [20 Fla. L. Weekly S135a]). See *id*. at 658 ("An expansion of insurance coverage . . . to include payment for estimated but not yet incurred repair costs would improperly create insurance coverage by waiver or estoppel contrary to [the Florida Supreme Court's] precedent ....")

[37]*Clark,* 2025 WL 850677, at *10

[38]*Id*. at *19

[39]The Court rejects Plaintiffs claim that they are entitled to diminution in value related to the subsequent sale of the property. See *Siegle v. Progressive Consumers Ins. Co.,* 819 So. 2d 732 (Fla. 2002) [27 Fla. L. Weekly S492a]; *Rezevskis v. Aries Insurance Co.,* 784 So.2d 472 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D725a]

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Volume 33, Number 4
August 29, 2025
Cite as 33 Fla. L. Weekly Supp. ____

COUNTY COURTS

Consumer law—Florida Consumer Collection Practices Act—Contempt—Bad faith conduct—Sanctions—Attorney's fees—Defendant operated in bad faith and caused unnecessary and vexatious delay by repudiating settlement agreement and violating court order requiring defendant to pay plaintiff's counsel for time expended enforcing settlement agreement—Court orders sanctions of additional attorney's fees to be paid to plaintiff's counsel—Per diem fee for half of days defendant remained in contempt to be paid to legal aid organization

TONY GWYNN, Plaintiff, v. RENT-A-TIRE, L.P., d/b/a RAW WHEELS & TIRES, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2022-SC-011414. Division CC-O. April 29, 2025. Julie K. Nelson, Judge. Counsel: Max Story, Story Law Group, Jacksonville Beach, for Plaintiff. Zoila Lahera, Gray Robinson, P.A., Tampa, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR CONTEMPT AGAINST DEFENDANT RENT-A-TIRE, L.P.

THIS CAUSE came before the Court for a hearing on March 25, 2025, upon Plaintiff's Motion to Hold Defendant Rent-a-Tire, L.P., in Civil and Criminal Contempt of Order Granting Plaintiff's Motion for Sanctions Entered January 16, 2025. The Court held a hearing via Zoom and Plaintiff's counsel, Max Story, and Defendant's counsel, Zoila Lahera, appeared at the hearing. The Court has considered Plaintiff's Motion, the relevant legal authority and the arguments of counsel and does hereby find as follows:

A trial court possesses the inherent authority to impose fees against a party for bad faith conduct. *Moakley v. Smallwood*, 826 So. 2d 221, 226 (Fla. 2002) [27 Fla. L. Weekly S357b]. "The inherent authority of the trial court, like the power of contempt, carries with it the obligation of restrained use and due process." *Id*. at 226-27. The Court in *Bitterman v. Bitterman,* 714 So.2d 356, 365 (Fla.1998) [23 Fla. L. Weekly S168a], recognized the inherent authority of a trial court to award attorneys' fees for bad faith conduct against a party, even though no statute authorized the award. In order to support sanctions, the trial court must make express findings of bad faith and provide notice and an opportunity to be heard before imposing attorneys' fees and "the amount of the award of attorneys' fees must be directly related to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct." *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002) [27 Fla. L. Weekly S175b].

Where the imposition of attorney's fees alone is insufficient to address a party's noncompliance, it is within the court's authority to impose per diem fines for noncompliance and bad faith conduct. *Channel Components, Inc. v. America II Electronics, Inc.*, 915 So. 2d 1278 (Fla. 2d DCA 2005) [31 Fla. L. Weekly D3a] (affirming a lower court's order imposing a daily fine of $2,500.00 for noncompliance).

Procedural History

Plaintiff filed this case against Defendant alleging violations of the Florida Consumer Collection Practices Act on June 10, 2022. On July 10, 2024, after over two years of litigation, the parties agreed a settlement and Defendant filed a Notice of Tentative Settlement. Plaintiff then filed a Notice of Settlement on July 15, 2024. Defendant later repudiated the settlement, and Plaintiff filed a Motion to Enforce Settlement Agreement on September 13, 2024. On December 4, 2024, the Court entered an Order Granting Plaintiff's Motion to Enforce Settlement Agreement which ordered payment by Defendant to Plaintiff by December 14, 2024. In the interim, the Court held a hearing on December 10, 2024, that had been coordinated by the Court regarding its failure to appear and did not seem to even recall the failure to appear at the hearing held on March 25, 2025. Thereafter, the Court entered an Order Granting Plaintiff's Motion for Sanctions on January 16, 2025, wherein the Court found that "Defendant caused the unnecessary litigation to enforce the settlement agreement. ***147 days*** passed from when the parties settled the matter on July 10, 2024, until the Court entered the Order Enforcing Settlement Agreement on December 4, 2024. This delay was egregious and caused by Defendant who acted in bad faith." As a result of the Court's findings, the Court ordered that Defendant pay Plaintiff's counsel for four hours of attorney's fees at a rate of $450.00, for a total of $1,800.00, within 10 days of the Order to compensate Plaintiff's counsel for time expended. Defendant failed to make the payment as required by the Court and therefore failed to comply with this Court's Order. Again, Defendant never contacted the Court regarding its failure to comply with the Court's Order. As a result, Plaintiff filed this Motion for Contempt on February 14, 2025. Plaintiff did not receive the sanction payment until March 5, 2025. By that time, Plaintiff's counsel, again, had expended unnecessary litigation time caused by Defendant's delay and had already noticed the hearing on the Motion for Contempt. Defendant remained in noncompliance with and in contempt of this Court's prior sanctions Order for 38 days and after being duly noticed, the Court held this hearing on March 25, 2025.

Analysis and Findings

The Court finds that the Defendant operated in bad faith in violating this Court's January 16, 2025, Order. The Court previously found Defendant operated in bad faith in creating unnecessary and vexatious delay, upon which this Court's first sanctions Order was based. Defendant thereafter failed to comply with the sanctions Order itself, and the Court finds no good cause for the noncompliance and contempt of its Order. The noncompliance further compounded the harm already caused by Defendant's prior bad faith and demonstrated a blatant disregard for this Court's authority. This sanction is entered because the Court specifically finds that the Defendant's bad faith conduct caused the unnecessary litigation by failing to comply with this Court's prior Order, and because this Court's prior sanction was insufficient to induce Defendant's compliance. This sanction could have been avoided altogether if Defendant had complied with the Court's prior Order. As Mr. Story argued, and this Court agrees, Defendant was solely responsible for the additional attorney hours Plaintiff was required to expend. The amount of attorney fees was directly attributable to the time required to draft and argue the Motion. Mr. Story is entitled to attorney fees pursuant to Fla. Stat. §559.77(2), as well as the inherent power of the Court. Mr. Story testified to expending 3 attorney hours in drafting the motion and additional time preparing for the hearing and arguing the Motion. This Court further sanctions Defendant $250.00 per day for one half of the days it remained in contempt of this Court's prior order (19 days of the 38 total), for a total additional sanction of $4,750.00. At the request of Plaintiff's counsel, the $4,750.00 sanctions payment shall be paid to Jacksonville Area Legal Aid and shall be used to promote their efforts to defend consumers against unlawful debt collection practices in Northeast Florida.

ORDERED AND ADJUDGED that:

1. The Motion for Sanctions is **GRANTED**.

2. The Court has reviewed the factors to be considered in determining reasonable attorney's fees as set forth in Rule 4-1.5. Rules Regulating the Florida Bar, *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985). and *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990). The Court has applied

those factors in this ruling and finds that $450.00 per hour is a reasonable rate for Max Story considering his years of practice and significant experience litigating consumer protection matters.

3. Accordingly, Defendant shall pay 3 hours of attorney fees at the rate of $450.00, and $4,750.00 as a total per diem sanction, for a total payment of $6,100.00 payable to "Jacksonville Area Legal Aid," 126 W. Adams St., Ste. 101, Jacksonville, Florida 32202, within thirty (30) days of the date of this Order.

* * *

Contracts—Quasi contracts—Account stated—Unjust enrichment—Dismissal with prejudice—Limitation of actions—Plaintiff's failure to appear at case management conference warrants dismissal of case where plaintiff had ample notice of conference and was warned that nonattendance could result in dismissal—Dismissal is with prejudice where account statement filed by plaintiff in support of claims for account stated and unjust enrichment shows payment due date that was more than four years prior to date of complaint

ABSOLUTE RESOLUTIONS INVESTMENTS, LLC, Plaintiff, v. MIKKA L. GLENN, Defendant. County Court, 4th Judicial Circuit in and for Clay County. Case No. 2025-CC-000250. Division D. April 28, 2025. Kristina K. Mobley, Judge. Counsel: Thomas Cupo, Mandarich Law Group, LLC, for Plaintiff. Max Story, Story Law Group, Jacksonville Beach, for Defendant.

ORDER OF DISMISSAL

THIS CAUSE came before the Court on the Case Management Conference on April 24, 2025. Defendant appeared through counsel, Max Story, Plaintiff's counsel failed to appear. The Court being fully advised in the premises, the Court finds as follows:

FINDINGS

1. On January 25, 2025, Plaintiff filed its two-count complaint for 1) account stated and 2) unjust enrichment, and pursuant to 1.130(a) attached a statement of debt with a payment due date of August 13, 2018.

2. On March 3, 2025, Defendant entered the case, filing her Motion to Dismiss. Her Motion alleges that since the statute of limitations for both of Plaintiff's claims is 4 years, and the account statement filed by Defendant in support of their claim lists a payment due date of August 13, 2018, Plaintiff's right to file its claims expired after August 13, 2022.

3. On March 7, 2025, this Court entered its Initial Case Management Order. The Order stated, among other things, "Upon the failure of a party (or the party's counsel if represented) to attend a Case Management Conference, the Court may dismiss the action, strike pleadings, limit proof or witnesses, or take any other appropriate action against a party failing to attend. Fla. R. Civ. P. 1.200(j)(6), and 1.420 (b)."

4. On March 11, 2025, this Court entered its Order Setting Case Management Conference, reminding the Parties of the requirements of the prior order, and stating, among other things, "IF PLAINTIFF'S COUNSEL FAILS TO APPEAR AT THE CASE MANAGEMENT CONFERENCE, THE CASE SHALL BE DISMISSED WITHOUT FURTHER NOTICE" (emphasis original). This Order was served on both Parties.

5. On April 24, 2025, Defendant through counsel appeared at the Case Management Conference, and Plaintiff failed to appear as required.

6. The Court finds Plaintiff's failure to appear to be willful and flagrant as the conference was noticed 44 days prior, two separate orders were entered warning Plaintiff of the possibility of dismissal as a sanction for failure to appear, and Plaintiff appears to have made no effort before or after the hearing to remedy or explain the failure to appear.

7. Further, as Defendant stated in her Motion to Dismiss, and Defendant's counsel explained at the hearing, Plaintiff and their counsel had been served a federal class action complaint addressing matters arising from Plaintiff's claims in this case, and so Plaintiff and their counsel had received additional notice concerning issues involving this case.

8. Pursuant to Fla. R. Civ. P. 1.200(2), the prior Case Management Order, and Rule 1.420, the Court elected to hear Defendant's pending Motion to Dismiss.

9. Upon consideration of the Motion, it is clear from the face of Plaintiff's complaint and attached exhibit that Plaintiff filed the Complaint more than two and one-half years after the applicable statutes of limitations have expired. On January 25, 2025, Plaintiff filed it's two-count complaint for 1) account stated and 2) unjust enrichment, pertaining to a Navy Federal Credit Union debt purchased by Plaintiff.

10. The statute of limitations for an account stated claim is four years from the date of the alleged agreement on the account, or from which the last item was drawn. *See* § 95.11(3)(j), Fla. Stat.; *Hawkins v. Barnes*, 661 So. 2d 1271, 1273 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2403a]. The statute of limitations for unjust enrichment is four years from the date of the alleged conferred benefit. *See* § 95.11(3)(j), Fla. Stat.; *Cleveland Clinic Fla. v. Children's Cancer Caring Ctr., Inc.*, 274 So. 3d 1102 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1368a].

11. Plaintiff attached a copy of a credit statement allegedly issued by Navy Federal to Defendant. The exhibit statement does not provide a specific issue date. However, the statement itself states the closing date for its statement period is July 16, 2018, and that the next payment due is August 13, 2018. As a result, based on the allegations in Plaintiff's exhibit, the alleged debt at issue for both claims accrued no later than August 13, 2018. Based on Plaintiff's own allegations, the statute of limitations for both claims ran after August 13, 2022, more than two and one-half years ago.

12. Since the statute of limitations for both its claims expired years ago, Plaintiff is without legal right to bring its claims, and Plaintiff's complaint should be dismissed with prejudice.

It is therefore,

ORDERED:

1. Plaintiff's Complaint is **DISMISSED**.

* * *

Insurance—Personal injury protection—Breach of contract—Limitation of actions—Statute of limitations applicable to medical provider's action against PIP insurer commenced five years from the date insurer denied reimbursement for last date of service and, taking into account tolling for an additional 60 business days based on two demand letters, expired prior to entry of agreed order adding insurer to medical provider's suit against another PIP insurer—Provider failed to properly raise equitable tolling and equitable estoppel avoidances in reply to insurer's affirmative defenses—Further, equitable tolling does not apply where insurer did not mislead or lull provider into inaction, provider did not mistakenly file claim in wrong forum, and provider was represented by experienced counsel—Equitable estoppel is also inapplicable where insurer did not submit any representations regarding denial of coverage that were contrary to its later asserted positions—Final judgment is entered in favor of insurer

THE INTERGRATIVE HEALTH SOLUTION!LLC., a Florida Corporation, a/a/o Gloria Verdugo, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY and THE TRAVELERS HOME & MARINE INSURANCE COMPANY, Defendants. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-003799-O. Division 79. May 14, 2025. Martha C. Adams, Judge. Counsel: Sadie Naveo and Jason B. Giller, Miami, for Plaintiff. Annie Beljour,

Coconut Creek, for Defendant Allstate Property & Casualty Insurance Company. Blake Levine and Maria Pace, Dutton Law Group, Orlando, for Defendant Travelers Home and Marine Insurance Company.

DEFENDANT'S COMPETING ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT REGARDING THE STATUTE OF LIMITATIONS

THIS MATTER comes before the Court on Defendant's Motion for Final Summary Judgment on the grounds that Plaintiff's Complaint is barred by the statute of limitations pursuant to Florida Rule of Civil Procedure 1.510 and section 95.11(2)(b), Florida Statutes, and this Court, having heard argument on the matter and otherwise being fully advised, reaches the following findings of fact and conclusions of law as follows:

UNDISPUTED MATERIAL FACTS

1. This case involves a claim for personal injury protection ("PIP") benefits for medical treatment/services provided by the Plaintiff, THE INTEGRATIVE HEALTH SOLUTION! LLC, provided to the Assignor, Gloria Verdugo, related to a motor vehicle accident that occurred on February 13, 2014. ***See* Original Complaint at ¶ 9.**

2. The Plaintiff submitted the bills for the dates of service at issue, February 25, 2014, through May 5, 2014, to the Defendant, THE TRAVELERS HOME & MARINE INSURANCE COMPANY, for reimbursement. ***See* Plaintiff's Bills attached as Exhibit B to Defendant's Affidavit of Vickey Strom ("Adjuster Affidavit") filed in support of Defendant's Motion for Final Summary Judgment; *see also* Plaintiff's Response to Defendant's Motion for Partial Summary Judgment regarding Statute of Limitations at ¶ 4.**

3. The Defendant, THE TRAVELERS HOME & MARINE INSURANCE COMPANY, denied Plaintiff's claim for payment finding that the Assignor was not eligible for PIP benefits under the policy of insurance issued by Defendant to its insured, Archiles Pierre-Jeune, policy number 980562091 101 2, with effective dates of December 4, 2013, to June 4, 2014. ***See* Certified Policy attached as Exhibit A and Explanations of Benefits attached as Exhibit C to the Adjuster Affidavit.**

4. The last date of service, May 5, 2014, was denied on June 16, 2014. ***See* Explanation of Benefits for date of service May 5, 2014, attached as Exhibit C to the Adjuster Affidavit.**

5. In a letter dated April 24, 2014, the Plaintiff submitted a pre-suit demand letter for PIP benefits under section 627.36(10), Florida Statutes to the Defendant. ***See* April 24, 2014 Demand Letter attached as Exhibit D to the Adjuster Affidavit.** The Plaintiff submitted a second pre-suit demand letter dated May 13, 2015, also seeking additional PIP benefits. ***See* May 13, 2015 Demand Letter attached as Exhibit E to the Adjuster Affidavit.**

6. In a letter dated June 18, 2015, Defendant issued its response to the May 13, 2015 demand letter which stated in pertinent part:

> We have concluded our investigation on the above referenced claim and have determined that at the time of the loss, Gloria Verdugo-Ramirez was an occupant/passenger of a 2001 Ford Explorer which is owned and operated by Jesus Contreras. The injured party[,] Gloria Verdugo-Ramirez[,] has advised that she was in the process of loading groceries into the 2001 Ford Explorer at the time of the alleged auto accident.
>
> ...
>
> Therefore, as Gloria Verdugo-Ramirez does not qualify for No-Fault benefits under this policy, no payments will be issued for this demand or for the postage, penalty and interest.

***See* Exhibit A attached to Plaintiff's Response to Defendant's Motion for Partial Summary Judgment regarding Statute of Limitations.**

7. The Plaintiff filed suit against ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY on January 31, 2019. ***See* Original Complaint filed on January 31, 2019.**

8. On January 14, 2022, the Plaintiff filed its Motion for Leave to File an Amended Complaint to Add a Party to add the Defendant, THE TRAVELERS HOME & MARINE INSURANCE COMPANY. ***See* Plaintiff's Motion for Leave to File an Amended Complaint to Add a Party.**

9. On February 1, 2025, this Court entered an Agreed Order on Plaintiff's Motion to Amend Complaint to add the Defendant, THE TRAVELERS HOME & MARINE INSURANCE COMPANY, to the lawsuit. ***See* Agreed Order on Plaintiff's Motion to Amend Complaint.**

10. On April 27, 2022, the Defendant filed its Answer and Affirmative Defenses. Defendant's First Affirmative Defense raised statute of limitations. Defendant's Second Affirmative Defense was that there was no coverage under the policy of insurance. ***See* Defendant's Answer and Affirmative Defenses.**

11. On May 4, 2022, the Plaintiff filed its Reply to Defendant's Answer and Affirmative Defenses. ***See* Plaintiff's Reply to Defendant's Affirmative Defenses.**

12. On November 19, 2024, Defendant filed its Motion for Final Summary Judgment regarding the statute of limitations defense. ***See* Defendant's Motion for Final Summary Judgment.**

13. On March 21, 2025, the Plaintiff filed its Response to Defendant's Motion for Final Summary Judgment. ***See* Plaintiff's Response to Defendant Motion for Partial Summary Judgment Regarding Statute of Limitations.**

14. On April 22, 2025, this Court heard the parties arguments on Defendant's Motion for Final Summary Judgment. The Defendant argued that the statute of limitations expired prior to when the Agreed Order was entered adding them to this lawsuit. The Plaintiff argued that Defendant's statute of limitations defense was barred by the doctrine of equitable tolling and/or equitable estoppel. The Defendant countered that the Plaintiff failed to specifically raise these avoidances in a Reply, and in the alternative, neither avoidance applies to the facts of this case.

CONCLUSIONS OF LAW

15. Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Section 95.11(2)(b), Florida Statutes, provides that that statute of limitations on a contract claim is five years. The statute of limitations is tolled for 30 business days for each demand letter timely submitted prior to the running of the statute of limitations. § 627.36(10)(e), Florida Statutes (2014).

16. A statute of limitations provides for the timeframe that a party can bring a lawsuit against a defendant and is designed to protect parties from "defending claims which, because of their antiquity, would place the defendant at a grave disadvantage." *Soffer v. R.J. Reynolds Tobacco Co.,* 187 So. 3d 1219, 1230 (Fla. 2016) [41 Fla. L. Weekly S101a] (quoting *Major League Baseball v. Morsani,* 790 So. 2d 1071, 1075 (Fla. 2001) [26 Fla. L. Weekly S465a]). Statutes of limitations begin to run upon the accrual of a cause of action except where there are provisions which defer the running of the statute in cases of fraud or where the cause of action cannot be reasonably discovered. *Hess v. Philip Morris USA, Inc.,* 175 So. 3d 687, 695 (Fla. 2015) [40 Fla. L. Weekly S188a]; § 95.031, Fla. Stat. (explaining that the time for the statute of limitations "runs from the time the cause of action accrues."). "A cause of action accrues when the last element constituting the cause of action occurs. § 95.031(1), Fla. Stat. (2023). The statute of limitations for "[a] legal or equitable action on a

contract" is five years. § 95.11(2)(b), Fla. Stat. (2023).

17. Statutes of limitations are designed "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Totura & Co. v. Williams,* 754 So. 2d 671, 681 (Fla. 2000) [25 Fla. L. Weekly S141a] (quoting *Order of R. Telegraphers v. Railway Exp. Agency, Inc.,* 321 U.S. 342, 348-49 (1944).

18. The last bill for May 5, 2014, was denied on June 16, 2014. The contract was breached and the statute of limitations began on the last date of service, if at all, on June 16, 2014. *See State Farm Mut. Ins. Co. v. Lee,* 678 So. 2d 818, 818 (Fla. 1996) [21 Fla. L. Weekly S335a] (breach occurs when the insurer breaches its obligation to pay). Five years for the statute of limitations is June 16, 2019. Considering the two demand letters that were submitted during the running of the time period, the statute of limitations was tolled for an additional sixty business days. Therefore, the statute of limitations ran on September 12, 2019. There is no genuine dispute of material fact that, absent Plaintiff's equitable tolling or equitable estoppel arguments, the statute of limitations ran before the Defendant was added to the lawsuit. ***See* Plaintiff's Response to Defendant's Motion for Partial Summary Judgment Regarding Statute of Limitations at 4 ("the last possible date to file the instant action against Travelers would have been July 2019.").**[1]

19. As an initial matter, the Plaintiff failed to properly raise the equitable tolling and equitable estoppel avoidances in a Reply. Rule 1.110(d) requires that any avoidance must be set forth affirmatively in a pleading to a preceding pleading. "Every defense in law or fact to a claim for relief in a pleading must be asserted in the responsive pleading . . . ." Fla. R. Civ. P. 1.140(b). "Any ground not stated must be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time." *Id.*

Equitable Tolling

20. The Plaintiff's Reply fails to set forth any affirmative avoidance of equitable tolling or equitable estoppel. *See Frisbie v. Carolina Cas. Ins. Co.,* 162 So. 3d 1079, 1080 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D917b] (reversing the trial court's granting of summary judgment where the party failed to raise an unclean hands avoidance in a reply); *see also Gamero v. Foremost Ins. Co.,* 208 So. 3d 1195, 1197 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D158b] (collecting cases). The Plaintiff's Reply, filed on May 4, 2022, fails to affirmatively set forth an equitable tolling or equitable estoppel avoidance.

21. Moreover, Plaintiff's arguments are inapplicable to the facts of this case. Equitable tolling can be found where the plaintiff was misled or lulled into inaction, has in some extraordinary way been prevented from asserted his rights, or has timely asserted his rights mistakenly in the wrong forum. *Machules v. Dep't of Admin,* 523 So. 2d 1132, 1134 (Fla. 1988).

22. In *Machules*, the petitioner was fired due to missing work as a result of alcoholism. *Id.* at 1132. The petitioner was directed of his right to appeal to the Department of Administration ("DOA") within twenty days. *Id.* The petitioner, through his union representative, filed a contractual grievance with his employer. *Id.* The employer set the grievance hearing for the day after the twenty-day timeframe to appeal to the DOA. *Id.* The employer denied the petitioner's grievance, and the DOA subsequently rejected the petitioner's request to toll the twenty-day time to period. *Id.* The Florida Supreme Court explained that equitable tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant." *Id.* at 1134 (quoting *Cocke v. Merrill Lynch & Co.,* 817 F.2d 1559, 1561 (11th Cir. 1987)).

23. The Florida Supreme Court found that equitable tolling applied where the petitioner was misled into inaction, and the claim was filed in the wrong forum. *Id.* The employer participated in the contractual grievance process until the appeal period ran, and it was not unreasonable to excuse the petitioner, a layperson, from their misunderstanding of the proper avenue for review. *Id.* at 1134-35. This is appropriate, especially in situations where the petitioner was acting without counsel or where the claim untimely filed due to attorney ineptitude. *Id.* at 1135. Further, the petitioner only had one legal remedy, to pursue an appeal with the DOA. *Id.* 1136.

24. Here, none of the bases for equitable tolling apply. The Defendant did not engage in any action that would mislead or lull the Plaintiff into inaction. Rather, the June 18, 2015 demand response letter expressly stated the results of the Defendant's investigation and basis for the denial of the Plaintiff's claim. Unlike *Machules,* where the petitioner was lulled into inaction by the employer's willingness to participate in a grievance process, here, Defendant did not take any action to mislead or lull the Plaintiff into not bringing a lawsuit. There was no extraordinary method prohibiting the Plaintiff from timely bringing suit against the Defendant. No claim was filed in the an incorrect forum. Further, the Plaintiff was not a layperson. The Plaintiff is a business that regularly provides medical treatment and services to individuals under insurance policies for PIP benefits. The Plaintiff was represented by experienced counsel throughout the claim process, dating back to April 24, 2014. Therefore, the avoidance of equitable tolling is inapplicable.

Equitable Estoppel

25. Equitable estoppel is also inapplicable to the facts of this case. Equitable estoppel prohibits a party from benefiting from their own misconduct. *Major League Baseball v. Morsani,* 790 So. 2d 1071, 1077 (Fla. 2001) [26 Fla. L. Weekly S465a]. The Florida Supreme Court has long recognized the equitable estoppel doctrine:

> The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury.

Id. at 1076 (quoting *State ex rel. Watson v. Gray,* 48 So. 2d 84, 87-88 (Fla. 1950)).

26. Equitable estoppel may be raised to prevent the defendant from raising the statute of limitations defense under "the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice." *Id.* at 1079.

27. Here, Defendant did not submit any representations that were contrary to a later asserted position. Defendant's position has always been that there was no coverage under its policy of insurance. Defendant conducted its investigation and expressly provided the results of its investigation and position to the Plaintiff in the June 18, 2015 demand response letter. The Plaintiff argues that Defendant misrepresented the underlying facts of the claim. But the Defendant did not later change its position on coverage. The Defendant asserted no coverage as its Second Affirmative Defense. There was no representation that was later changed to benefit Defendant. While Plaintiff argues that it relied upon the Defendant's position and investigation, there is no dispute of material fact. This Court finds that any reliance that Plaintiff placed on Defendant's position was not reasonable. Defendant did not deny that a policy of insurance existed. Rather, Defendant's position was that the Assignor's medical bills were not covered under the policy. Therefore, the doctrine of equitable estoppel is inapplicable to this case.

THEREFORE, IT IS ORDERED AND ADJUDGED that:

Defendant's Motion for Summary for Final Summary Judgment Regarding the Statute of Limitations is **GRANTED**.

Final Judgment is entered in favor of the Defendant. The Plaintiff, THE INTERGRATIVE HEALTH SOLUTION! LLC, shall take nothing from this action and the Defendant, THE TRAVELERS HOME & MARINE INSURANCE COMPANY, shall go hence without day.

The Court reserves jurisdiction to determine entitlement to and the amount of attorney's fees and costs to Defendant.

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[1]Plaintiff's calculation does not consider the other demand letter submitted by a different law firm.

* * *

Insurance—Automobile—Windshield repair or replacement—Coverage—Conditions precedent—Notice of loss—Failure to comply with condition precedent of policy requiring that insurer be notified of loss so that damaged windshield could be inspected prior to being replaced relieved insurer of its obligation to reimburse insured's assignee for replacement of windshield

GORLAMI GLASS, LLC, a/a/o Ronald Pirela, Plaintiff, v. GEICO CASUALTY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-SC-0009980-O. June 16, 2025. Carly S. Wish, Judge. Counsel: Marc LoCascio, Law Offices of Michael B. Brehne, P.A., Altamonte Springs, for Plaintiff. William Austin Shaw, Law Offices of Dillon K. McLean, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the Court for hearing on May 28, 2025, on Defendant's Motion for Final Summary Judgment filed on April 18, 2024, the Court having reviewed Defendant's Motion, Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment filed on May 14, 2025, Plaintiff's Motion Requesting Court Consider the Attached Exhibits as Summary Judgment Evidence filed on June 9, 2025[1], the court file, case law, hearing argument of counsel, and being otherwise duly advised in the premises, the Court finds as follows:

Plaintiff, as the insured's assignee filed a Complaint alleging breach of contract regarding a windshield replacement. Plaintiff invoiced Defendant and Defendant denied the claim. Defendant pled in its Answer and Affirmative Defenses that Plaintiff failed to comply with the notice and inspection-related conditions precedent in its policy. To prevail at summary judgment, the moving party must demonstrate there is no genuine dispute as to any material fact and that the movant is entitled to summary judgment as a matter of law.

Summary judgment is appropriate when there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. *See* Fla. R. Civ. P. 1.510. Conversely, summary judgment is improper "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). Fed. R. Civ. P. 56(e) and Fla. R. Civ. P. 1.510 require that when a motion for summary judgment is made and supported according to the rule, the nonmoving party's response must set forth specific facts showing a genuine issue for trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a] (quoting *Matsushita*, 475 U.S. at 586-87). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of a ruling on a motion for summary judgment." *Id.* An issue is "genuine" if a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the nonmoving party in light of its burden of proof. *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1175a]; *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). A fact is "material" if, "under the applicable substantive law, it might affect the outcome of the case." *Nunez v. Coloplast Corp.*, 461 F. Supp. 3d 1260 (S.D. Fla. 2020) (quoting *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C195a]). "[W]here the material facts are undisputed and do not support a reasonable inference in favor of the non-movant, summary judgment may properly be granted as a matter of law." *Id.* If the party's response consists of nothing more than a repetition of his conclusory allegations, the court must enter summary judgment in the moving party's favor. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The nonmoving party may not rest on its pleadings but must set forth specific facts in opposition to the motion. *Id.* at 1241. At the summary judgment stage, the parties need not submit evidence in a form admissible at trial; however, the content or the substance of the evidence must be admissible. *Hardy v. S.F. Phosphates Ltd.*, 185 F.3d 1076, 1082 n. 5 (10th Cir. 1999).

Defendant presented competent substantial record evidence in the affidavit of its Corporate Representative, Bryan Tuczynski. Mr. Tuczynski attested he has personal knowledge of the policies and procedures GEICO utilizes in managing insurance claims involving repair or replacement of windshields and reviewed the business records relevant to the instant windshield replacement claim. Mr. Tuczynski attested he has personal knowledge that GEICO set up a claim only upon receipt of Plaintiff's invoice *after* the replacement had been completed, and GEICO subsequently denied the claim. The affidavit refers to and attaches the relevant insurance policy and the letters sent from GEICO to Plaintiff and its insured informing of the claim's denial.

It is undisputed that Defendant issued an insurance policy governing this windshield claim. The relevant portion of the insurance policy, setting forth the specific duties in the event of a loss, states:

> 4. INSURED'S DUTIES IN EVENT OF LOSS
> In the event of loss the insured will:
>
> (a) Protect the auto, whether or not the loss is covered by this policy. Further loss due to the insured's failure to protect the auto will not be covered. Reasonable expenses incurred for this protection will be paid by us for loss that is covered by this policy.
>
> (b) File with us, within 91 days after loss, his sworn proof of loss including all information we may reasonably require.
>
> (c) Permit us to inspect and appraise the damaged property, including but not limited to the glass of the owned auto or non-owned auto, before its repair, replacement and/or disposal. This means we have the right to inspect and appraise the damaged property before its repair, replacement and/or disposal and the insured will do nothing after loss to prejudice our right to inspect and appraise the damaged property, including but not limited to the glass of the owned auto or non-owned auto, before its repair, replacement and/or disposal.

See Florida Family Automobile Insurance Policy, A30FL (03-20) Page 21 of 26 (Page 45 of Defendant's Motion for Summary Judg-

ment).

The relevant record testimony, apart from the affidavit of Mr. Tuczynski and its attached documents, is Mr. Tuczynski's deposition testimony, part of Plaintiff's Response to Defendant's Motion for Summary Judgment:

> "However, in this particular case, when we received the invoice that indicated that work had already been performed to the vehicle, and we did not have any information from the insured about the extent of the damage, the size of the damage, quantity of the damage, we had no information to establish or. . .what the condition of the windshield was prior to the replacement taking place." *Deposition of Bryan Tuczynski*, page 16, lines 7-15.
>
> "When I reviewed the file in preparation for today, there was no work order generated or in this—in this particular claim. In fact, I did not see any sort of information established in the SV2 system for this particular claim." *Id.* at Page 19 line 24—page 20 line 5.

With Defendant having satisfied its burden of presenting competent, summary judgment evidence, Plaintiff proffered no evidence of the same. Rather, Plaintiff presented mere speculative testimony that a referral number was provided to Plaintiff by Defendant, thus somehow proving that Plaintiff notified Defendant of the loss prior to replacing the windshield of Defendant's insured in accordance with the insurance policy requirements. The record is devoid of competent proof this alleged referral number was provided to Plaintiff, let alone who provided it, to whom, how, and when.

The deposition testimony attached to Plaintiff's Response establishes that Mr. Kelada, the Corporate Representative of Gorlami Glass, LLC., does not know specifically who performed the windshield replacement (*Deposition of Richard Kelada*, page 16, lines 6-16) does not know who confirmed that the loss was covered, (*Id*. at page 17, line 21—page 18, line 7), and does not know how the claim was set up (*Id.* at page 11, lines 9-12). Moreover, the original invoice attached to Plaintiff's Complaint lists the insured's phone number as the "referral number." This was the same invoice sent to GEICO via fax transmission on December 30, 2022. *See* Plaintiff's Complaint, Ex. A. As is made clear also by Mr. Kelada, an invoice dated August 6, 2023, which is dated and generated *after* the lawsuit was filed on February 20, 2023, was "updated" by Mr. Kelada at that later date. (*Id.* at p. 23). There is nothing to support the claim that this referral number was provided to Plaintiff by Defendant at any time prior to the windshield replacement. The record evidence, and lack thereof, demonstrates Defendant has proven as a matter of law entitlement to Final Summary Judgment and Plaintiff has failed to contradict Defendant's claim with competent substantial evidence giving rise to a genuine dispute as to any material fact. The Court finds that any dispute is not genuine and that no reasonable jury could return a verdict for Plaintiff based on the evidence presented to this Court.

Accordingly, Plaintiff's failure to comply with the condition precedent of the policy requiring the insured to notify Defendant of the loss so that the damaged windshield could be inspected prior to being replaced relieved Defendant of its obligation to reimburse Plaintiff.

ORDERED AND ADJUDGED as follows:

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

2. The Court reserves jurisdiction as to Defendant's attorney's fees and taxable costs.

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

[1]This Motion and evidence was filed well beyond the time frame required by the Rule. However, the Court will consider the invoice dated August 6, 2023, as it was introduced and referenced as part of an exhibit during the deposition of Defendant's corporate representative, and Plaintiff contends it was inadvertently not attached to the Defendant's deposition transcript that was attached as an exhibit to Plaintiff's Response.

* * *

Declaratory judgments—Insurance—Personal injury protection—Attorney's fees—Insured seeking declaration that PIP insurer improperly stopped payment for chiropractic services based on independent medical examination—Insured is not entitled to award of attorney's fees under 86.121 where insured did not allege ultimate facts demonstrating that insurer made a "total coverage denial"

SAMAR QUDEIRI, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 25-CC-000382. Division P. June 7, 2025. Marc S. Makholm, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. David S. Dougherty and Nigel F. Northe, Law Office of Peter A. Cirrinicione, Tampa, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR ATTORNEY'S FEES, COSTS, INTEREST ON FEES AND COSTS FROM DATE OF ENTITLEMENT, RISK MULTIPLIER & TAXATION OF ATTORNEY FEE EXPERT COSTS

This matter came before the Court on April 30, 2025, on Plaintiff's Motion For Attorney's Fees, Costs, Interest On Fees And Costs From Date Of Entitlement, Risk Multiplier & Taxation Of Attorney Fee Expert Costs. The court having reviewed the Motion, the court file, applicable law, having taken argument of the parties, and being otherwise fully advised, makes the following findings and conclusions of law:

Procedural History

On January 6, 2025, Plaintiff filed a Petition for Declaratory Relief pursuant to Chapter 86, Florida Statutes. On January 25, 2025, Defendant filed its Motion to Dismiss and Motion to Strike on the basis that "Plaintiff's complaint fails to allege the ultimate facts necessary for entitlement to attorney's fees pursuant to 86.121, Fla. Stat. ." See Docket Entry 14, Paragraph 12. On February 20, 2025, Plaintiff filed its Motion for Attorney's Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier & Taxation of Attorney Fee Expert Costs on the basis that Defendant agreed to pay previously denied personal injury protection (PIP) benefits. See Docket Entry 17, Paragraph 8. Shortly thereafter, on March 3, 2025, a Joint Notice of Settlement was filed stating the parties had come to a settlement of the underlying issues of this lawsuit except for whether Plaintiff is entitled to attorney's fees. See Docket Entry 20. Plaintiff's Motion for Attorney's Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier & Taxation of Attorney Fee Expert Costs was set for hearing on April 30, 2025, but the parties stipulated at the hearing that the only matter before the court would be the question of Plaintiff's entitlement to attorney's fees.

Florida Statute Section 86.121

The legislature enacted House Bill (HB) 837, Civil Remedies, on March 24, 2023. Laws of Florida, Chapter No. 2023-15. The law included, but was not limited to, the repeal of § 627.428, Fla. Stat., as well as the creation of § 86.121, Fla. Stat., which reads:

> 86.121 Attorney fees; actions for declaratory relief ***to determine insurance coverage after total coverage denial of claim***.—
>
> (1) In an action brought for declaratory relief in state or federal court to determine insurance coverage ***after the insurer has made a total coverage denial of a claim***:
>
> (a) Either party is entitled to the summary procedure provided in s. 51.011, and the court shall advance the cause on the calendar.
>
> (b) ***The court shall award reasonable attorney fees to the named insured, omnibus insured, or named beneficiary*** under a policy issued by the insurer upon rendition of a declaratory judgment in favor of the named insured, omnibus insured, or named beneficiary. ***This***

> ***right may not be transferred to, assigned to, or acquired in any other manner by anyone other than a named or omnibus insured or a named beneficiary.*** A defense offered by an insurer pursuant to a reservation of rights does not constitute a coverage denial of a claim. Such fees are limited to those incurred in the action brought under this chapter for declaratory relief to determine coverage of insurance issued under the Florida Insurance Code.
>
> (2) This section does not apply to any action arising under a residential or commercial property insurance policy.

(Emphasis added).

This change is important because, prior to the enactment of § 86.121, Fla. Stat., Chapter 86 only provided specifically for the award of costs, but made no provision for, and was not expanded by Florida courts to include, attorney's fees. See section 86.081, Florida Statutes; *Progressive Am. Ins. Co. v. Rural/Metro Corp.*, 994 So. 2d 1202, 1208 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2649a]. Before this new legislation, attorney's fees were awarded within any declaratory action concerning PIP disputes "[u]pon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary." See section 627.428, Fla. Stat. (2022) (repealed by s. 11, ch. 2023-15, effective March 24, 2023). Because of the settlement reached between the parties, Plaintiff seeks its entitlement to attorney's fees pursuant to section 86.121, Florida Statutes.

The statute provides this court shall award reasonable attorney fees to the named insured, omnibus insured, or named beneficiary under a policy issued by the insurer. Plaintiff, Samar Qudeiri, is a named insured on the subject policy issued by the Defendant, GEICO General Insurance Company, that is attached as Exhibit A to Defendant's Motion to Dismiss and Motion to Strike. The award is triggered upon rendition of a declaratory judgment in favor of the named insured, omnibus insured, or named beneficiary. See § 86.121(1) and (1)(b). Plaintiff also brought an action for declaratory relief in which rendition of a declaratory judgment in favor of the named insured is a ministerial act at this stage as a result of the settlement reached by the parties. However, the statute only allows the award for actions brought for declaratory relief to determine insurance coverage after the insurer has made a total coverage denial of a claim. This new statutory requirement is the dispute at issue: whether the insurer made a total coverage denial of a claim.

The language of the statute controls whether Plaintiff's complaint falls within its parameters. At the outset of statutory analysis, Florida Courts follow the "supremacy-of-text principle." *State v. Crose*, 378 So. 3d 1217, 1232-33 (Fla. 2d DCA 2024) [49 Fla. L. Weekly D241a]. This principle dictates that the words of a governing text in their context are paramount unless the context furnishes some ground to control, qualify, or enlarge their meaning. *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946-47 (Fla. 2020) [46 Fla. L. Weekly S9a]. Meaning 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. *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) [47 Fla. L. Weekly S199a].

Chapter 86 does not contain a definitions section to control the construction of any of the terms that appear in § 86.121, Fla. Stat. . *Fla. Ins. Guar. Ass'n v. Bernard*, 140 So. 3d 1023, 1030 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1002a]. Absent a legislatively supplied definition, we give every word employed in a legal text its plain and ordinary meaning at the time of the statute's enactment and we can use dictionaries, such as Black's Law Dictionary, for evidence of that meaning. *See Tsuji v. Fleet*, 366 So. 3d 1020, 1028 (Fla. 2023) [48 Fla. L. Weekly S130a] (*citing Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009) [34 Fla. L. Weekly S251a]); *Westpark Preserve Homeowners Ass'n v. Pulte Home Corp.*, 365 So. 3d 391, 395 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D952a]. In this context, insurance coverage is the inclusion of the risk of loss to the health of the person indemnified by the insurance policy.[1] An insurance claim is a policyholder's formal report to an insurance company about a loss with a request for a payment based on the insurance policy's terms.[2] A denial of claim is that rejection of an application for benefits.[3]

The prior restrictive modifier "total coverage denial of" identifies, or limits the reference of, the noun "claim" that it modifies. A "claim" is each claim that can be subject to a total coverage denial—not just a denial or a partial coverage denial. It must be a *total* coverage denial. The specific context in which that language is used and the broader context of the statute can also act similar to a restrictive modifier when contemplating the meaning of "claim". It can tell us whose insurance claim is identified by the term.

This statutory section is narrowly focused on entitlement to attorney's fees, which is limited to the named insured, omnibus insured, or named beneficiary by the statute. In PIP, the risk of loss is to the health of the person. More than one person could be in a motor vehicle in a collision. A motor vehicle could contain two named insureds and an omnibus insured. Consequently, there could be three claims for PIP coverage—one brought by each of those three insureds. Likewise, the statute is not limited to automobile policies. Named beneficiaries are common in life insurance policies. The three types of persons listed by this statute could make an insurance claim based on any type of insurance policy except residential or commercial property insurance policies.

For this reason, the indefinite article "a" is used instead of the definite article "the" to allow for entitlement to attorney fees pursuant to a declaratory action for coverage from each or any of those three persons based upon the total coverage denial of their respective insurance claims. When one considers all of this pursuant to the supremacy-of-text principle, a claim is an insurance claim attributed to the named insured, omnibus insured, or named beneficiary that could be subject to a denial based upon a complete lack of coverage for the risk of loss.

Florida PIP insurance must provide medical and disability benefits to a limit of $10,000 and $5,000 in death benefits resulting from bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle. *See* section 627.736(1), Fla. Stat. (2023). Therefore, a total coverage denial of a claim is a rejection of a policyholder's application of benefits based on the complete lack of coverage for PIP benefits. In the instant matter, a total coverage denial of a claim would be the Defendant insurer's rejection of the Plaintiff insured, Samar Qudeiri's, insurance claim based on the complete lack of PIP coverage.

The Pleadings

Plaintiff's motion for entitlement is based upon the pleadings. An award of relief not sought by the pleadings is error because the jurisdiction of the court can be exercised only within the scope of the pleadings. *Hooters of America, Inc. v. Carolina Wings, Inc.*, 655 So.2d 1231 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D1272a] (citing Henry P. Trawick, Jr., Florida Practice and Procedure s. 25-4). A complaint cannot merely list the elements of a cause of action, the complaint must allege ultimate facts showing this *total* coverage denial. *Havens v. Coast Fla., P.A.*, 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1273b]. Paragraph 6 of the complaint states medical providers, plural, provided services to the Plaintiff. There is no allegation that any of the medical providers had legal standing to submit a claim. Instead, in this complaint, Plaintiff, the insured, only alleged her legal standing to seek determination of her PIP insurance claim. Paragraph 8 of the complaint alleges the Defendant stopped short of paying all the bills rather than denied all

of the bills. Paragraph 9 of the complaint and Exhibit A to the complaint elaborate on that allegation by indicating that the Defendant paid the Plaintiff's bills that were received until February 23, 2024, and then the Defendant only suspended payment of chiropractic treatment pursuant to an independent medical examination ("IME"). See *Fladell v. Palm Beach County Canvassing Bd.*, 772 So.2d 1240 (Fla. 2000) [25 Fla. L. Weekly S1102b] (If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls.). The Defendant did not communicate any intention to stop paying any other categories of services or supplies or the providers furnishing them. Finally, paragraph 11 of the complaint states the controversy is whether or not GEICO wrongfully denied medical benefits for chiropractic treatment and whether GEICO can prove that it properly *suspended* the Plaintiff's benefits for chiropractic treatment.

The summation of the allegations and the relevant exhibits is the Defendant did not make a total denial of the Plaintiff's access to her PIP coverage. Instead, the Plaintiff sought a declaration that the Defendant improperly stopped payment for the Plaintiff's chiropractic services based upon an IME. As a result, Plaintiff fails to allege the ultimate facts that would constitute a "total coverage denial of a claim" under section 86.121.

As such, it is ORDERED and ADJUGED as follows:

Plaintiff's Motion For Attorney's Fees, Costs, Interest On Fees And Costs From Date Of Entitlement, Risk Multiplier & Taxation Of Attorney Fee Expert Costs is hereby DENIED on the issue of entitlement.

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[1]*See* Black's Law Dictionary (Deluxe 11th ed. 2019) definition of "insurance" at page 953; Black's Law Dictionary (Deluxe 11th ed. 2019) definition of "coverage" at page 461.

[2]*See* Black's Law Dictionary (Deluxe 11th ed. 2019) definition of "insurance claim" at page 311.

[3]*See* Black's Law Dictionary (Deluxe 11th ed. 2019) definition of "denial of claim" at page 547.

* * *

Insurance—Automobile—Windshield repair or replacement—Coverage—Conditions precedent—Notice of loss—Where insured failed to comply with condition precedent of notifying insurer of loss prior to repairs being completed, and repair shop did not provide any record evidence to rebut presumption that insurer was prejudiced by breach of policy terms, insurer was entitled to deny coverage for windshield replacement—Neither invoice for repair work nor retention of damaged windshield for inspection by insurer satisfied policy conditions requiring pre-repair notice of loss

INTERCOASTAL AUTO GLASS, LLC, a/a/o Kenneth Penn, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY; PROGRESSIVE CASUALTY INSURANCE COMPANY; PROGRESSIVE DIRECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 23-CC-045210. Division M. June 20, 2025. Lisa Allen, Judge. Counsel: Christopher Ligori, Christopher Ligori and Associates, Tampa, for Plaintiff. Henry R. Ramos, Andrews Biernacki Davis, Orlando, for Defendant.

Order Granting Defendant's Motion for Summary Judgment

THIS CAUSE, having come before the Court on Defendant's Motion for Final Summary Judgment, and the Court, after reviewing the filings by the parties, applicable case law, after hearing argument of counsel on February 26, 2025, and being otherwise fully advised in its premises, makes the following findings of fact and conclusions of law:

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

Undisputed Facts

Defendant, Progressive Select Insurance Company, issued an automobile policy of insurance to Kenneth Penn for a 2002 GMC Sierra pickup truck, which Plaintiff alleges sustained windshield damage on or about September 30, 2021. On October 5, 2021, Kenneth Penn executed an assignment of benefits in favor of Plaintiff, Intercoastal Auto Glass, LLC, and Plaintiff completed the glass replacement services that same day. On October 6, 2021, Defendant received Plaintiff's work order, invoice, and assignment of benefits via fax. Defendant has provided sworn testimony that Kenneth Penn never reported the subject claim to Defendant, nor has Plaintiff provided any record evidence that Kenneth Penn has had any communication with Defendant regarding the subject claim.

October 6, 2021 was the first notice of the alleged loss received by Defendant. Defendant was not informed of the damage to the subject windshield before Plaintiff commenced with repairs, and only learned of the repairs after it received an invoice for the completed work. On October 8, 2021, Defendant attempted to communicate with Kenneth Penn regarding the subject loss via two phone calls with voicemails, email, and text message. To date, Defendant has never received a reply, nor any communication from Kenneth Penn regarding the subject claim. On October 11, 2021, Defendant issued its denial of coverage letter.

Plaintiff asserts via affidavit from its co-owner and corporate representative that it retained the damaged windshield for approximately six months after the replacement, and took photographs of the damaged glass, but provides no evidence said photographs or information was sent to Defendant. Defendant never took steps to inspect the damaged windshield. Defendant did not request copies of the photographs taken by Plaintiff.

Defendant's policy of insurance includes a FULL COMPREHENSIVE WINDOW GLASS COVERAGE endorsement limiting exposure to a loss if repairs to a vehicle are performed before the insured reports the claim or loss. The pertinent policy language provides as follows:

> INSURING AGREEMENT—FULL COMPREHENSIVE WINDOW GLASS COVERAGE
>
> If you pay the premium for Comprehensive Coverage, we will pay for sudden, direct, and accidental loss to a windshield on a covered auto that is not caused by a collision, without applying a deductible.
>
> No coverage for windshield only damage shall apply unless you or the owner of the covered auto seeking coverage:
>
> 1. cooperates with us in any matter concerning a claim;
>
> 2. notifies us about any claim or loss, before any work is commenced or repairs are completed, by contacting us using the claim reporting functionality on our website, our mobile app, or the numbers listed in your current policy materials; and
>
> 3. allows us to have the damage to the covered auto for which coverage is sought inspected; provided, however, that this condition for coverage is waived in the event we fail to inspect the covered auto within 48 hours after the loss is reported by you or the owner of the covered auto or emergency repairs are necessary to minimize future damage or expenses so long as color photographs clearly showing the damaged areas(s) are taken and provided to us along with an itemized estimate of such repairs and payment receipts.
>
> * * *

Defendant's policy of insurance also includes more general provides regarding duties in case of an accident or loss as follows:

> PART VI—DUTIES IN CASE OF AN ACCIDENT OR LOSS
>
> For coverage to apply under this policy, you or the person seeking coverage must promptly report each accident or loss even if you or the person seeking coverage is not at fault. You or the person seeking coverage must provide us with all accident or loss information including time, place, and how the accident or loss happened. You or the person seeking coverage must also obtain and provide us the names and addresses of all persons involved in the accident or loss, the names and addresses of any witnesses, and the license plate numbers of the vehicles involved.

* * *

PART VII—GENERAL PROVISIONS

. . .

LEGAL ACTION AGAINST US

We may not be sued unless there is full compliance with all the terms of this policy.

* * *

In its Motion for Summary Judgment, Defendant claims that it's not liable for the windshield damage to the insured vehicle, because the insured failed to comply with a valid condition precedent prior to filing suit; specifically, failing to provide the insurer with notice of loss prior to performing repairs on the motor vehicle. Plaintiff counters that it was willing and able to cooperate with Defendant, including supplying photographs of the loss and the damaged windshield for inspection for six months post-loss, if Defendant had made a request. Plaintiff also argues that Defendant must show prejudice before refusing to pay the windshield loss.

Summary Judgment Standard

As noted by the Florida Supreme Court, " '[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part' of rules aimed at 'the just, speedy and inexpensive determination of every action.' " *In re: Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d at 75 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)) (alteration in original). Florida Rule of Civil Procedure 1.510(a) provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Further, effective May 1, 2021, the summary judgment standard in Florida is to be "construed and applied in accordance with the federal summary judgment standard." Fla. R. Civ. P. 1.510(a). Specifically, this standard encompasses the principles set forth in what is referred to as the Celotex trilogy and case law interpreting the federal counterpart to rule 1.510.3 Fla. R. Civ. P. 1.510 (Court Notes for 2021 Amendment); In re: Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d 72, 75-76 (Fla. 2021)* [46 Fla. L. Weekly S95a].

The focus for determining whether a genuine dispute exists, so as to bar summary judgment, is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Like the standard for directed verdict, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-252. "When the moving party has carried its burden under [the summary judgment rule], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also Gargiulo v. G.M. Sales, Inc., 131 F. 3d 995, 999 (11th Cir. 1997) (noting that "to oppose [a] properly supported motion for summary judgment, [the opposing party] must come forward with specific factual evidence, presenting more than mere allegations" (citing Anderson, 477 U.S. at 248-249)). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007)* [20 Fla. L. Weekly Fed. S225a].

In discussing the application of the "new" rule 1.510, the Florida Supreme Court indicated: In Florida it will no longer be plausible to maintain that 'the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the "slightest doubt" is raised.' Bruce J. Berman & Peter D. Webster, *Berman's Florida Civil Procedure § 1.510:5 (2020 ed.) (describing Florida's* pre-amendment summary judgment standard). *In re: Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d at 75-76.*

Analysis

Where the insurer alleges failure by the insured to comply with a mandatory condition precedent for coverage to be extended, the trial court must perform a two-prong analysis. First, the court must decide "whether the insured complied or substantially complied with the terms of the insurance policy." *Shivdasani v. Universal Prop. & Cas. Ins. Co.*, 306 So. 3d 1156, 1161 n7 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2044a]. Second, if a determination is made that the insured did not comply with its post-loss policy obligations, the "burden shift wherein prejudice to the insurer is presumed, and the insured then has an opportunity to rebut that presumption and prove that the insurer was not prejudiced*." Id.* (citing *Am. Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 916 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a]); *see Nunez v. Universal Prop. & Cas. Ins. Co.,* 2021 WL 3377526, at *4 (Fla. 3d DCA Aug. 4, 2021) [6 Fla. L. Weekly D1747b] (when an insurer proves that the insured has materially breached a post-loss obligation, the burden shifts to the insured to "prove that any breach did not prejudice the insurer.").

"[A]ctual compliance with other policy requirements or conditions is not evidence of substantial compliance with the pertinent policy requirement or condition at issue". *Id.* at *6. Thus, cooperating with an insurer's investigation such as promptly reporting a claim, allowing the insurer to inspect the property, and sending a proof of loss, does not bear on whether the insured "substantially complied with the specific, pertinent policy provision." *Id.*

The undisputed record clearly shows that Plaintiff performed the windshield replacement prior to the insured providing Defendant with notice of the loss. Furthermore, it is undisputed there has been no communication of any kind between Kenneth Penn and Defendant regarding the subject claim. Kenneth Penn failed to notify Defendant about the subject loss prior to the work being completed, breaching the Policy's FULL COMPREHENSIVE WINDOW GLASS COVERAGE provision requiring notice by the insured prior to any work/repairs being completed. While Plaintiff states that it was willing to cooperate with Defendant by taking photographs of the loss and keeping the damaged windshield for possible inspection, such cooperation to unrelated provisions does not cure Kenneth Penn's breach regarding lack of notice. *Nunez,* 2021 WL 3377526, at *6.

Having concluded the insured breached the policy by not following the Policy's post- loss obligations, prejudice to Defendant is presumed. Plaintiff must, therefore, rebut that presumption. *Shivdasani*, 306 So. 3d at 1161 n7. Plaintiff did not provide any record evidence to rebut Defendant's presumption of prejudice. Requiring timely notice of the loss from the insured allows the insurer to obtain necessary information to establish whether the claim is a covered loss. The insured has personal knowledge about facts of loss, such as how the damage occurred, when the damage occurred, the extent of the damage, along with other relevant information necessary to verify the claim is legitimate and ultimately a covered loss. If the Defendant insurer is unable to obtain this fundamentally basic information to confirm coverage from the person with personal knowledge regarding the claim (the insured), prejudice is clearly established.

At the Summary Judgment hearing, Plaintiff asserts that it maintained the windshield for inspection and was willing to cooperate with Defendant's investigation, but failed to provide any record evidence to address Kenneth Penn's lack of communication with Defendant. Furthermore, Plaintiff is unable to provide any record evidence to establish any facts regarding the subject loss other than

confirming the windshield was replaced in connection with an alleged loss. When an insurance policy assigns duties to an insured, certain duties are not automatically transferred to an assignee when the insured signs an assignment of benefits. "If the assignor is entitled to be paid, the assignee is entitled to be paid, but if the assignor is not entitled to be paid because of some failure of performance on the part of the assignor, then the assignee is not entitled to be paid either." *Shaw v. State Farm Fire & Cas. Co*., 37 So. 3d 329, 333 (Fla. 5th DCA 2010) [5 Fla. L. Weekly D1020a].

In the instant case, Kenneth Penn breached the duty to provide timely notice of the loss before the work was performed. Plaintiff's argument that the invoice satisfied the policy conditions for notice of the loss is not well taken by the Court because the prejudice stems from the timing and substance of notice from the insured with personal knowledge of the loss, not a general existence of notice by way of an invoice. Specifically, the policy states, in pertinent part:

> If you pay the premium for Comprehensive Coverage, we will pay for sudden, direct, and accidental loss to a windshield on a covered auto that is not caused by a collision, without applying a deductible.
>
> *No coverage for windshield only damage shall apply unless you or the owner of the covered auto seeking coverage:*
>
> 1. cooperates with us in any matter concerning a claim;
>
> 2. *notifies us about any claim or loss, before any work is commenced or repairs are completed,* by contacting us using the claim reporting functionality on our website, our mobile app, or the numbers listed in your current policy materials (emphasis added)

* * *

The Plaintiff repair shop does not have personal knowledge as to the relevant facts of loss and is unable to fulfill the above policy duty in place of Kenneth Penn by simply submitting an invoice to Defendant. "The purpose of a provision for notice of proofs of loss is to enable the insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it." *LoBello v. State Farm Fla. Ins. Co.,* 152 So. 3d 595, 598 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1273c].

Conclusion

Since the condition precedent to timely notice of the loss by the Kenneth Penn was never met, and Plaintiff failed to rebut the presumption of prejudice, Defendant was within its rights to deny coverage for the subject windshield claim. Accordingly, it is

ORDERED and ADJUDGED that:

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

2. Judgment is entered in Defendant's favor and against Plaintiff. Plaintiff shall take nothing from this action. Defendant shall go hence forth without delay.

3. The Defendant is the prevailing party in this action. The Court retains jurisdiction to address and determine Defendant's entitlement to reasonable attorney's fees and costs, if any.

4. The Clerk is directed to ADMINISTRATIVELY CLOSE this case.

* * *

Insurance—Motion for final summary judgment is denied where factual issues remain—Insured who obtained partial summary judgment is entitled to attorney's fees and costs

SACHA DE JESUS, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-091413. June 23, 2025. Joelle Ann Ober, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S SECOND AMENDED MOTION TO TAX ATTORNEY'S FEES AND COSTS AND DENYING DEFENDANT'S SECOND AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on June 17, 2025 on Plaintiff's Second Amended Motion to Tax Attorney's Fees and Costs and Defendant's Second Amended Motion for Final Summary Judgment. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Defendant's Second Amended Motion for Final Summary Judgment is **HEREBY DENIED**. The Court finds that based on the Court's Final Summary Judgment entered on January 23, 2023, genuine issues of material fact remain.

2. Plaintiff's Second Amended Motion to Tax Attorney's Fees and Costs is **HEREBY GRANTED**. The Court finds that Plaintiff prevailed on partial summary judgment on Wherefore Clauses A and B per the Final Summary Judgment entered by this Court on January 23, 2023 (*docket no. 78*).

3. The case shall be concluded via a jury trial that will commence on September 15, 2025 at 9:00 AM. The Court shall enter a separate Uniform Order Setting Jury Trial and Pre-Trial Conference.

* * *

Insurance—Discovery—Depositions—Failure to appear— Sanctions—Attorney's fees awarded as sanction for defendant's failure to appear for duly noticed deposition of corporate representative—Protective order—Although defendant filed motion for protective order, defendant failed to schedule hearing on motion before failing to appear—Plaintiff's counsel is entitled to attorney's fees for time related to deposition, filing of motion for sanctions, and attending hearing on motion for sanctions

MINERVA ZAMORA, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 25-CC-005859. June 6, 2025. Matthew A. Smith, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Marsha M. Moses, Christos Pavlidis, and Teodora Siderova, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AND MOTION TO COMPEL DEPOSITION

THIS CAUSE having come before the Court on May 28, 2025 on Plaintiff's Motion for Sanctions and Motion to Compel Deposition and Defendant's Motion for Protective Order. The Court, having reviewed the record, considered the motions, the arguments of counsel, and the applicable law, and being otherwise advised in the premises, finds:

1. Plaintiff's motion alleges that Plaintiff's counsel submitted multiple requests to Defendant's counsel in an attempt to mutually coordinate the deposition of Defendant's claims Corporate Representative and that Plaintiff's counsel received no cooperation from Defendant's counsel, to wit, on March 19, 2025, Plaintiff filed a Notice of Taking Deposition Duces Tecum for April 29, 2025 at 1:00 PM.

2. Defendant waited until April 25, 2025 to file a Motion for Protective Order.

3. Defendant and Defendant's counsel failed to appear at the deposition on April 29, 2025, to wit, a Certificate of Non-Appearance was taken.

4. The Court finds that the facts in this case are extremely similar to the facts as stated in *AJ Therapy Center, Inc. (a/a/o Sergio Cordova Bernal) v. Direct General Ins. Co.*, 31 Fla. L. Weekly Supp. 391a (Fla. 13th Jud. Cir. Ct., Hillsborough Cty., Case No. 23-CC-074375, October 8, 2023, Mattew A. Smith, Judge) which held: Motion for sanctions granted where Defendant failed to appear for duly noticed deposition. Although Defendant filed motion for protective order, Defendant failed to schedule a hearing on motion before failing to appear. As such, the Court will not deviate from its previous ruling. (*Said Order is attached as referenced*)

5. Prior to a party refusing to appear for a duly noticed deposition, said party must both file and schedule for hearing a Motion for Protective Order prior to failing to appear for said deposition. Defendant and Defendant's counsel failed to appear for a duly noticed deposition on April 29, 2025 and did not schedule for hearing its Motion for Protective Order prior to failing to appear for said deposition. Further, Defendant never attempted to set a hearing on its Motion for Protective Order but merely "piggybacked" and cross noticed its hearing onto Plaintiff's Notice of Hearing for May 28, 2025 on its Motion for Sanctions and Motion to Compel Deposition. As such, Plaintiff's Motion for Sanctions is **HEREBY GRANTED.**

6. Plaintiff's counsel is entitled to reasonable attorneys' fees for all time spent related to the deposition, the filing of Plaintiff's Motion for Sanctions and attending a hearing on same.

7. The deposition of Defendant's Corporate Representative must be scheduled within 15 days of the date of this Order and the deposition must occur within 30 days of the date of this Order. The Defendant does not have to answer questions that require privileged information nor does Defendant have to produce anything privileged.

8. The parties are given 20 days from the date of the Order to attempt to reach a resolution on the total amount of attorney's fees to be awarded as sanctions. Should the parties not be able to reach an agreement, the matter shall be set for a one (1) hour evidentiary fee hearing, before the Court.

* * *

Insurance—Discovery—Claims history spreadsheet is summary within meaning of section 90.956—Summary and original or duplicates of underlying data must be made available for examination or copying or both

MELTON & MELTON MARKETING, LLC, d/b/a FIRST CLASS AUTO GLASS, a/a/o Robert Fox, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 23-CC-023489. Division L. May 29, 2025. Michael C. Baggé-Hernández, Judge. Counsel: James T. Tanton and Eliot C. Veith, Ligori & Ligori, Tampa, for Plaintiff. Scott Zimmer, Law Office of Jaskirat K. Asti, Tampa; and Lindsey R. Trowell, Rivkin Radler LLP, Jacksonville, for Defendant.

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

THIS CAUSE came before this Court on May 28, 2025, concerning "Plaintiff's Motion to Compel Better Responses and Responsive Documents to Plaintiff's Second Request for Production" filed on November 14, 2024 (**DN# 82**). 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 Second Request for Production" (**DN# 82**) 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 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 2nd Request for Production by **June 13, 2025**.

(d) The Defendant: (i) shall, by **June 13, 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.

* * *

Criminal law—Driving under influence—Detention—Arrest—911 call from defendant's wife, reporting that he was intoxicated and describing his vehicle and location in abandoned lot, is not hearsay where call was not admitted at suppression hearing for truth of matter asserted, but to show information deputy had in determining that he had founded suspicion for detention and probable cause for arrest—Furthermore, hearsay is admissible in suppression hearing—Deputy had founded suspicion justifying detention based on information provided in 911 call, unusual location of defendant in abandoned lot late at night, odor of alcohol, and defendant's unusual behavior of laying limp across console—Deputy had probable cause to arrest defendant for resisting officer where defendant physically refused to get out of vehicle when deputy was ordering him to do so and attempting to forcefully remove him from vehicle—Deputy had probable cause for DUI arrest based on circumstances that formed basis of founded suspicion determination in addition to defendant's actions in refusing to exit vehicle and his appearance, speech and gait—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. CHRISTOPHER MICHAEL EAST, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2024-MM-022291-A. April 30, 2025. David C. Koenig, Judge. Counsel: Samantha Whyte, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Bryan McCarthy, Rockledge, for Defendant.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE came before the Court for a hearing on February 27, 2025 on the Defendant's Motion To Suppress. Testimony, video evidence and argument was submitted on that day, and written memorandum followed. The Court having considered the evidence, written and verbal arguments, and the applicable law, finds as follows:

1. In seeking to exclude evidence in this case, the Defense's Motion to Suppress makes three basic interrelated claims: a. The 911 call that led to Deputy Moore being dispatched to the Defendant's location and subsequent detention and arrest is inadmissible hearsay, and should not be considered in the court's analysis of the validity of the Defendant's detention and arrest; b. Deputy Moore lacked founded suspicion to detain the Defendant; and c. Deputy Moore lacked probable cause to arrest the Defendant for DUI.

2. **Relevant Facts**: Brevard County Sherrif's Office received a 911 call from a person identifying as the Defendant's wife. The caller stated the Defendant was intoxicated, that she did not want him driving, and described the vehicle he was in and the location. As a result of this call, BCSO Deputy Moore was dispatched to the location conveyed in the call which was an abandoned unlit lot and located the Defendant's vehicle, as described by the 911 caller. As Deputy Moore's patrol vehicle approached the Defendant's vehicle, a bright light was shined into the passenger compartment and the Defendant is observed covering his face and then either leaning over or collaps-

ing towards the center console. Deputy Moore and another deputy then approached the vehicle and made contact with the Defendant. It appears from the video shown in court and the Deputy's testimony, that the Defendant remained unresponsive to Deputy Moore's attempts to either wake him or get him out of the car. Deputy Moore further testified that he could see slight movement from the Defendant but he continued to lay completely limp across the center console with his eyes closed. Additionally, Deputy Moore testified that he smelled alcohol while standing outside the Defendant's vehicle's open driver's side window. Based on his observations and detecting a pulse, Deputy Moore concluded that the Defendant was not having a medical episode and attempted to remove him from the vehicle. According to Deputy Moore, and as observed on the video, the Defendant physically refused to exit the vehicle and ultimately had to be forcefully removed by the two deputies. Upon being removed from the driver's seat of his vehicle, the Defendant was handcuffed, presumably placed under arrest for resisting and DUI. The video then shows the Defendant being walked by the two deputies to the front of Deputy Moore's car and Deputy Moore telling the Defendant, among other things, that he is not going to conduct field sobriety exercises because he does not trust that the Defendant won't run away and that he reeks of alcohol.

3. **Admissibility of 911 Call**: A significant amount of attention was paid to the admissibility of the 911 call in this case, with the Defense arguing that it is inadmissible hearsay and that the Business Records Certification filed by the State is inadequate to overcome this objection. The court finds that, for purposes of this Motion, there is no need to address the issues around the Business Records Certification because the 911 call is not hearsay and, even if it was hearsay, hearsay is admissible in a Motion to Suppress. As to the first point, the contents of the 911 call "were not introduced at the suppression hearing for the truth of the matter asserted, but to show what information [Deputy Moore] had when making his [founded suspicion and] probable cause determination". *State v. Saravia,* 403 So. 3d 245, 248 (Fla. 4DCA 2025) [50 Fla. L. Weekly D526a]; *State v. Littles,* 68 So. 3d 976, 978 (Fla. 5DCA 2011) [36 Fla. L. Weekly D1952b]. As to the second point, in *State v. Littles, id. @* 978, the Fifth DCA held that hearsay was admissible in motion to suppress hearings. Therefore, the information contained in the 911 call - that the Defendant was intoxicated or drunk, and in his vehicle at a certain location, which was known to Deputy Moore upon his encounter with the Defendant can be considered by the court in determining if Deputy Moore had founded suspcion to detain and probable cause to arrest the Defendant.

4. **Founded Suspicion to Justify Temporary Detention**: Deputy Moore's reaction to the 911 call, initial contact and interaction with the Defendant to determine if he was ill, injured or impaired was, in the court's view, extremely reasonable. Not conducting a well being check on the Defendant, who exhibited unusual behavior (leaning or falling over indicating he passed out, fell asleep or was hiding) in an unusual location for a law abiding citizen (abandoned unlit lot) at an unusual time for a person not engaged in criminal activity (best the court can ascertain between 11:00 PM and midnight) would have been a dereliction of the Deputy's duty. The only way to do this, under the circumstances, was to open the vehicle door and make physical contact with the Defendant. Once Deputy Moore made physical contact with the Defendant, who was seated in the driver's seat with the keys in the ignition, and determined that the Defendant was not overdosing or having a similar medical emergency and then combined this with the odor of alcohol he had smelled and the information provided in the 911 call, he was justified in removing the Defendant from the vehicle and temporarily detaining him. In other words, based on the facts adduced at the suppression hearing that would have been known to Deputy Moore at the time, there was an objective reasonable basis to seize the Defendant for being in actual physical control of a motor vehicle while impaired by alcohol and resisting. See, *State v. Jimoh,* 67 So. 3d 240 (Fla. 2DCA 2011) [35 Fla. L. Weekly D2469a].

5. **Probable Cause to Justify Arrest**: Having found that Deputy Moore was justified in seizing the Defendant based on founded suspicion, the final question is whether the factors that led to that conclusion support the higher standard of probable cause for a DUI (actual physical control) and resisting arrest. With regard to the resisting arrest without violence charge, the Defendant's actions of refusing to get out of the vehicle, clearly observed on video, when Deputy Moore was lawfully ordering and physically attempting to remove him from the vehicle, establish probable cause for the resisting arrest. As it relates to the DUI (actual physical control) charge, the court finds the following factors established at the hearing and known to Deputy Moore, to be relevant in the probable cause determination:

a. The contents of the 911 call, to wit: the Defendant was in a vehicle that he was the sole occupant and driver of, and too intoxicated to safely drive;

b. The Defendant's unusual behavior of leaning or falling over when Deputy Moore shined a light into his vehicle, and being in an unusual spot at an unusual time for a person not engaged in criminal activity;

c. The Defendant being found in the drivers seat of the vehicle with the keys in the ignition, as indicated in the 911 call;

d. The odor of alcohol detected outside the driver's window and on the Defendant's person;

e. The Defendant's failure to comply with Deputy Moore's instruction to exit the vehicle and the level of physical resistance he engaged in as the deputies attempted to remove him from the car; and

f. The Defendant's appearance, speech and gait as he is removed from the car, walked to Deputy Moore's patrol vehicle and while he is at the patrol vehicle interacting with the deputies.

This is clearly an imperfect case and the court does not fully understand Deputy Moore's reasoning in not conducting field sobriety exercises. However, the court is not being asked to determine if the State has proven whether the Defendant is guilty beyond a reasonable doubt of DUI, but only if based on the totality of facts and circumstances known to Deputy Moore there was sufficient trustworthy information to justify a person of reasonable caution to believe that an offense has been or is being committed. *State v. Saravia,* 403 So. 3d 245, 248 (Fla. 4DCA 2025) [50 Fla. L. Weekly D526a]. The court finds that the State has met its burden and probable cause existed for Deputy Moore to conclude that the Defendant's normal faculties were impaired by alcohol while he was in actual physical control of his vehicle.

Accordingly, the Motion to Suppress is ***DENIED***

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Reasonable suspicion—Officers had reasonable suspicion of criminal activity justifying stop of defendant's vehicle where they had encountered defendant in bar parking lot 12 minutes earlier, had observed indicia of impairment, and had put defendant in rideshare vehicle to be transported home, but rideshare driver subsequently reported that defendant had been returned to her vehicle at her request—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. DIANE TERESE ELLISON, Defendant. County Court, 20th Judicial Circuit in and for Collier County, Criminal Division. Case No. 11-2024-CT-003831-AXXX-01. May 30, 2025. Deborah J. Cunningham, Judge.

ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come before the Court for an evidentiary hearing on May 27, 2025 concerning the Defendant's Motion to Suppress (docket entry #35) and the Court having received testimony and evidence, heard argument of counsel, reviewed the motion and the case law presented by the parties, and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is DENIED.

The Defendant was arrested for driving under the influence on December 16, 2024 in the City of Naples. The Defendant filed a Motion to Suppress arguing that the Law Enforcement Officers did not have a reasonable suspicion to conduct a traffic stop on the Defendant. An evidentiary hearing on the Defendant's afore-mentioned motion was held on May 27, 2025. At the hearing, the State called Naples Police Officers Yasmin Pacheco and Nicole Langlois to testify.

According to the testimony of both officers, the officers were called to the Cabana Bar at Bayfront regarding an intoxicated woman who was attempting to drive. The officers responded to Bayfront at approximately 10:21 p.m. They first spoke with the manager of the Cabana Bar and then made contact with the Defendant, who was identified by her Florida Driver's License. The Defendant was standing in front of the bar using a railing for balance. Officer Pacheco testified that the Defendant had red, bloodshot eyes, slurred speech, and had trouble with her balance. Officer Langlois added that the Defendant alternated between leaning on the railing and grabbing Officer Langlois for balance. The Defendant told the officers she had a few cocktails and just wanted to get home. The officers told her it was best to call an Uber and come back and retrieve her car the next day. The Defendant was hesitant to consent to an Uber ride, but ultimately agreed. The officers observed the Defendant enter her white, Ford sport utility vehicle (SUV) and retrieve some belongings. Officer Langlois noted that the vehicle was boxy and not rounded like most SUVs. Both officers testified that they noted the color, make and tag number of the Defendant's car. Then, with the assistance of Officer Langlois, the Defendant entered an Uber. Officer Langlois testified that she had to physically assist the Defendant by helping to place her legs in the car. According to the CAD report entered into evidence as Defense Exhibit 2, the officers left Bayfront at 10:37 p.m. The officers thought they called the tag number of the Defendant's vehicle into dispatch, but it is not reflected in the CAD report. Nonetheless, the officers both stated they noted the tag number of the vehicle.

The evidence shows that at 10:44:30, a call came into the Naples Police Department from an Uber driver, who provided the name of Junior. (See Defense Exhibit #3). The phone number from which Junior was calling was recorded by dispatch. (See Defense Exhibit #3). The CAD reflects that the caller was a Spanish speaking male who stated he was the Uber driver who picked up the drunk female with whom the officers were just out. According to the Uber driver, the female started crying and asked the Uber driver to drop her back off at her vehicle, which he did. Apparently, he did not want to be responsible if something were to happen to her. (See Defense Exhibit #3).

The information received by the Uber driver was relayed to Officers Pacheco and Langlois, who were in riding in the same vehicle. The Uber driver reported that the female was in a white Lexus. However, the officers did not recall dispatch mentioning a white Lexus. Based on the information received from dispatch, Officer Pacheco put out a BOLO for the white, Ford SUV from which she and Officer Langlois saw the Defendant retrieve her personal belongings.

Officers Pacheco and Officer Langlois drove back to Bayfront and noted that the Defendant's vehicle was no longer at the location. The officers, with Officer Langlois driving, headed north on Goodlette Road and encountered the Defendant's vehicle at the intersection of Central Ave and Goodlette Road. Officer Langlois testified she recognized the boxy, white SUV and the license plate number, which the officers had previously noted. The license plate was a Florida tag. The CAD reported reflects the license plate as being a Michigan tag, however the officers had no idea from where that information came.

Based on their prior interaction and the information provided by the Uber driver, Officer Langlois immediately pulled the Defendant's vehicle over. She did not verify that the Defendant was driving prior to the stop. Further, the Defendant did not violate any traffic laws. The CAD report reflects the stop was effectuated at 10:49 p.m., approximately twelve minutes after the officers had placed the Defendant in an Uber and left Bayfront. (See Defense Exhibit 3).

In order to stop the Defendant's vehicle, the officers had to have a reasonable suspicion that she was driving under the influence. *See Jacobson v. State,* 227 So. 3d 712, 714 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2033a]. "The totality of the circumstances must be considered in evaluating whether an officer has a reasonable or well-founded suspicion to justify an investigatory stop." *See id.*; *Baden v. State,* 174 So. 3d 494, 497 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1913b].

In the instant case, the officers' reasonable suspicion of criminal activity came from their personal interaction with the Defendant a mere twelve minutes prior to the stop. The officer's observed the Defendant to have red, bloodshot eyes, slurred speech, and she had trouble keeping her balance. The Defendant admitted to drinking alcohol. The officers were so concerned about her condition that they insisted that she take an Uber rather than drive herself home. Because of the Defendant's state, Officer Langlois had to physically assist the Defendant into the Uber.

Further, the Uber driver called the police to report that he drove the woman who was just out with the officers back to her car. He detailed how she was crying and requested to go back to her car. He dropped her off at her vehicle and contacted police. Minutes later, the vehicle was no longer parked at Bayfront. The Uber driver provided his name and the police had a phone number for him. The information provided to dispatch was credible.

The traffic stop performed on the Defendant by Officers Pacheco and Langlois was justified based on their belief that the Defendant was driving under the influence. There was a concern for public safety based on their earlier observations of the Defendant coupled with the information provided by the Uber driver. A concern for public safety can warrant a brief investigative stop to determine if a driver is driving under the influence. *See Jacobson* at 714; *Agreda v. State,* 152 So. 3d 114, 116 (Fla. 2nd DCA 2014) [39 Fla. L. Weekly D2516a]. Based on a totality of the circumstances the officers had a well-founded, reasonable suspicion that the Defendant was driving under the influence and was a danger to the public. Accordingly, the Defendant's Motion to Suppress is denied.

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Volume 33, Number 4
August 29, 2025
Cite as 33 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Lobby, activist, and advocacy groups—Judge assigned to unified family court may interact with local domestic violence fatality response team on ad hoc basis for limited purpose of offering recommendations and insights from a judicial perspective—Because of concerns about perceived impact on judge's impartiality, a judge whose docket includes civil and criminal domestic violence cases may not serve on a county domestic violence oversight board whose stated mission is to be "survivor-centered" with goal of "supporting those affected by domestic violence"

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-11. Date of Issue: May 27, 2025.

ISSUES

1. May a judge assigned to unified family court, hearing civil interpersonal violence injunction cases, interact on an ad hoc basis with a local Domestic Violence Fatality Response Team for the limited purposes of offering recommendations and insights from a judicial perspective?

ANSWER: Yes.

2. May a judge who presides over misdemeanor domestic violence cases and civil domestic violence injunction cases serve on the county's Domestic Violence Oversight Board if it adopts as part of its mission statement that it is "survivor-centered" and exists to "support those affected by domestic violence?"

ANSWER: No.

FACTS

We have received inquiries from two judges regarding their desire to engage in extra-judicial service in the community by interacting with or serving on groups that analyze and attempt to reduce domestic violence. There is no doubt that the groups provide valuable service to the community; however, the JEAC is called upon to advise whether these judges may participate, in the mode each set forth, in the groups described below. We are responding to each inquiry separately, but are doing so in the same opinion to highlight their similarities and differences.

The judge inquiring as to Issue 1 ("Judge 1") wants to serve in an ad hoc role with a local Domestic Violence Fatality Response Team ("DVFRT"), which is a statutorily-created organization. A DVFRT reviews and analyzes fatal incidents, such as homicides and suicides caused by or related to domestic violence.[1] Each local DVFRT decides what kind of incidents (fatalities only or also near-fatal incidents) and how many incidents they will review during any period of time. "The purpose of the teams is to learn how to prevent domestic violence by intervening early and improving the response of an individual and the system to domestic violence."[2] Part of the DVFRTs' role is to "make policy and other recommendations as to how incidents of domestic violence may be prevented." A Florida handbook for DVFRTs suggests that the work of these teams can improve safety for victims of domestic violence while providing "insight into meaningful and constructive ways to hold perpetrators accountable for their violent behavior."[3] The teams may interview friends, family, co-workers, and others close to the victim or to the perpetrator of the domestic violence in an effort to gain better understanding of the circumstances surrounding the particular events. The teams do not "investigate" the homicide or suicide; rather, they "review" it.[4]

The documents and information obtained by a DVFRT are confidential, privileged from discovery, and are not to be introduced in evidence at any proceeding.[5] Team members and those attending a meeting of the DVFRT may not testify in any proceedings with regard to records or information produced or provided to the DVFRT. The "teams are assigned to the Department of Children and Families for administrative purposes."[6] Members can include law enforcement, court clerks, court administrators, child protection service providers, medical examiners, and several other named categories. Judge 1's DVFRT does not include representatives from the Public Defender's office or other defense attorneys. Judge 1 will have no direct link to the local DVFRT and no specific role other than to share insights, information, and recommendations from a judicial perspective with the other team members.

Judge 2, who inquires as to Issue 2, wishes to serve on the county's Domestic Violence Oversight Board ("DVOB") which currently describes itself as having been created to serve in an advisory and oversight capacity with the local board of county commissioners with respect to issues affecting or related to domestic violence. The DVOB is charged with developing and submitting a plan for using certain local funding to support domestic violence centers and to pursue federal and state matching funds. The DVOB also monitors and evaluates the provision of services to domestic violence victims. The reason for Judge 2's concern and inquiry is that the local DVOB is considering adoption of a mission statement saying that it is "survivor-centered" and exists to "support those affected by domestic violence."

DISCUSSION

Issues 1 and 2 raise related concerns. First, Canon 3A states that "[t]he judicial duties of a judge take precedence over all the judge's other activities." Canon 4A(4) requires judges to conduct all "quasi-judicial activities so that they do not interfere with the proper performance of judicial duties." Thus, judges cannot allow extrajudicial activities to impinge materially on court time or take priority over conducting hearings, trials, and issuing orders. Second, because the focus of these groups concerns issues that may often arise in cases coming before these judges, they must be alert to and avoid any ex parte communications or conversations in their presence regarding any aspect of their pending cases. If not careful, conversations about a particular issue or concern may turn from general or theoretical to relaying the facts of a currently pending case. Canon 3B(7) clearly states that a judge cannot permit or consider ex parte communications or other communications made to the judge outside the presence of the parties concerning a pending or impending matter.

Third, these judges must recognize and balance the competing encouragement found in Canon 4B for a judge to speak, write, lecture, and teach about the law, legal system, and administration of justice against the precautions contained in Canon 4A(1), (2), (5), and Canon 5A(1) and (2), to ensure that such extra-judicial activities do not create the perception or reality that a judge cannot serve impartially on certain types of cases.

One could certainly regard the groups described in Issues 1 and 2 as being focused positively on victims of domestic violence, while being focused negatively on those who commit domestic violence. Thus, these groups could be seen as being representative of only one side of potential cases that may come before each inquiring judge.

The JEAC has issued several opinions, not always based on a unanimous vote, dealing with "focused interest groups" or "partisan groups" in other situations and has given consistent advice that neutrally speaking, lecturing, and teaching about the law is permissible for judges, while drawing the line at membership or repeated interaction in such groups as being ill-advised. For example, we opined that a judge could neutrally teach law to police officers in their educational academy at a community college, (JEAC Op. 05-11) [12 Fla. L. Weekly Supp. 1197b], and could preside over a mock trial intended to familiarize police officers with courtroom procedures. (JEAC Op. 18-01) [25 Fla. L. Weekly Supp. 851a]. But, the JEAC has

concluded that a judge should not participate with the Florida Highway Patrol Auxiliary in any on-going capacity, (JEAC Op. 06-29) [14 Fla. L. Weekly Supp. 193a], nor should a judge serve as a volunteer for the sheriff's mounted patrol due to concerns that this degree of continued involvement could cast doubt about the judge's impartiality. (JEAC Op. 06-28) [14 Fla. L. Weekly Supp. 111a]. We have concluded that it was permissible for a judge to lecture about law to the Academy of Florida Trial Lawyers, a group of plaintiffs' personal injury lawyers, (JEAC Op. 87-03), but opined that it would be inappropriate for a judge to be a member of that same organization because of concerns that the judge's impartiality could reasonably be called into question. (JEAC Op. 95-21) [3 Fla. L. Weekly Supp. 303b].

The JEAC has determined that a judge could serve as a panelist discussing legal issues related to underaged drinking at a meeting of Mothers Against Drunk Drivers ("MADD"), (JEAC Op. 06-17) [13 Fla. L. Weekly Supp. 1118a], but a judge should not serve on the board of MADD as the judge's impartiality in DUI cases might be reasonably questioned. (JEAC Op. 82-18).

In opinions more closely on point with the judges' inquiries, we have followed that same pattern. We have opined that a judge could ethically participate in a panel discussion about legal issues related to human trafficking, (JEAC Op. 20-03) [27 Fla. L. Weekly Supp. 1057a], and could attend a luncheon for Women in Distress, which has a mission of providing victims of domestic violence with various support and resources. (JEAC Op. 16-16) [24 Fla. L. Weekly Supp. 585a]. However, we concluded that concerns about impartiality meant that a judge should not be a member of a committee of Women in Distress. (JEAC Ops. 91-22 and 09-11) [16 Fla. L. Weekly Supp. 791a].

We have previously reached the opinion that a judge could serve on the governor's task force on domestic violence where the judge's role was similar to that of Judge 1, offering insight from a judicial perspective. (JEAC Op. 94-33). Judges can teach at seminars designed to inform court personnel how to deal with domestic violence. (JEAC Op 15-04) [22 Fla. L. Weekly Supp. 863a]. We have concluded that it was ethically appropriate for a judge to attend domestic violence council meetings to answer questions about court procedures; however, in that same opinion, we advised that the judge should not serve as a member on that council if it appeared to have become an advocacy group. (JEAC Op. 01-14) [8 Fla. L. Weekly Supp. 663b].

Issue 1. Judge 1's anticipated limited role seems to fit squarely within Canon 4A's encouragement to speak, lecture, and teach about the law, the legal system, and the administration of justice. One can expect that members of the DVFRT would be interested to learn how Florida courts deal with civil and criminal domestic violence cases, including what options exist for preventing or limiting fatal domestic violence incidents while explaining punishment options for those found through the courts to have committed or threatened to commit acts of domestic violence. If Judge 1 limits his/her involvement in that manner, it seems unlikely that the judge's activities would cause anybody to reasonably question whether the judge would remain impartial and unbiased. Judge 1 should be cautious about significantly increasing the scope or frequency of involvement with the DVFRT.

Issue 2. Judge 2's inquiry to and the response of the JEAC is specifically limited to a concern about the DVOB revising its mission statement so that it would be self-labeled as "survivor-centered" with the goal of "supporting those affected by domestic violence." That would seem to transform the DVOB into an advocacy group which would be a focused interest and partisan group. If that were to occur, Judge 2's membership and continuing involvement with the DVOB beyond law-related speaking, lecturing, and teaching could cause litigants to reasonably question whether the judge will remain impartial in the domestic violence cases on his/her docket. If that change in mission is adopted, the JEAC advises Judge 2 to end his/her membership and limit participation to speaking, lecturing, and teaching about law-related topics.

REFERENCES

Section 741.316(1), (2), (4), (5), Florida Statutes (2024)
Fla. Code Jud. Conduct, Canons 3A, 3B(7), 4A(1),(2),(4),(5), 4B, 5A(1),(2)
Fla. JEAC Ops. 2020-03 [27 Fla. L. Weekly Supp. 1057a], 2018-01 [25 Fla. L. Weekly Supp. 851a], 2016-16 [24 Fla. L. Weekly Supp. 585a], 2015-04 [22 Fla. L. Weekly Supp. 863a], 2009-11 [16 Fla. L. Weekly Supp. 791a], 2006-29 [14 Fla. L. Weekly Supp. 193a], 2006-28 [14 Fla. L. Weekly Supp. 111a], 2006-17 [13 Fla. L. Weekly Supp. 1118a], 2005-11 [12 Fla. L. Weekly Supp. 1197b] , 2001-14 [8 Fla. L. Weekly Supp. 663b], 1995-21 [3 Fla. L. Weekly Supp. 303b], 1994-33, 1991-22, 1987-03, 1982-18
Florida Coalition Against Domestic Violence, Domestic Violence Fatality Review, A Guide for Florida's Domestic Violence Fatality Review Teams, p.4. https://www.myflfamilies.com/sites/default/files/2022-10/FCADV%20DVFRT%20Guide6-2017_0.pdf

[1]Section 741.316(1), (2), Florida Statutes (2024).
[2]Section 741.316(2).
[3]Florida Coalition Against Domestic Violence, Domestic Violence Fatality Review, A Guide for Florida's Domestic Violence Fatality Review Teams, p.4. https://www.myflfamilies.com/sites/default/files/2022-10/FCADV%20DVFRT%20Guide6-2017_0.pdf
[4]*Id.* at 11.
[5]Section 741.316(4).
[6]Section 741.316(5).

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Law enforcement—A judge may not complete mandated certification requirements to maintain active law enforcement credentials with judge's former police department in county where judge hears cases—Certification would cast reasonable doubt on judge's ability to act impartially and undermines judge's independence, integrity, or impartiality

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-12. Date of Issue: June 16, 2025.

ISSUE

Can a judge, who was formerly a police officer, complete the sitting judge's four-year certification requirement to maintain active law enforcement credentials with the sitting judge's former police department which is in the county where the judge hears cases?

ANSWER: No. The certification and financial arrangement with the former police department would cast reasonable doubt on the judge's capacity to act impartially or undermines the judge's independence, integrity, or impartiality.

FACTS

The inquiring judge is a circuit court judge who was previously reserve police officer with a city police department in the county where the judge sits. While the inquiring judge no longer works as a reserve officer, in order to remain actively certified, law enforcement officers are required to complete 40 hours of continuing education every four years. Fla. Stat. 943.135(4) provides a person who resigns their position as a law enforcement officer, in order to avoid the dual office holding prohibition of section 5(a), Art. II of the Florida Constitution, to be affiliated with their previous employing agency in order to continue the education requirements to keep their certificate active. The provision reads as follows:

> (4)(a) Notwithstanding any other provision of law, any person holding active certification from the Criminal Justice Standards and Training Commission as a law enforcement officer, correctional officer, or correctional probation officer, as defined in s. 943.10(1),

(2), (3), (6), (7), (8), or (9), who resigns his or her position as law enforcement officer, correctional officer, or correctional probation officer for the sole purpose of serving in an office to which the person has been elected or appointed and to thereby avoid the prohibition against dual officeholding established in s. 5(a), Art. II of the State Constitution may be allowed to retain active certification in a special status during the tenure of the elected or appointed office if, at the time of resignation, . . .

(b) Any person who qualifies under paragraph (a) may, for purposes of meeting the minimum mandatory continuing training or education requirements of this section, at the option of an employing agency, associate with that agency for the sole purpose of securing continuing training or education as required by this section and for allowing the agency to report completion of the education or training to the Criminal Justice Standards and Training Commission. The employing agency with which the person has associated shall submit proof of completion of any education or training so obtained for purposes of demonstrating compliance with this section and shall indicate that the person for whom the credits are reported has secured the training under the special status authorized by this section. An employing agency may require any person so associated to attend continuing training or education at the person's own expense and may determine the courses or training that a person is to attend while associated with the agency. Any person who is permitted to associate with an employing agency for purposes of obtaining and reporting education or continuing training credits while serving in an elected or appointed public office shall not be considered to be employed by the employing agency or considered by the association with the employing agency to maintain an office under s. 5(a), Art. II of the State Constitution.

The sitting judge is due for a four-year 40-hour training to maintain active law enforcement credentials, and the sitting judge would like to do the training with the sitting judge's prior police department. Additionally, the sitting judge would like the former department to pay for the certification course. The sitting judge believes that F.S. 943.135(4) allows the sitting judge to do this so that the police department bears the cost of the training.

The sitting judge hears probate, guardianship and delinquency cases on a regular basis. Additionally, the sitting judge is on duty every four weeks. During duty week, the judge handles first appearances and detention hearings. Additionally, the sitting judge is also the warrant duty judge authorizing arrest and search warrants. During duty week, the judge does handle warrants and sits on cases from the sitting judge's former police department.

DISCUSSION

There are two issues presented to this committee, the first is can a sitting judge utilize Fla. Stat. 943.135(4) to keep their law enforcement certification active while serving as a judge? The second issue is whether there is an ethical problem with the judge completing and having the former police department pay for the sitting judge's four-year certification requirement to maintain active law enforcement credentials with the sitting judge's former police department which is in the county where the judge hears cases?

As to the first issue, this Committee cannot opine on the use of Fla. Stat. 943.135(4). The JEAC provides advisory opinions based on the Code of Judicial Conduct to judges. Interpretation of a Florida statute is beyond the purview of this Committee.

As to the second issue, the Committee turns to Canons 2, 3, and 5 of the Code of Judicial Conduct for guidance.

Canon 2A of the Florida Code of Judicial Conduct provides that a judge shall respect and comply with the law and shall act in a manner that promotes public confidence in the judiciary. Canon 3A provide that judicial duties of a judge shall take precedence over all of the judge's other activities. Further, Canon 3E provides for a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Lastly, Canon 5A provides that a judge engaged in extra-judicial activities shall do so in a manner that does not cast reasonable doubt on the judge's capacity to act impartially or undermines the judge's independence, integrity, or impartiality.

In assessing Canon 2A, the Committee is tasked with answering the question as to whether the inquiring judge attending and having them pay for the recertification course with police officers from the judge's former police department would this cause an appearance of impropriety. "The test for the appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." Commentary to Canon 2A.

Additionally, in Fla. JEAC Op. 2019-02 [26 Fla. L. Weekly Supp. 919b], this Committee set forth factors that a judge should consider when engaging in extrajudicial activities. The Committee opined that if any of the factors listed below results in a yes answer to the question, it is recommended that the judge not engage in the activity. The factors to consider are:

1. Whether the activity will detract from full time duties;
2. Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice;
3. Whether the activity will appear to trade on judicial office for the judges personal advantage;
4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;
5. Whether the activity will lend the prestige of the judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;
6. Whether the activity will create any other conflict of interest for the judge;
7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court; and,
8. Whether the activity will lack dignity or demean judicial office in any way.

In Fla. JEAC Op. 2000-04 [7 Fla. L. Weekly Supp. 365a], the Committee found that a special hearing officer, who was subject to the Code of Judicial Conduct, could not attend the local police department's Citizens Police Academy, because to do so would be a violation of the Code of Judicial Conduct in that it would create an appearance of impropriety.

In Fla. JEAC Op. 2001-03 [8 Fla. L. Weekly Supp. 409a], the Committee found that a judge could not serve as a spokesperson in Florida Department of Highway Safety and Motor Vehicles (Department) advertising that would advocate seatbelt use. The Committee opined that to do so would create the appearance of impropriety and would cast reasonable doubt on the judge's capacity to act impartially as a judge in cases where Highway Patrol officers appear as witnesses or where the Department is involved as a litigant.

In JEAC Opinion 2006-29 [14 Fla. L. Weekly Supp. 193a], the Committee found that membership and work in an administrative capacity for the Florida Highway Patrol Association would cast reasonable doubt on the judge's capacity to act impartially as a judge and interfere with the proper performance of judicial duties.

Given the precedent of this Committee, it is evident that associating with a prior employer, a police department, in the county where the judge sits, and accepting their payment of the certification course would cast reasonable doubt on the judge's capacity to act impartially or undermines the judge's independence, integrity, or impartiality.

The Committee notes that one member did not participate in this opinion.

REFERENCES

Fla. Code Jud. Conduct, Canon 2A, 3A, 3E, and 5A
Fla. JEAC Ops. 2023-11, 2019-03, 2006-29 [14 Fla. L. Weekly Supp. 193a], 2000-04 [7 Fla. L. Weekly Supp. 365a], 2001-03 [8 Fla. L. Weekly Supp. 409a]

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—A judge's wholly owed corporation may purchase tax certificates and property subject to tax and foreclosure sales in online auctions unless judge is using information which is not publicly available, is given preferential treatment, or presided over any facet of litigation concerning the property

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-13. Date of Issue: June 23, 2025.

ISSUES

1. May a judge's wholly owned corporation purchase tax certificates, in an online auction, in the same county where the judge presides?

ANSWER: Yes, if the judge is purchasing the tax certificates with publicly available information only, so long as the judge is given no preference for being a judge.

2. May the judge's corporation purchase the property at tax sale through an online auction in the county where the judge presides if the tax certificate goes unpaid?

ANSWER: Yes, if the judge is purchasing the property at tax sale with publicly available information only, so long as the judge is given no preference for being a judge.

3. May the judge's corporation purchase circuit court and county court foreclosure sales in an online auction from the clerk of court in the same county where the judge presides and on cases where the judge may have presided over?

ANSWER: Yes, unless the judge presided over any facet of the litigation concerning the property.

FACTS

The inquiring judge is a county court judge who is assigned to the civil division. The inquiring judge has a wholly owned corporation that owns and manages property.

The inquiring judge would like to purchase tax certificates and if the taxes are not paid, purchase the property at tax sale. The judge would also like to bid on the foreclosure of properties in the county where the judge presides, including properties as to which the judge signed the final judgment.

DISCUSSION

Canons 2, 3, and 5 of the Code of Judicial Conduct provide the Committee with guidance to address the issues presented.

Canon 2A of the Florida Code of Judicial Conduct provides that a judge shall respect and comply with the law and shall act in a manner that promotes public confidence in the judiciary. Canon 3A provides that judicial duties of a judge shall take precedence over all of the judge's other activities. Canon 5A provides that a judge engaged in extra-judicial activities shall do so in a manner that does not cast reasonable doubt on the judge's capacity to act impartially or undermines the judge's independence, integrity, or impartiality. Lastly, Canon 5D(2) provides that a judge may hold and manage investments of the judge. . ., including real estate, and engage in other remunerative activities.

In assessing Canon 2A, the Committee is tasked with answering the question as to whether the inquiring judge bidding and purchasing tax certificates, tax sales and foreclosure properties cause an appearance of impropriety. "The test for the appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." Commentary to Canon 2A.

In Florida Judicial Ethics Advisory Committee Opinion 2019-02 [26 Fla. L. Weekly Supp. 919b], this Committee set forth factors that a judge should consider when engaging in extrajudicial activities. The Committee opined that if any of the factors listed below results in a yes answer to the question, it is recommended that the judge not engage in the activity. The factors to consider are:

1. Whether the activity will detract from full time duties;
2. Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice;
3. Whether the activity will appear to trade on judicial office for the judge's personal advantage;
4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;
5. Whether the activity will lend the prestige of the judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;
6. Whether the activity will create any other conflict of interest for the judge;
7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court; and,
8. Whether the activity will lack dignity or demean judicial office in any way.

Another issue to consider is how the inquiring judge received information about the tax certificates, tax sales or circuit and county court foreclosure sales. In Florida Judicial Ethics Advisory Committee Opinion 2015-03 [22 Fla. L. Weekly Supp. 862a], this Committee opined that a judge may not disclose nonpublic information to the employer of a party in a case. Similarly, in Florida Judicial Ethics Advisory Committee Opinion 2025-05 [33 Fla. L. Weekly Supp. 41a], this Committee opined that a judge should not extrajudicially notify others of upcoming foreclosure sales or details about those cases in mortgage foreclosure over which the judge presided.

In analyzing the canons and opinions of this Committee, we conclude that the inquiring judge may bid on tax certificates, tax deeds and foreclosure sales, anonymously, so long as the judge is using only publicly available information, and it does not detract from the judge's full-time duties.

However, bidding on tax certificates, tax sales and foreclosure sales based on information that is not publicly available would cast reasonable doubt on the judge's capacity to act impartially and undermines the judge's independence, integrity, or impartiality, even if conducted anonymously online. Likewise, bidding on the foreclosure sale of any property over which the judge presided *in any way* lacks dignity, demeans the judicial office, and calls into question the judge's impartiality, even if conducted anonymously online.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A, 3A 5A, and 5D
Fla. JEAC Ops. 2025-05 [33 Fla. L. Weekly Supp. 41a], 2019-03 [26 Fla. L. Weekly Supp. 921a], 2015-03 [22 Fla. L. Weekly Supp. 862a]

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