Volume 33, Number 5, September 30, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 183-214

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.

- **LICENSING—DRIVER'S LICENSE—SUSPENSION—REFUSAL TO SUBMIT TO A BREATH TEST—LAWFULNESS OF STOP AND ARREST. The requirements of section 322.2615, Florida Statutes, were met and probable cause for a stop and an arrest was demonstrated by a properly sworn criminal report affidavit submitted by a back-up officer who was not present at the traffic stop and a detailed, but unsworn, supplemental summary from the officer who conducted the stop. There is no statutory requirement that all documents submitted to the hearing officer be notarized.** *HEISLER v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES. Circuit Court, Thirteenth Judicial Circuit (Appellate) in and for Hillsborough County. Filed June 17, 2025. Full Text at Circuit Courts-Appellate Section, page 184a.*

- **COURTS—TRIAL COURTS—JUDICIAL ECONOMY—HEARINGS—TIME RESTRICTIONS. The use of a chess clock system to limit each litigant to an equal share of time during a three-hour hearing was within a trial court's authority to efficiently manage the proceedings. In the case at issue, three hours was an ample and appropriate amount of time for the child custody proceeding, and neither party objected to timekeeping or suggested that the time was insufficient until after the time ran out.** *ATIYA v. SHPERLING. Circuit Court, Seventeenth Judicial Circuit in and for Broward County. Filed July 15, 2025. Full Text at Circuit Courts-Original Section, page 200b.*

- **CONSUMER LAW—FLORIDA CONSUMER COLLECTION PRACTICES ACT—DEBT COLLECTION—PROHIBITED PRACTICES. Section 559.72(1), Florida Statutes, which prohibits persons from communicating with a debtor between the hours of 9 p.m. and 8 a.m. in the debtor's time zone without the debtor's prior consent, only applies to telephone calls, not emails.** *DIAZ v. AFTERPAY US SERVICES, LLC. County Court, Thirteenth Judicial Circuit in and for Hillsborough County. Filed April 22, 2025. Full Text at County Courts Section, page 212a.*

FLW SUPPLEMENT (ISSN10684050) is published monthly by Judicial and Administrative Research Associates, Incorporated, 1327 North Adams Street, Tallahassee, FL 32303. All rights reserved. Subscription price is $300 per year plus tax. Internet subscription available at www.FloridaLawWeekly.com. Periodical postage paid at Tallahassee, FL. POSTMASTER: Send address changes to FLW Supplement, P.O. Box 4284, Tallahassee, FL 32315. Telephone (800) 351-0917; Fax (850) 222-7938. E-mail: staff@FloridaLawWeekly.com

FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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

Bold denotes decision by circuit court in its appellate capacity.

VENUE (continued)

* * *

TABLE OF CASES REPORTED

* * *

TABLE OF STATUTES CONSTRUED

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

TABLE OF STATUTES CONSTRUED (continued)

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

TABLE OF CASES TREATED (continued)

* * *

Volume 33, Number 5
September 30, 2025
Cite as 33 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Counties—Code enforcement—Hearings—Notice—Due process—Holding dangerous dog determination hearing within three days of receipt of owner's request for hearing is in conflict with section 767.12(3), which requires that hearing be held no sooner than five days from receipt of request—Further, notice that did not include proposed penalty was deficient—Remand for new proceedings

CHRIS GANDY, Appellant, v. LAKE COUNTY, FLORIDA, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) in and for Lake County. Case No. 2025-AP-01. L.T. Case No. SM-AS-250001146. July 9, 2025. Appeal from Code Enforcement, Special Master Charles D. Johnson, Lake County, Florida. Counsel: Marcy I. LaHart, Tacoma, WA, for Appellant. Melissa R. Martinez, Assistant County Attorney, Lake County Attorney's Office, Tavares, for Appellee.

OPINION

(PER CURIAM.) The issue for determination is whether the "notice of hearing" provided by Appellee violated Appellant's right to due process. Because the hearing was set sooner than the five (5) day time limit authorized by law we find Appellant's rights were violated and reverse and remand.

Appellant, Chris Gandy, requested a hearing on Lake County Code Enforcement's initial determination that sufficient cause existed to classify "Zeus" as a dangerous dog. The request was made by Appellant on January 12, 2025. The Notice of Hearing was submitted January 13, 2025, with a hearing date of January 15, 2025. The hearing was conducted on January 15, 2025, and the Special Master's Order was rendered January 22, 2025, finding "Zeus" a dangerous dog and ordering humane euthanasia. This appeal ensued.

Appellant argues that due process was not afforded to him because the Dangerous Dog determination hearing was premature. Lake County Ordinance 4-56(c)(1) states that "[i]f the owner requests a [dangerous dog determination] hearing, the hearing shall be held as soon as possible, but not later than twenty-one (21) calendar days." However, Section 767.12(3), Florida Statutes, requires the hearing to be held "not later than twenty-one (21) calendar days and not sooner than 5 days after receipt of the request from the owner." Section 767.14, Florida Statutes, allows local government to adopt further restrictions and procedures, but provisions of Chapter 767 may not be lessened by the local regulations or requirements.

"[A] county cannot enact an ordinance that directly conflicts with a state statute." *Phantom of Brevard, Inc. v. Brevard Cnty.,* 3 So. 3d 309 (Fla. 2008) [33 Fla. L. Weekly S1002c]. "The test of conflict between a local government enactment and state law is whether to comply with one provision, a violation of the other is required." *City of Orlando v. Udowychenko,* 98 So. 3d 589, 597 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1608a]. Holding a Dangerous Dog determination hearing within three days of the request is in conflict with §767.12(3). Additionally, the removal of the five-day minimum in Section 4-56(c)(1) deprives a dog owner of the opportunity to adequately and meaningfully prepare for the hearing. *See Cnty. of Pasco v. Riehl,* 620 So. 2d 229 (Fla. 2d DCA 1993).

Appellant also argues that Appellee's written notice of Appellee's findings was deficient. We agree. Both §767.12(3) and 4-56(c)(1) require that the owner be provided with "written notification of the sufficient cause finding and proposed penalty." Appellee's Dangerous Dog Classification and Notice of Opportunity for Hearing does not include the proposed penalty. We therefore REVERSE the Special Master's January 22, 2025, Order and REMAND for new proceedings that comply with Chapter 767 and five (5) day minimum notice provision and this opinion.

REVERSED and REMANDED with DIRECTIONS. (TAKAC, M., EINEMAN, T., and HERNDON, L., JJ., concur.)

* * *

Licensing—Driver's license—Hardship license—Cancellation—Appeals—Certiorari—Timeliness—Petition seeking certiorari review of cancellation of hardship license based on licensee's substance abuse was untimely where petition was filed more than thirty days after rendition of cancellation order—Time for filing petition was not tolled by fact that licensee sought review of DUI program's recommendation of cancellation with another DUI program

CLARENCE C. BOWLING, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. AP25-0001, Division 55. June 3, 2025. Counsel: Terry Shoemaker, Tampa, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

(HOWARD M. MALTZ, J.) THIS CAUSE is before the Court pursuant to Respondent, State of Florida, Department of Highway Safety and Motor Vehicles' ("Department") Motion to Dismiss Petition for Writ of Certiorari as Untimely. Being fully advised in its premises, the Court finds as follows:

Petitioner's driving privilege was permanently revoked in 2013. Petitioner was later granted a hardship driver's license, pursuant to Fla. Stat. § 322.271. Section 322.271(5)(b)2 mandates that a person awarded such a hardship license must remain under the supervision of a DUI program licensed by the Department. Petitioner was being supervised by the Northeast Florida Safety Council. (Pet. p. 3, 13-14)[1]

On July 31, 2024, Petitioner was notified by the Northeast Florida Safety Council that they would be recommending to the Department that Petitioner's hardship license be canceled due to substance abuse, as a result of a positive urine test result. (Pet. p.3)

On August 13, 2024, the Department issued to Petitioner its Notice of Order of Cancellation and Final Order, advising him that his driving privilege (hardship license) would be canceled on September 2, 2024. (Pet. p. 20) That notice went on to state:

> If you believe you have any basis to show why this action is incorrect, you may request a hearing to present evidence per section 322.271, Florida Statutes. Please note, a request for hearing does not stop the cancellation from going into effect on September 2, 2024, and does not stop the 30-day timeframe to appeal from the effective date of the Final Order per section 322.31, Florida Statutes.

Id. Lastly, the notice specified it would become a Final Order on September 2, 2024. *Id.*

Fla. Stat. § 322.31 provides:

> The final orders and rulings of the department wherein any person is denied a license, or where such license has been canceled, suspended, or revoked, shall be reviewable in the manner and within the time provided by the Florida Rules of Appellate Procedure only by a writ of certiorari issued by the circuit court in the county wherein such person shall reside, in the manner prescribed by the Florida Rules of Appellate Procedure, any provision in chapter 120 to the contrary notwithstanding.

Fla. R. App. P. 9.100(c)(1) provides that a petition for writ of certiorari must be filed within 30 days of the rendition order to be reviewed. This 30-day time limit for filing a petition for certiorari is jurisdictional. *Johnson v. Snyder,* 296 So.3d 547, 548 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1160a]. Equitable considerations do not toll the 30-day jurisdictional time limit. *D'Amico v. Clemmons,* 298 So.3d 114, 115 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1423c].

Petitioner's deadline to file his Petition for Writ of Certiorari was October 2, 2024. The fact that Petitioner sought review of the Northeast Florida Safety Council's recommendation with another

DUI program, did not toll the 30-day period. Petitioner filed his Petition for Writ Certiorari on March 27, 2025. [DIN 4] Petitioner's Petition was untimely filed, and therefore, must be dismissed.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Respondent's Motion to Dismiss is GRANTED.
2. Petitioner's Petition is dismissed with prejudice.
3. The Clerk of Court shall close this case.

[1]The petition fails to contain page numbers. Thus, the page numbers referenced herein corresponds to the PDF page number for the petition filed in the court docket. [DIN 4]

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop and arrest—Requirements of section 322.2615 were met and probable cause for stop and arrest was demonstrated by properly sworn criminal report affidavit containing summary of events accurate to best of officer's knowledge, which was submitted by back-up officer who was not present at stop, and by detailed but unsworn supplemental summary from officer who conducted traffic stop—There is no requirement that all documents submitted to hearing officer be notarized

ERIC HEISLER, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for the Hillsborough County, Circuit Civil Division. Case No. 24-CA-004647. Division B. June 17, 2025. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, Tampa, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MARK R. WOLFE, J.) THIS MATTER is before the Court on Petitioner Eric Heisler's Petition for Writ of Certiorari filed June 7, 2024. The petition is timely and this court has jurisdiction. § 322.31, Fla. Stat. Petitioner contends that Respondent, Florida Department of Highway Safety and Motor Vehicles, failed to observe the essential requirements of law by entering a decision not based on competent, substantial evidence because the sworn affidavit did not contain sufficient details to demonstrate probable cause for an arrest, and the supplemental report submitted as part of the DUI packed was not notarized. After reviewing the petition, appendix, response, relevant statutes, and case law, the Court finds the DUI packet taken as a whole complied with the statutory requirements because it contained a properly sworn and notarized criminal report alongside a detailed supplemental report that contained sufficient details to demonstrate Petitioner's arrest was lawful. The petition must therefore be denied.

On May 2, 2024, the Department conducted a formal hearing to review the administrative suspension of Petitioner's driver license resulting from a DUI arrest. The Tampa Police Department (TPD) sent a DUI packet detailing Petitioner's arrest to the Department prior to the hearing. The packed included an affidavit of refusal, a written statement from TPD Officer Peters who conducted the initial traffic stop, and a criminal report affidavit written by TPD Officer Whitlock who arrived at the scene in response to Officer Peters' request for assistance. Whitlock's criminal report affidavit contains a brief description of the traffic stop, stating "Tampa PD officers contacted the defendant on a traffic stop, in reference to operating a motor vehicle on the roadway while failure to maintain his lane of travel and driving carelessly." Peters' supplemental statement contains a detailed description of the facts leading up to the initial traffic stop. At the formal review hearing, Petitioner submitted a motion to invalidate the suspension on the basis that the hearing officer lacked competent, substantial evidence to find that the underlying arrest was lawful.

Petitioner argues the Department violated Petitioner's right to due process because § 322.2615 "contains a minimum requirement of affidavits in the DUI packet for the officer's grounds of belief that a driver was operating a motor vehicle under the influence of alcohol," and those requirements had not been met when the Department held the formal hearing. Petitioner cites *State v. Johnston*, 553 So. 2d 730, 733 (Fla. 2d DCA 1989), in support of his argument, stating that "due process required the Department to first receive a properly sworn statement to have its jurisdiction vested." The court in *Johnston*, however, was analyzing a version of the statute that was no longer in effect when the Department reviewed Petitioner's license suspension.

The current version of § 322.2615(2)(a) states:

> Except as provided in paragraph (1)(a), the law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, the driver license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test, if any; and the notice of suspension. The failure of the officer to submit materials within the 5-day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing.

Petitioner admits the criminal report affidavit was properly sworn and notarized. Of import to this court, the criminal report affidavit was written by Officer Whitlock, who was not present to witness the initial traffic stop. The affidavit includes a description of Florida Statute § 92.525 and states "I declare that I have read the foregoing document and the facts stated in it are true to the best of my knowledge." It is true that Officer Whitlock's description of Officer Peters' observations alone would not be sufficient to establish probable cause, but Officer Whitlock would risk perjuring himself if he were to write a moment-by-moment report of events that happened prior to his arrival. While he was permitted to rely on Officer Peters' statements in the moment to justify his own actions, the fellow officer rule does not extend to testimony given after the fact. *State v. Bowers*, 87 So. 3d 704, 709 (Fla. 2012) [37 Fla. L. Weekly S136a] (finding that in the moment, law enforcement officers may assume that their fellow officers are acting lawfully but "this is not the same as permitting an officer to testify as to knowledge that another officer possessed in order to justify the other officer's conduct"). The best evidence in this situation is a written statement from Officer Peters, who did personally witness the events leading up to the initial traffic stop. This court has previously highlighted the importance of statements and testimony from the officer who first initiated the traffic stop in DUI cases because that officer is best able to testify as to their own observations and reasons for believing they had probable cause to detain the driver. *See Smith v. Dep't of Highway Safety & Motor Vehicles*, 30 Fla. Weekly Supp. 193a (Fla. 13th Cir. May 25, 2022); *Jones v. Dep't of Highway Safety & Motor Vehicles*, 30 Fla. Weekly Supp. 63a (Fla. 13th Cir. March 8, 2022).

Section 322.2615(2)(a) requires law enforcement to submit affidavits outlining the underlying facts of a driver's arrest prior to the driver's suspension review hearing. In this case, Officer Whitlock submitted a properly sworn criminal report affidavit containing a summary of events that was accurate to the best of his knowledge, alongside a detailed supplemental written summary from Officer Peters. Taken together, it is clear that law enforcement had probable cause to initiate a traffic stop and then place Petitioner under arrest. There is no statutory requirement that all documents submitted to the hearing officer be notarized. The requirements of § 322.2615 were thus met and the Department relied on competent, substantial evidence in upholding Petitioner's license suspension.

The Petition is therefore DENIED.

* * *

Counties—Ordinances—Ethics—State preemption—Self-directed complaint initiated against petitioner by executive director of county ethics commission—Portion of county ordinance authorizing self-initiated complaint and investigation by county ethics commission became void during pendency of proceedings against petitioner when legislative changes to section 112.326 became effective—Amended statute required that any additional standards of conduct imposed by political subdivisions or agencies prohibit the initiation of complaints or investigations by the political subdivision's governing body or any entity created to enforce those standards, and statute further stated that any existing local ordinance that conflicted with legislative changes would be void—Commission departed from essential requirements of law by continuing investigation after effective date of statute

RONALD BOOK, Petitioner v. PALM BEACH COUNTY COMMISSION ON ETHICS, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Appellate Civil Division AY. Case No. 50-2024-CA-009650-XXXA-MB. July 14, 2025. Petition from Palm Beach County Commission on Ethics. Counsel: Mark Herron, Tallahassee, for Petitioner. Rhonda Giger, West Palm Beach, for Respondent.

(PER CURIAM) Petitioner, Ronald Book, seeks review of a quasi-judicial "Public Report and Final Order" ("Final Order") entered by the Palm Beach County Commission on Ethics (the "Commission"). The Final Order found that Petitioner had committed an ethics violation of Section 2-260(b)(2) of the Palm Beach County Code of Ethics.

On April 18, 2024, a Self-Initiated Complaint was filed by Christie E. Kelley, the Executive Director of the Palm Beach County Commission on Ethics, against Ronald Book. The complaint was filed pursuant to Section 2-260(b)(2) of the PBC Commission on Ethics Ordinance. On June 21, 2024, Section 112.326 of the Florida Statutes was amended to add additional statutory requirements for a political subdivision to be able to regulate additional standards of conduct and impose additional disclosure requirements beyond Chapter 112 of the Florida Statutes. Specifically, the relevant statutory language at issue in this petition, states:

> **112.326 Additional requirements by political subdivisions and agencies not prohibited; certain procedures preempted.—**
>
> (1) Except as provided in subsection (2), this part does not prohibit the governing body of any political subdivision, by ordinance, or agency, by rule, from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in this part, provided that those standards of conduct and disclosure requirements do not otherwise conflict with the provisions of this part.
>
> (2) If a political subdivision or an agency adopts by ordinance or rule additional or more stringent standards of conduct and disclosure requirements pursuant to subsection (1), any noncriminal complaint procedure must:
>
> (a) Require a complaint to be written and signed under oath or affirmation by the person making the complaint.
>
> (b) Require a complaint to be based upon personal knowledge or information other than hearsay.
>
> (c) Prohibit the initiation of a complaint or investigation by the governing body of the political subdivision, agency, or any entity created to enforce the standards.
>
> (d) Include a provision establishing a process for the recovery of costs and attorney fees for public officers, public employees, or candidates for public office against a person found by the governing body of the political subdivision, agency, or entity created to enforce the standards to have filed the complaint with a malicious intent to injure the reputation of such officer, employee, or candidate by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation.
>
> (3) Any existing or future ordinance or rule adopted by a political subdivision or an agency which is in conflict with subsection (2) is void.
>
> Fla. Stat. § 112.326

After the change of the law in June of 2024, the Commission rendered a probable cause determination as to the complaint filed against Mr. Book on July 29, 2024. A Motion to Dismiss Proceeding was submitted by Mr. Book on July 29, 2024. The Motion to Dismiss was denied by the Commission on September 5, 2024. A letter of instruction was issued on September 5, 2024 with a Public Report and Final Order. This Petition for Writ of Certiorari followed.

Legal Analysis

In interpreting Section 112.326 of the Florida Statutes, the Court looks to the plain language of the statute utilizing textual and structural clues. *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) [47 Fla. L. Weekly S199a]. In other words, the Court looked at the text of the statute itself as well as the broader context of the statute as a whole. *Id.*

By looking at the text and context of the statute, the heading clearly indicates that additional requirements by political subdivisions and agencies are not prohibited, but certain procedures will be preempted. Section 112.326(3) of the Florida Statutes states that an existing ordinance or rule adopted by a political subdivision that conflict with subsection two (2) is "void". As defined by the Black's Law Dictionary, void means to have no legal force or binding effect. *See Void*, *Black's Law Dictionary* (12th ed. 2024). Accordingly, the plain text of the statute dictates that any procedure that conflicts with the requirements of subsection two (2) will have no legal force or binding effect.

Under subsection two (2), any noncriminal complaint procedure adopted by a political subdivision must require that complaints be written, signed under oath or affirmation by the person making the complaint, and be based on personal knowledge or information other than hearsay. In addition, Section 112.326(2)(c) states that the noncriminal complaint procedure must "[p]rohibit the initiation of a complaint or investigation by the governing body of the political subdivision, agency, or any entity created to enforce the standards."

The parties do not dispute that the legislative change at issue in this Petition occurred *before* the proceedings below were concluded by the Commission. As of June 21, 2024, portions of Section 2-260 of the PBC Commission on Ethics Ordinance that conflicted with the statutory change became void. This includes the portion of the Palm Beach County ordinance authorizing a self-initiated complaint and investigation by the Commission. The Court finds that continuing the proceedings without a legally sufficient complaint and continuing the investigation when there was not authority to do same was a departure from the essential requirements of the law. *See State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento*, 989 So. 2d 692, 693 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1926a].

The Court does not find the Commission's argument that there can be no retroactive application of Section 112.326 of the Florida Statutes to be persuasive. First, the plain language of Florida Statute Section 112.326 states that if there is a conflict, the local existing ordinance will be void. *See Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 130 (Fla. 2011) [36 Fla. L. Weekly S435a] (discussing the express language of the statute and the application of the two-part test utilized to determine whether a statute may be applied retroactively). Second, simply because local ethics agencies were previously unregulated does not give the local government a vested substantive

right of regulation. *See Cole v. Universal Prop. & Cas. Ins. Co.,* 363 So. 3d 1089, 1091 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D916a] (explaining that substantive law sets rights and duties and procedural law sets the means and methods to enforce and apply the rights).

Accordingly, Petitioner, Ronald Book's Petition for Writ of Certiorari is **GRANTED** and the Final Order entered by the Commission is **QUASHED**. This case is remanded for further proceedings consistent with this opinion. (MULLINAX, ROWE, SURBER, JJ., concur.)

* * *

Attorney's fees—Prevailing party—Civil rights—Unlawful housing practices—Portion of amended final order that awards attorney's fees to prevailing respondents in unlawful housing practices complaint is quashed—Order failed to set forth factual findings required when computing fee awards and lacked any indication that *Rowe* factors were considered

WOODHAVEN CONDOMINIUM ASSOCIATION, INC., Petitioner, v. WIILIAM F. ODIERNO and DOROTHY ODIERNO, Respondents. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County. Appellate Civil Division AY. Case No. 50-2024-CA-005471-XXXA-MB. July 2, 2025. Petition from Palm Beach County Board of County Commissioners Office of Equal Opportunity. Counsel: Katie M. Merwin, West Palm Beach, for Petitioner. Matthew T. Ramenda, Boca Raton, for Respondents.

(PER CURIAM.) Petitioner, Woodhaven Condominium Association, Inc., seeks review of a quasi-judicial Amended Final Order entered by the Palm Beach County Board of County Commissioners (the "Board") Office of Equal Opportunity rendered in favor of the Respondents, William Odierno and Dorothy Odierno. The Amended Final Order found that Petitioner had committed an unlawful housing practice in violation of Section 15-58(8) of the County Code, awarded nominal damages in the amount of $500.00, assessed a $5,000.00 civil penalty (payable to the Board of County Commissioners' general fund), and awarded injunctive relief requiring the Petitioner's board to complete fair housing training and eliminating a $1,000,000.00 insurance requirement contained in a chair lift agreement entered between Petitioner and Respondents. The Amended Final Order also declared Respondents' the prevailing party and awarded attorney fees in the amount of $33,600.00, and costs totaling $4,559.94. The Court is unable to determine many of the issues brought forth by the parties briefing due to the lack of an adequate record. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).

However, the Court has been provided the entirety of the transcript and record related to the attorney's fee hearing. In contravention to the applicable law, the Amended Final Order fails to set forth factual findings as required when computing an attorney fee award. *See Powell v. Powell,* 55 So.3d 708, 709 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D449a] ("The law is well established that the trial court must set forth specific findings concerning the hourly rate, the number of hours reasonably expended and the appropriateness of reduction or enhancement factors"). Certiorari is appropriate "*only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 889 (Fla. 2003) [28 Fla. L. Weekly S287a] (citing *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a]). The Court finds that the Amended Final Order lacks any indication that the Board considered the *Rowe* factors, which is a violation of a clearly established principle of law. As such, the portion of the Amended Final Order awarding attorney's fees in the amount of $33,600.00 shall be quashed.[1]

Accordingly, Petitioner, Woodhaven Condominium Association, Inc.'s Petition for Writ of Certiorari is **GRANTED** in part, **DENIED** in part, and the Amended Final Order entered by the Board is **QUASHED** in part. (ROWE, SURBER, and MULLINAX, JJ., concur.)

---

[1]*See Ludwigsen v. Ludwigsen,* 313 So. 3d 709, 714 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2670a] (allowing a Petition for Writ of Certiorari to be granted in part and denied in part).

* * *

Volume 33, Number 5
September 30, 2025
Cite as 33 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Criminal law—Forfeiture of property—Cryptocurrency account—Subject matter jurisdiction—Sheriff in Wakulla County lacked authority to seize cryptocurrency account that was located in Miami-Dade County and had never been located in Wakulla County—Wakulla County circuit court lacked subject matter jurisdiction to authorize continued seizure—Sheriff ordered to return account to claimant—Motion for rehearing is denied

IN RE FORFEITURE OF THE FOLLOWING DESCRIBED PROPERTY: BINANCE.COM ACCOUNT UID #58061817 CONTAINING MULTIPLE CRYPTOCURRENCY TOKENS. Circuit Court, 2nd Judicial Circuit in and for Wakulla County. Case No. 2025-CA-62. June 17, 2025. [Rehearing denied July 8, 2025.] J. Layne Smith, Judge. Counsel: Leslie M. Sammis, Sammis Law Firm, P.A., Tampa, for Claimant.

ORDER DISMISSING CASE FOR LACK OF SUBJECT MATTER JURISDICTION

Per Chapter 932, on May 14, 2025, the Wakulla County Sheriff's Office (WCSO) seized Binance.com Account UID #58061817. On May 23, 2025, the WCSO filed a petition seeking a probable cause determination, per Section 932.703.

In response, the account owner, Barry Augustinsky, filed a claim and requested an adversarial preliminary hearing per Section 932.701(2)(f).

The Court held the adversarial preliminary hearing on June 11, 2025.

Christopher Hunt, an Assistant Attorney General, represents the WCSO. Leslie Sammis, Esq., from the Sammis Law Firm, represents Barry Augustinsky.

At the beginning of the adversarial preliminary hearing, Ms. Sammis handed the Court a copy of the claimant's motion to dismiss and memorandum of law that she had filed that morning. The Court reviewed the motion prior to the start of the evidentiary hearing. The Court took the motion under advisement and proceeded with an all-day adversarial preliminary hearing.

After the evidentiary hearing concluded, the Court asked the parties to submit proposed orders, by an agreed deadline the following day, which they did.

The Court, having read the parties' proposed orders, the claimant's motion to dismiss, and the applicable law, finds as follows:

The Court lacks subject matter jurisdiction.

In this case, the WCSO seized the claimant's account in Miami-Dade County, Florida. The account has never been located in Wakulla County, Florida.

Forfeiture is an *in rem* proceeding. *Ruth v. Dep't of Legal Affairs*, 684 So.2d 181,185 (Fla. 1996) [21 Fla. L. Weekly S505a]; *Burns v. State*, 147 So.3d 95, 97 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1614a]. "To have subject matter jurisdiction in an *in rem* proceeding, a court must have both the jurisdictional authority to adjudicate the class of cases to which the case belongs and jurisdictional authority over the property which is the subject matter of the controversy." *Burns v. State,* 147 So.3d 95, 97 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1614a].

Per Florida Statute Section 30.15(1), the petitioner lacked the authority to seize property in another county. The record shows the account at issue has never been located in Wakulla County, Florida. Thus, the Wakulla County Circuit Court lacked the subject matter jurisdiction to authorize the continued seizure of the claimant's property in another county. *Burns v. State,* 147 So.3d 95, 97 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1614a].

Lacking subject matter jurisdiction, the Court finds it unnecessary to make other findings of fact and law that would result in the same outcome.

Wherefore, the Court dismisses this action for lack of subject matter jurisdiction. The Court orders the petitioner to return the seized account to the claimant.

ORDER DENYING REHEARING

The Petitioner, Wakulla County Sheriff's Office ("WCSO"), moved the Court for a rehearing and a stay of the order the Court rendered on June 17, 2025. The Court denies the Petitioner's motion. Upon review, the Court finds no legal or factual reason to amend its earlier order. The property was at issue is an account seized in Miami-Dade County. Based on the record developed at the June 11, 2025 hearing, the seized account has never been in Wakulla County, Florida, before, during, or after the seizure. Thus, the Court lacks subject-matter jurisdiction.

Notwithstanding a lack of subject-matter jurisdiction, the Court has the inherent power to render an order closing the case, Moreover, as cited by the Claimant, Florida law already requires the same result. Florida Statute Section 932.703(2)(d).

* * *

Insurance—Homeowners—Rescission of policy—Material misrepresentations on application—Insured made false statement that was material to insurer's acceptance of risk where insured stated on application that there was no existing or unrepaired damage on property, despite having performed no repairs on roof after home inspection identified advanced signs of aging and deterioration and recommended roof replacement and repair—Because insurer would not have issued policy had it known of unrepaired damage, insurer was entitled to void policy *ab initio*—Insured's misrepresentation voided policy whether misrepresentation was intentional or not—Discovery initiated by insured after motion for summary judgment was filed and hearing on motion was scheduled cannot be used to prevent entry of summary judgment

MORDEHAY DARWISH, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2023-10036-CIDL. June 5, 2025. Randell H. Rowe, III, Judge. Counsel: Matthew S. Messina, Your Insurance Attorney, Maitland, for Plaintiff. Andrew L. Bickford, Bickford & Chidnese, LLP, Tampa, for Defendant.

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

This matter came before the Court for a hearing on the Defendant's Motion for Final Summary Judgment. The Court, having considered the motion along with the Plaintiff's memorandum of law in opposition, having heard argument of counsel and reviewed their summary judgment evidence submitted, and being duly advised in the premises, hereby finds as follows:

Undisputed Material Facts

This action involves a claim for alleged wind damage to the roof of the Plaintiff's home. On October 29, 2021, Aaron Price of Super Inspection Pros performed a home inspection at the Plaintiff's subject property located at 2721 Charleston Place, DeLand, Florida (the "Property"). The home inspector identified "advanced signs of aging and deterioration" to the roof. He opined that replacement of the roof was recommended but also suggested that a licensed roofing contractor be contacted for further evaluation and **repair.** The Plaintiff testified at his deposition that he read the home inspection report before he purchased the Property and that no repairs were performed to the roof between the date of the home inspection and the date of purchase.

On January 19, 2022, the Plaintiff signed an application for property insurance with the Defendant. In that application, the Plaintiff answered "no" in response to the question: "Does the Insured location have any existing or unrepaired damage?" Relying on the representations in the application, the Defendant issued a homeowners insurance policy bearing policy number CDP00124326 (hereinafter "the Policy") to the Plaintiff for the Property.

On March 30, 2022, Plaintiff reported a claim for wind damage to his roof to Defendant with a reported date of loss of March 9, 2022. On April 12, 2022, Defendant's field adjuster inspected the Property. He observed that no roof repairs had been made since the October 29, 2021 home inspection, even though Plaintiff swore to Defendant in his application that there was no existing or unrepaired damage. Accordingly, on May 13, 2022, Defendant voided the policy *ab initio* pursuant to the Policy and Section 627.409, Florida Statutes, and informed Plaintiff of that in writing. The Defendant also promptly refunded the Plaintiff's entire property insurance premium of $2,433.91, as required by Florida law. Notwithstanding the fact that the policy was rescinded and the premium was refunded, Plaintiff continued to pursue his roof damage claim with Defendant. On January 11, 2023, the Plaintiff filed his Complaint against the Defendant for breach of contract. Subsequently, the Defendant filed the instant motion.

The Plaintiff's misrepresentation regarding existing or unrepaired damage was material to the acceptance of the risk and to the hazard assumed by Defendant. In addition, had Defendant known that the property had existing or unrepaired roof damage, it would not, in good faith, have issued the Policy at all, let alone at the same premium rate or with coverage for direct physical loss to the roof. Both above-referenced conclusions were contained in the affidavit of Defendant's Vice President of Underwriting, Patrick Madigan. Plaintiff submitted no counter evidence to the Court on this issue; therefore, this evidence is uncontroverted.

Analysis and Conclusion

A party is entitled to 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." Fla. R. Civ. P. 1.510(a). In this case, summary judgment turns on the falsity and materiality of the Plaintiff's statement that there was no existing or unrepaired damage to the Property, as well as the fact that the Defendant would not have issued the Policy had it known the true facts.

I. Plaintiff's Statement that the Property had no "Existing or Unrepaired Damage" was False

The first inquiry relevant to this summary judgment analysis is whether Plaintiff's statement that there was no "existing or unrepaired damage" was false. In his response in opposition to Defendant's Motion for Final Summary Judgment, Plaintiff cites *Anchor Property & Casualty Insurance Co. v. Trif,* 322 So. 3d 663 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1267a] in arguing that Defendant must prove not only falsity, but that Plaintiff intended to deceive Defendant when he stated in the application that there was no "existing or unrepaired damage." The Court is not persuaded by this argument, as Plaintiff's intent to deceive is not relevant to the Court's analysis. The *Trif* opinion merely held that for *post-loss* conduct, the policy requires proof of knowing or intentional fraudulent conduct by the insureds to trigger application of the Concealment or Fraud provision to void the Policy. Here, Plaintiff's statement was made at the time he signed the application for insurance, before any loss occurred. The case of *Universal Property and Casualty Insurance Company v. Johnson,* 114 So. 3d 1031 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D950a] governs this fact pattern. In *Johnson,* the First District Court of Appeal held that an insured's misrepresentation on an application constituted a misrepresentation before a claim and thus voided the policy regardless of whether the insured's misrepresentation was intentional or not. *See also Old Southern Life Insurance Company v. Kirby,* 522 So. 2d 424 (Fla. 5th DCA 1988).

Consequently, the Court turns to whether Plaintiff's statement that there was no "existing or unrepaired damage" was false. The record evidence in the form of the home inspection report states that the roof showed "advanced signs of aging and deterioration." Importantly, the home inspector opined that replacement of the roof was recommended but also suggested that a licensed roofing contractor be contacted for further evaluation and **repair.** Excerpts from pages 22-23 of the report are contained below:

> **The roof showed advanced signs of aging and deterioration. This condition can indicate imminent leakage. Replacement is recommended. Recommend further evaluation by a qualified roofing**
> . . .
> **raining at the time of inspection. Client should obtain full disclosure / history information from the seller prior to close. It is suggested that a "Licensed Roofing Contractor" be contacted for further evaluation and repair.**

First, because the home inspector recommended repairs to the roof, this indicates that the roof was damaged. One cannot repair something that is not damaged or broken; therefore, Plaintiff's statement on the application that there was no "existing or unrepaired damage" was false. While a "repair" recommendation alone is sufficient to indicate that the roof was damaged, this Court also analyzes additional language used by the home inspector which further supports the finding that the roof was damaged. The home inspector concluded that the roof showed signs of advanced deterioration. The question is, does "deterioration" constitute "damage?" The term "damage" is not defined in the application for homeowners insurance or the insurance policy. "[T]he first step towards discerning the plain meaning of [a term undefined by an insurance policy] is to 'consult references [that are] commonly relied upon to supply the accepted meaning of [the] words.' " *Arguelles v. Citizens Property Insurance Corporation,* 278 So. 3d 108, 111 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1726a] (quoting *Penzer v. Transportation Insurance Company,* 29 So. 3d 1000, 1005 (Fla. 2010)) [35 Fla. L. Weekly S73a]. "When a term in an insurance policy is undefined, it should be given its plain and ordinary meaning, and courts may look to. . .dictionary definitions to determine such a meaning." *Botee v. Southern Fidelity Insurance Company,* 162 So.3d 183, 186 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D368a].

This Courts looks to *Merriam-Webster's Collegiate Dictionary* for guidance. Damage means "harm resulting from injury to person, property, or reputation." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2009). Considering the home inspector recommended roof **repairs** due to advanced deterioration, this Court finds that the roof sustained "harm" sufficient to be characterized as damage. Moreover, the Court looks to *Merriam-Webster's* definition of "deterioration," which is "the action or process of becoming impaired or inferior in quality, functioning, or condition." *Merriam-Webster* provides that "impairment" is a synonym of "damage."

Ultimately, it is undisputed that there was existing or unrepaired damage to the Plaintiff's roof at the time he signed the insurance application with the Defendant.[1] In addition, Plaintiff testified at his deposition that he was aware of the findings in the home inspection report when he signed the application. The record evidence is sufficient to allow this Court to conclude that Plaintiff's statement in the application was false.

II. Plaintiff's False Statement was Material to the Acceptance of the Risk or Hazard Assumed

The unrefuted affidavit of Defendant's Vice President of Under-

writing, Patrick Madigan, provides that Plaintiff's misrepresentation was material to the risk or hazard assumed. Because Plaintiff submitted no counter evidence and made no argument as to this point, the Court finds that Plaintiff's false statement was material to the acceptance of the risk or hazard assumed. "A misrepresentation is material if it does not enable a reasonable insurer to adequately estimate the nature of the risk in determining whether to assume the risk." *Singer v. Nationwide Mutual Fire Insurance Company,* 512 So. 2d 1125, 1128-29 (Fla. 4th DCA 1987). Here, Plaintiff's statement that there was no existing or unrepaired damage prevented Defendant from adequately estimating the nature of the risk in determining whether to assume the risk. That is because Defendant issued a policy which provides coverage for direct physical loss to the roof, and Plaintiff's roof was more susceptible to loss due to its condition. As to any argument that Defendant had the opportunity to inspect the roof before the Policy was bound, Defendant is entitled to rely upon the accuracy of the information contained in the application and has no duty to make additional inquiry. *United Automobile Insurance Company v. Salgado,* 22 So. 3d 594, 601 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1578a]. Evidence of materiality in this case cannot be disproven by Plaintiff.

III. Defendant Would Not Have Issued the Policy as Written had it Known the True Facts

The unrefuted affidavit of Defendant's Vice President of Underwriting, Patrick Madigan, also provides that Defendant would not have issued the Policy at all had it known that there was unrepaired damage on Plaintiff's roof Because Plaintiff submitted no counter evidence and made no argument as to this point, the Court finds that Defendant would not have issued the Policy at all had it known that there was unrepaired damage on Plaintiff's roof.

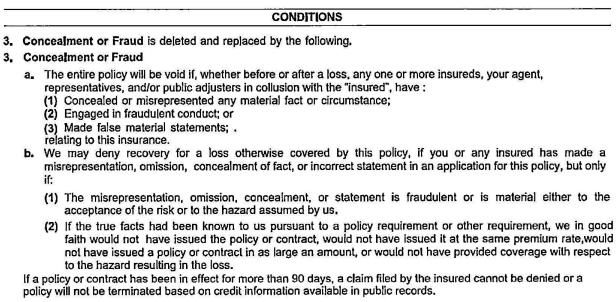
Florida Courts have upheld an insurer's decision to rescind the policy under similar facts. In *Moustafa v. Omega Insurance Company,* 201 So. 3d 710 (Fla 4th DCA 2016) [41 Fla. L. Weekly D2064a], the insured stated in his application that the property had no "unrepaired damage." During a subsequent examination under oath, the insured admitted the property had water stains that were unrepaired at the time the application was signed. Omega rescinded the policy based on the material misrepresentation and the insured filed a lawsuit. During litigation, Omega's underwriting representative testified that the rescission was based in part on the misrepresentation regarding the unrepaired damage, as the policy would not have been renewed had those misrepresentations been known. Omega moved for summary judgment that it properly rescinded the policy based on the misrepresentation. The trial court granted summary judgment in favor of Omega. On appeal, the Fourth District Court of Appeal affirmed the trial court's ruling and held that the misrepresentation was material as a matter of law because the clear and uncontroverted evidence established that the misrepresentation objectively prevented Omega from adequately estimating the nature of the risk in determining whether to assume the risk. Furthermore, the appellate court held that the evidence supported the trial court's conclusion that Omega would not have issued the policy if it had known about the unrepaired damage. Like *Omega,* the record evidence supports this Court's conclusion that Defendant would not have issued the Policy if it had known about the unrepaired damage.

IV. Florida Law and the Policy Allow Defendant to Void the Policy *Ab Initio* Under these Facts

To void a policy *ab initio* based on a misrepresentation in an insurance application, the representation must have been 1) fraudulent **or** material to the acceptance of the risk or hazard assumed, **or,** 2) the insurer would not have issued the policy or would not have issued it as written (as to scope, rate, or amount of coverage) had it known the true facts. *See* § 627.409, Fla. Stat. Pursuant to that statute, the Plaintiff's misrepresentation on the insurance application precludes any recovery in this case, as it voids the Policy. Section 627.409, Florida Statutes, provides, in pertinent part, as follows:

> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only **if any** of the following apply:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.
>
> Fla. Stat. § 627.409(1)(a)-(b) (emphasis added).

The subject policy is consistent with Florida law, in that it states the policy will be void if an insured makes material false statements relating to the subject insurance, as follows:



CONDITIONS

3. **Concealment or Fraud** is deleted and replaced by the following.

3. **Concealment or Fraud**

a. The entire policy will be void if, whether before or after a loss, any one or more insureds, your agent, representatives, and/or public adjusters in collusion with the "insured", have :
(1) Concealed or misrepresented any material fact or circumstance;
(2) Engaged in fraudulent conduct; or
(3) Made false material statements; .
relating to this insurance.

b. We may deny recovery for a loss otherwise covered by this policy, if you or any insured has made a misrepresentation, omission, concealment of fact, or incorrect statement in an application for this policy, but only if:
(1) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by us.
(2) If the true facts had been known to us pursuant to a policy requirement or other requirement, we in good faith would not have issued the policy or contract, would not have issued it at the same premium rate,would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

If a policy or contract has been in effect for more than 90 days, a claim filed by the insured cannot be denied or a policy will not be terminated based on credit information available in public records.

For the reasons stated above, the Defendant is entitled to final summary judgment that the Policy is void.

V. Defendant's Motion for Final Summary Judgment is Not Premature

The Plaintiff argues that Defendant's Motion for Final Summary Judgment must be denied because discovery is still pending and entry of Final Summary Judgment is premature. Specifically, Plaintiff's counsel stated that he was unable to depose Defendant's Corporate Representative and Underwriting Corporate Representative. This Court is not persuaded by Plaintiff's argument for two reasons. First, Defendant made its Corporate Representative available for deposition on November 7, 2024. At 2:31 PM on November 6, 2024, Plaintiff's counsel unilaterally cancelled the deposition. Second, Plaintiff's counsel has never requested the deposition of Defendant's Underwriting Corporate Representative. The first reference to such a deposition was in Plaintiff's Response in Opposition to Defendant's Motion for Final Summary Judgment, which was filed after Defendant's Motion was already scheduled for hearing. "[A]fter a motion for summary judgment is filed and scheduled, the non-moving party cannot thwart the summary judgment hearing by initiating discovery." *Harper v. Wal-Mart Stores East, L.P.,* 134 So. 3d 557, 558 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D556a]; citing *Vills. at Mango Key Homeowners Ass'n v. Hunter Dev., Inc.,* 699 So. 2d 337, 338 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2271b].

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Defendant's Motion for Final Summary Judgment is GRANTED, and Final Judgment is entered in favor of Defendant, American Integrity Insurance Company of Florida. The Plaintiff, Mordehay Darwish, shall take nothing from this action and the Defendant shall go henceforth without day.

2. The Defendant's *ore tenus* motion to strike the Plaintiff's late-filed evidence is GRANTED.

3. The Court reserves jurisdiction to determine entitlement to, and the amount of, reasonable attorney's fees and taxable costs, and to enter such other orders as may be necessary to enforce this Final Summary Judgment.

---

[1]On May 22, 2025, the morning of the hearing on Defendant's Motion for Final Summary Judgment, Plaintiff's counsel filed evidence from Plaintiff's related criminal case, including the Affidavit of home inspector Aaron Price and the deposition transcript of contractor Peter Navarro. This evidence was filed fifty-nine days after Defendant filed its Motion for Final Summary Judgment in this case. Florida Rule of Civil Procedure 1.510(c)(5) provides that the nonmovant must serve a response that includes the nonmovant's supporting factual position no later than forty days after service of the motion for summary judgment. Because Plaintiff failed to timely submit such evidence, the Court declines to consider either filing. The Court also grants Defendant's *ore tenus* Motion to Strike Plaintiff's late-filed evidence.

* * *

Criminal law—Sexual battery—Evidence—Deposition to perpetuate testimony—Material witness—Motion for deposition to perpetuate testimony of psychologist to whom victim reported alleged battery is denied—Fact that psychologist, who lives and works in California, would sustain significant unreimbursed economic hardship due to loss of revenue while away from his office does not establish that it is necessary to perpetuate his testimony to prevent failure of justice—Alternative request to allow psychologist to testify remotely is also denied

STATE OF FLORIDA, Plaintiff, v. RODRIGO ARANA, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F24-23790. July 7, 2025. Milton Hirsch, Judge.

ORDER ON STATE'S MOTION TO PERPETUATE TESTIMONY

I. Facts

Defendant Rodrigo Arana is accused of what is referred to in Florida law as sexual battery, but was referred to at common law, and is still referred to in common parlance, as rape. The State Attorney's Office intends to prosecute Mr. Arana, but is disadvantaged by the fact that the alleged victim waited half a year before ever reporting the crime to the police.

The victim, however, did make a prompt report to the psychologist with whom she was then treating, a Dr. Ryan Silverman. Understandably, the Office of the State Attorney is eager to present Dr. Silverman's testimony at trial.[1]

Dr. Silverman, however, lives and practices a continent's-width away, in Los Angeles. Why the alleged victim in this case chose to treat with a psychologist from whom she was separated by three time zones; and why Dr. Silverman chose to accept such a patient; are questions that the present record does not address.

Dr. Silverman is reluctant in the extreme to travel to Miami to give testimony in the case at bar. His reluctance, according to a pleading filed on his behalf by his Florida lawyers, is prompted by "his busy clinical practice" in Los Angeles. *See* pleading filed on behalf of "non-party Ryan Silverman," dated June 17, 2025 (hereinafter "Silverman motion"). Travel to and from Miami would "cause Dr. Silverman to sustain a significant, unreimbursed economic hardship," in that he would be unable to charge for the treatment of patients while he was away from his office. *Id*.

Accordingly, the prosecution moves for that "Deposition to Perpetuate Testimony" provided for in Rule 3.190(i), Fla. R. Crim. P.[2] That rule requires that the court find, as conditions prevenient to perpetuation of testimony:

> 1. that a prospective witness resides beyond the territorial jurisdiction of the court; and
>
> 2. that the witness's testimony is material; and
>
> 3. that it is necessary to perpetuate the witness's testimony to prevent a failure of justice.

See Fla. R. Crim. P. 3.190(i)(1). I consider these factors in turn.

Undoubtedly Dr. Silverman "resides beyond the territorial jurisdiction of [this] court." I am a judge of the 11th Judicial Circuit of Florida. My writ runs throughout this state, Fla. Const. Art V, § 5, but it runs no farther. Los Angeles lies well beyond "the mouth of the Perdido River," Fla. Const. Art. II, § 1(a) (providing the geographical boundaries of the State of Florida). My jurisdiction does not.[3]

Dr. Silverman himself concedes that his testimony is material. "Dr. Silverman believes that his testimony is highly relevant to the issues at trial." *Silverman Motion* at 1. "[T]he testimony of Dr. Silverman is highly relevant and material to the case." *Id*. at 2. Prosecution counsel agrees. Defense counsel suggests that much if not all of Dr. Silverman's testimony will be found inadmissible as hearsay, or on other grounds; but is hard-pressed to deny that the testimony, whether or not technically admissible, is material. That is sufficient for present purposes. *See* n. 1, *supra* (citing *Gallagher v. State*).

Thus the outcome-determinative question is whether it is necessary to perpetuate the witness's testimony to prevent a failure of justice. Dr. Silverman, and the prosecution, take the position that forcing the doctor to be away from his practice for two or three days to attend the trial of this case would be just such a failure of justice, which failure can be obviated only by the perpetuation of Dr. Silverman's testimony.

II. Analysis

As long ago as 1904 Dean Wigmore was able to assert that, "For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence." John Henry Wigmore, IV A Treatise on the System of Evidence in Trials at Common Law § 2192 at 2965 (1st ed. 1904). Still earlier by half a century, Jeremy Bentham, in much-quoted language that could have come from no pen but his, wrote:

> What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary—they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think it proper to call upon them for their evidence, could they refuse it? No, most certainly.

Jeremy Bentham, The Works of Jeremy Bentham 320-21 (John Bowring ed., 1843). Wigmore provides the rationale for the rule:

> From the point of view of the *duty* here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may . . . be . . . of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society. He who will live by

> society must let society live by him, when it requires to.
> . . .
> From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution, and from law and order as indispensable elements of civilized life.

Wigmore § 2192 at 2967. The constitutional guarantees of confrontation and compulsory process, *see* U.S. Const. Amend. VI[4]; Fla. Const. Art. I, § 16(a)[5]; reflect the foregoing principles.

The procedure for perpetuation of testimony embodied in Rule 3.191(i)(1) is not at odds with these long-standing and fundamental principles. Rather, that procedure establishes a very narrow exception. If a witness is terminally ill and expected to die before time of trial, or is so physically incapacitated as to be incapable of attending trial, the use of video-recording—a commonplace technology today, but one beyond the vision of even the most prescient in the time of Wigmore, much less that of Bentham—makes it possible to perpetuate the testimony of that witness. Such perpetuation is less than ideal, and certainly less desirable than in-court testimony; but it is preferable to the complete loss of the witness's testimony when that is the only alternative. It is justified not by convenience but by necessity: the testimony must be perpetuated not because it is inconvenient for the witness to provide it in court, but because the witness will never be able to provide it in court at all. *See, e.g.*, *Avsenew v. State*, 334 So. 3d 590, 592 (Fla. 2022) [47 Fla. L. Weekly S3a] (perpetuation "[d]ue to serious health problems that rendered [the witness] unable to travel); *Gallagher, supra*, at * ("witnesses . . . have serious medical issues which could make their testimony unavailable if not taken now"). Subsection (6) of Rule 3.190(i) makes this distinction clear: "No deposition shall be used or read into evidence when the attendance of the witness can be procured" at trial. The testimony of a witness on death's doorstep may be perpetuated, but if that witness miraculously recovers and is in condition to testify *viva voce* at time of trial, he must be called to do so. The perpetuated testimony may not be used.

Most nearly on point is *Knox v. State*, 98 So. 3d 679 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2342a]. There, as here, a prosecution witness:

> informed the State that "she is unable to travel again to Florida due to the economic hardship it would present her." Attached to the motion was the [witness's] affidavit, which alleged: she was not able to pay for transportation, she worked 43 hours per week and did not receive leave pay when she missed work; whenever she missed work, she was unable to pay her bills and household expenses; and her family heavily depended on her assistance.

Knox, 98 So. 3d at 680-81. The court cited various statutes pursuant to which the prosecution could reimburse the witness for out-of-pocket expenses (albeit not for lost income), *id*. at 682-83, but held that perpetuation of testimony in these circumstances was inconsistent with the constitutional guarantee of confrontation. For its part, "the State conceded that it was not aware of a case which held that economic hardship alone was enough to justify granting" perpetuation of testimony. *Id*. at 681. Thirteen years later, I am still aware of no such case in Florida.

The prosecution places great reliance on the earlier opinion of the Florida Supreme Court in *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998) [23 Fla. L. Weekly S236a], but *Harrell* is of limited applicability here. *Harrell* involved the testimony, not of residents of another American jurisdiction, but of citizens and residents of Argentina. The witnesses "were unable to be physically present in the courtroom, both because of the distance between the United States and Argentina *and because of health problems that [one of the witnesses] was experiencing*." *Harrell*, 709 So. 2d at 1367 (emphasis added). There was no claim of financial hardship, and certainly none of foregone earnings and opportunity costs.

I am entirely sympathetic to Dr. Silverman's desire to remain in Los Angeles so that he can continue to provide services for patients and to bill for those services. To one degree or another, the justice system works a financial hardship on every witness, local as well as out-of-town, who must miss work to attend court; and indeed on every juror who must miss work to attend court. But as Wigmore so eloquently and forcibly points out, our duty to present ourselves in court and give testimony is a duty that each of us owes to all of us, even when it results in lost opportunities to bill patients. In Wigmore's words excerpted *supra*, "From the point of view of the *duty* here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may . . . be . . . of time and labor, and thus of . . . profits, of livelihood."

If anything, this duty is more incumbent upon Dr. Silverman than it is on mere passers-by (in Bentham's example, "the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor") who happened to be standing on the street corner when a crime was committed and must now come to court to tell us about it, even if doing so involves the loss of a day's earnings. When Dr. Silverman agreed to take on the victim in this case as his patient, he undertook a professional obligation to her, and a professional responsibility for her. Now, in her moment of greatest need, he is being called upon to discharge that obligation, and that responsibility. If he may be relieved of his duty to do so because it will result in the loss of billable hours for a day or two, I can see no reason why every psychologist, local as well as out-of-jurisdiction, should not be relieved of the same duty; and even less reason why every passer-by should not be relieved of the same duty. Any witness who earns wages by the hour can then demand to give testimony by scheduling a video-recording, and trials will become film festivals.

We insist that, in all but the most exceptional circumstances, a witness testify in the very presence of the jury because it is essential to our system of justice that the witness do so. It is essential because there is an "advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a *witness's deportment while testifying*, and a certain subjective moral effect is produced upon the witness." Wigmore, § 1395 at 1751 (emphasis in original). At the trial of this case, the testimony of Dr. Silverman will be—as he himself acknowledges—"highly relevant," indeed critical. The jurors deserves to hear that relevant, critical testimony delivered in their presence in open court, where they can assess with their own senses the words that a man speaks and the man who speaks those words. The jurors deserve that much. Dr. Silverman's patient, alleged to have been raped, deserves that much.

III. Conclusion

The prosecution's application to perpetuate testimony pursuant to Rule 3.190(i)(1) or, in the alternative, to permit the witness to testify remotely, is respectfully denied. The court will work sedulously with the prosecution to schedule Dr. Silverman's in-court testimony so as to make the best and most efficient possible use of Dr. Silverman's valuable time.

---

[1]For purposes of the present order, I assume but do not decide that at least some of Dr. Silverman's testimony would be admissible under Fla. Stat. 90.803(4), which provides:

> Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment . . . which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment [are not inadmissible on hearsay grounds].

That assumption is more than adequate for present purposes. To justify the perpetuation

of testimony that the prosecution seeks herein, "[w]hat must be shown . . . is that the testimony is material. In a subsequent hearing [or at trial, I may be called upon] . . . to determine admissibility, once the [prosecution seeks] to use the [perpetuated] depositions." *Gallagher v. State*, 2025 WL 1646625, * (Fla. 4th DCA 2025) [50 Fla. L. Weekly D1274a].

[2]Originally, the prosecution sought to have Dr. Silverman testify at trial by Zoom. Apparently prosecution counsel later concluded that a request for perpetuation of testimony might stand on stronger legal grounds than a request for Zoom testimony. At argument on the motion at bar, prosecution counsel framed the request in the alternative, *viz*., to perpetuate testimony or, if that were not permitted, to allow testimony via Zoom.

[3]In its responsive pleading, the defense point to the Uniform Interstate Depositions and Discovery Act, codified in Florida at Fla. Stat. § 92.251, as vesting this court with territorial jurisdiction over Dr. Silverman. *Defense's Response and Objection* at 1. That Act does no such thing. It does nothing more than provide a mechanism for the taking of discovery depositions in one state in connection with litigation in another state. And it is, by its express terms, inapplicable to criminal cases. *See* Section 92.251(8) ("This act does not apply to criminal proceedings").

[4]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[5]

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

* * *

Criminal law—Post conviction relief—Juror bias—Timeliness of motion—Successive motion—Motion for post conviction relief alleging juror bias filed 17 years after judgment and sentence became final is untimely—Moreover, claim was not raised in earlier unsuccessful rule 3.850 motion, and defendant failed to establish that juror's alleged concealment could not have been discovered at time prior motion was filed—Laches also applies to bar collateral relief proceeding—Defendant offered no reason for delay in bringing claim, and granting motion would prejudice state—Motion denied—Discussion of laches in context of rule 3.850 proceedings—Discussion of post conviction juror investigations

STATE OF FLORIDA, Plaintiff, v. OLSON PIERRE, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F04-339098. July 25, 2025. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

According to Justice Cardozo, a "talesman"—today we would probably say a "venireperson"—

> when accepted as a juror becomes a part or member of the court. . . . The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and a sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. . . . The doom of mere sterility was on the trial from the beginning.

Clark v. United States, 289 U.S. 1, 11 (1933) (Cardozo, J.).

The danger that a single biased or prejudiced[1] juror may inflict the "[t]he doom of mere sterility . . . on [a] trial" has not changed since Justice Cardozo wrote those words. But other dangers to the criminal justice system, dangers unimagined even by a mind as prescient as that of Cardozo, have arisen in the intervening nine decades. The case at bar illustrates just such a danger. The motion at bar prefigures a tidal wave of like-kind motions that may flood Florida's post-conviction courts.

I. Facts

More facts will be developed below, but in brief: In 2006 Mr. Pierre, assisted by competent and experienced counsel, was tried for and convicted of some but not all of the very serious felonies with which he had been charged. His judgment and sentence were affirmed by the court of appeal two years later. Since that time, he has filed a motion for post-conviction relief; an amendment to that motion; and a supplement to that motion. His claims were denied, which denial was reversed on appeal and the matter remanded to the post-conviction court. After a hearing, Pierre's post-conviction claim was again denied; and this denial was affirmed in 2013. In the ordinary course of things, that should have been the end of the litigation of this case.

A dozen years later, however, Mr. Pierre's litigation has been re-initiated by the author of the motion at bar, attorney Bryan D. Savy. Mr. Savy apparently has a very close connection to a business calling itself "Covert Ops Jury Investigations, LLC." That company's very elaborate website, adorned with military imagery evocative of the *Rambo* movies, announces (among a great many other things), that, "We have completed 105 investigations, and uncovered at least one biased juror on every jury. We are 100% successful because we do not stop searching until we find that biased juror." See https://juryinvestigations.com/jury-investigations (visited July 10, 2025). More particularly:

> To find the biased jurors, we search hundreds of public records, looking for information that indicates they intentionally concealed their true self during the voir dire, to improve their chances of being selected for the jury. We research the jurors, their family and friends, and everyone associated with the case (accusers/victims and their friends/family, law enforcement, witnesses, all courtroom personnel, etc.). To our knowledge, we are the only company who performs this unique service. Our mission is to find potential juror bias, so you can get back in the courthouse, and have a second chance to be free again!

Id. And then in large, capitalized, colored font: WANT US TO FIND OUT IF ANY OF YOUR JURORS WERE GUILTY OF MISCONDUCT? CLICK HERE! *Id.* The website includes a disclaimer that "Covert Ops Jury Investigations, LLC" is "not a licensed private investigation company, nor are we licensed private investigators or attorneys, but we work closely with them." *Id.* Mr. Savy's name appears several times in the website as having represented persons who retained "Covert Ops Jury Investigations, LLC."

Apparently the motion at bar is the product of the Savy/"Covert Ops" connection. Histrionic and exaggerated as some of the language on the "Covert Ops" website may be, Mr. Savy and "Covert Ops" kept their promise in Mr. Pierre's case: they "searched hundreds of online public record search engines," *Defendant's Motion for Post-Conviction Relief* (hereinafter simply *Motion*) 24; and a "search . . . on social media platforms [was] a time-consuming step in the investigation that required hundreds of hours to complete," *id.* The extraordinary extent to which "Covert Ops" investigated and invigilated someone who may have been the foreperson in Mr. Pierre's trial; and a great many people who had the same, relatively common, name as the foreperson; and anyone who might be related to the foreperson; is detailed in the motion at bar at pp. 17 *et. seq.* "Background reports from multiple sources were used to confirm Foreperson Moore's family members. Online records from Miami-Dade and Hillsborough Clerks' offices were searched for deeds, marriage licenses, traffic tickets, and criminal cases. Each document was reviewed carefully, with particular attention to dates, names, and signatures." *Motion* 23.

Initially, the Savy/"Covert Ops" team attempted to obtain from the court itself the home addresses of the jurors who had served, two long

decades ago, on Mr. Pierre's trial. *Motion* 17. Apparently that information was unavailable; but what was available was the verdict form itself, which bore the signature of foreperson Charles Moore. *Id.* "Covert Ops" then searched "online records" and "voter registration records" to find a similar signature. *Id.* They obtained a document associated with a 1993 real-property transaction that bore a signature that, in the opinion of "Covert Ops" (recall the website disclaimer that "Covert Ops" is not made up of licensed investigators; nor, presumably, of qualified handwriting analysts) "closely resembled the one on the verdict form." *Id.* Proceeding on the naked assumption that the "Charles Moore" whose name appeared on the 1993 real-property document was the same "Charles Moore" who served as foreperson in Mr. Pierre's 2006 trial, "Covert Ops" then took it upon itself to obtain a marriage license and a real-property deed for that Charles Moore, *id.*; military records for that Charles Moore, *id.* at 18; and all manner of information about "immediate and extended family members" of that Charles Moore. *Id.*

They investigated, for example, Charles Moore's late father, *id.,* and a Michael Leon Moore, whom they believed to be Charles Moore's brother. *Id.* at 19. They then determined that Michael Leon Moore, who may or may not be the brother of a Charles Moore who may or may not have been the foreperson at Mr. Pierre's trial a couple of decades ago, had a criminal record in the Tampa area; his convictions being mostly of the small drug possession/public consumption of alcohol variety. *Id.*

But the search into the intimate details of those related, however distantly, to the Charles Moore who may or may not have been Mr. Pierre's jury foreperson was far from at an end at that point. "Covert Ops" was at pains to learn that Charles Moore's mother was killed in a tragic auto accident when Moore was 12 years old, *id.* 21-22; and that a Sharon Ann McDaniels, who may or may not have been the sister of that Charles Moore, brought a civil lawsuit as a consequence of that accident. *Id.* 22. "Covert Ops" made sure to learn that Sharon Ann McDaniels had a criminal record involving arrests for batteries and possession of open containers. *Id.*

Then "Covert Ops" went about ferreting into the lives of Charles Moore's children. It appears that there is a Charles Moore who had two children, a son and a daughter. *Id.* at 23. The daughter was briefly married to a man who had a criminal conviction, although "Covert Ops" admits that "no evidence was found to establish . . . whether [the daughter] or Foreperson Moore"—or some other Charles Moore—"were aware of that conviction. *Id.* As the result of "a painstaking search," *id.* 25, "Covert Ops" learned that a Charles Moore had a son who had, for at least a time, a license as a security officer. He had at some point been charged with marijuana possession in violation of a county ordinance, but the charge was dismissed; and with petit theft, which was also dismissed. *Id.*

Next, "Covert Ops" went rooting around in the lives of Charles Moore's wife's family. *Id.* at 24. It identified, and delved into as many details as possible about, her father, her mother, and every one of her six siblings. *Id.*

The foregoing is but a brief summary of the inquest that "Covert Ops" conducted into the personal life of a man who may or may not have been the jury foreperson in the trial of Mr. Pierre; and of that man's wife and children, siblings, parents, and in-laws. In conducting this inquest "Covert Ops" did no more than it promised on its website. Indeed it did less. Recall that the website ballyhoos that "Covert Ops" "researches the jurors, their family and friends, and everyone associated with the case (accusers/victims and their friends/family, law enforcement, witnesses, all courtroom personnel, etc.)." Here, at least the "victims and their friends/family, law enforcement, witness, all courtroom personnel" were spared the minute and invasive invigilation that "Covert Ops" lavished on a man named Charles Moore, and on his family members, living and dead.

Armed with the fruits of his colleagues' labors, Mr. Savy brings the present motion, alleging that, "Foreperson Charles Moore concealed material information that demonstrated actual bias [*sic*; *see* n. 1 *supra*] against Defendant." *Motion* 9. On that basis, he asserts a deprivation of Mr. Pierre's right to an impartial jury guaranteed by Art. I § 16 of the Florida Constitution;[2] and prays that Pierre's judgment and sentence be vacated and a new trial ordered.[3]

And what did Mr. Moore—the *real* Mr. Moore, the jury foreperson—do to deprive Mr. Pierre of that fair and impartial jury guaranteed by two constitutions? The motion at bar alleges that he "falsely claimed that his son had been in law enforcement." *Motion* 31. But the motion itself alleges that for at least some period of time, Mr. Moore's son was a "licensed security officer." *Id.* 25; *see also id.* at 33. Apparently Mr. Moore chose to construe the question broadly, including licensed security officers under the rubric of law enforcement. Perhaps he is guilty of misinterpretation. There is a difference between a misinterpretation and a constitutional violation. (Had Mr. Moore omitted to mention his son's employment as a security guard, because, well, it isn't *really* law enforcement, no doubt the Savy/"Covert Ops" team would scream that this *omission* deprived Olson Pierre of a fair and impartial jury.)

"Additionally," the motion announces, "Foreperson Moore failed to disclose his sister's extensive criminal history and the death of his mother as a result of his father wrecking his vehicle while driving intoxicated. Foreperson Moore further failed to divulge that his sister sued their father due to the death of their mother." *Id.* 31. Apparently Mr. Moore acknowledged that his brother, but not his sister, has been arrested. He was questioned in *voir dire* as to that by prosecution counsel, *id.* 14-15, and his answers were deemed satisfactory to one and all. As for his sister's "extensive criminal history," the documents appended to the motion indicate that in 2001 a Sharon McDaniels was arrested for aggravated battery, but no charges were filed and the case was "no-actioned'; that in 2002 she was again arrested for aggravated battery, but again no charges were filed and the case was "no-actioned'; and in 2005 she was prosecuted for an open container violation. Assuming that the Sharon McDaniels who was arrested in the Tampa area on these occasions was the sister of the Charles Moore who served as jury foreman in Mr. Pierre's trial, and assuming that Mr. Moore was even aware that his sister had been arrested twice for felonies that were dismissed, and once for a misdemeanor or ordinance violation, the most that can be said is that these immaterial trifles never came to light during jury *voir dire.*

Taking "Covert Ops's" averments as true, Mr. Moore's mother died in a tragic accident caused by his father or step-father's drunk driving when Mr. Moore was 12 years old. A lawsuit was brought for insurance benefits on behalf of his sister, who was six years of age at the time. The motion does not identify the question or questions asked by the court or counsel in *voir dire* that, in the opinion of the author of the motion, should have elicited this information from Mr. Moore. Mr. Pierre was not on trial for drunk driving. Had he been, questions about whether the jurors or anyone close to them had ever been involved in DUI accidents would have been germane, and the deliberate failure of a venireperson to answer such a question candidly would call that venireperson's truthfulness into question. But Mr. Pierre was not charged with any drunk-driving crime.

The motion alleges that Charles Moore was asked in jury *voir dire* "if he had any close friends, or family members who had ever been arrested or convicted of a crime. Foreperson Moore deliberately chose to conceal this information and mislead the trial court, the defense, and the State, by falsely disclosing only" his brother's criminal past. *Motion* 31. As to that brother's criminal past, prosecution counsel conducted *voir dire* of Mr. Moore and was clearly satisfied. *Motion*

14-5. (As noted *supra,* whether the Sharon McDaniels who was arrested in Tampa and then had her charged dropped was Foreman Moore's sister; and whether, even assuming that she was his sister, he ever knew about the arrests, is a matter of rank speculation.) The motion repeats the claim that Mr. Moore lied in identifying his son as having been in law enforcement. *Id.* 31. As to that point, trial counsel for Mr. Pierre conducted *voir dire* of Mr. Moore and was clearly satisfied. *Id.* 15.

II. Analysis

Claims of ineffective assistance of counsel in connection with jury selection—claims, for example, that a lawyer was constitutionally ineffective for failure to strike a juror who should have been stricken—are commonplace. *See, e.g., Nixon v. State,* 2025 WL 15232 (Fla. 3d DCA 2025) [50 Fla. L. Weekly D100a]. This is not such a claim.[4] In his present motion, Mr. Pierre alleges nothing more or less than a deprivation of his right under two constitutions to an impartial jury, as a consequence of answers given by Mr. Moore; which answers he alleges were deliberately false or deliberately materially incomplete.[5]

A. The motion is untimely, and subject to denial as such.

As a general rule a motion brought pursuant to Rule 3.850 must be filed within two years of the date when the judgment and sentence to which the motion is directed became final. Rule 3.850(b), Fla. R. Crim. P. As discussed *supra* at 2, the judgment and sentence herein became final in 2008. Any claim under Rule 3.850 was obliged to be filed in or before 2010. And indeed such a claim was brought on Mr. Pierre's behalf within the allotted time, and timely amended twice.[6] The motion at bar is untimely by a decade and a half, and subject to denial on that basis alone.

Collateral attacks on criminal convictions brought pursuant to Rule 3.850 are civil claims, heard by criminal courts in the exercise of their ancillary jurisdiction. *State v. Weeks,* 166 So. 2d 892, 893, 894-95 (Fla. 1964); *Grange v. State,* 199 So. 3d 440, 442 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1976a]. As such, the civil-law doctrine of laches is applicable to such claims. *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997) [22 Fla. L. Weekly S627a]; *Xiques v. Dugger*, 571 So. 2d 3 (Fla. 2d DCA 1990). And it is applicable separate and apart from the two-year time limitation imposed by Rule 3.850. "[L]aches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced." *Homberg v. Armbrecht,* 327 U.S. 392, 396 (1964).[7] "[T]he doctrine of laches has been applied to bar a collateral relief proceeding when, from the face of the petition, it is obvious that the state has been manifestly prejudiced and no reason for an extraordinary delay has been provided." *McCray,* 699 So. 2d at 1368. *See also Wright v. State,* 711 So.2d 66, 68 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D851d]; *Hurtado v. Singletary,* 708 So. 2d 974, 975 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D766a].

The predicate for laches is amply present here. The motion at bar asks this court to vacate the judgment and sentence imposed. If the court were to do so, it would be impossible to set this matter for retrial at this late date. Court records and evidence have been abandoned long ago. Witnesses have died, forgotten, moved away. *See, e.g., Wright,* 711 So. 2d at 68 (defendant's "lack of due diligence is apparent in that he did not bring this claim until 24 years" had passed); *Hurtado,* 708 So. 2d at 975 (delay of eight years "is unreasonable' and "the prejudice is obvious"). Having received what to all appearances was a fair trial at a time when the State was able to prosecute this case to conviction and obtain an incarcerative sentence, Mr. Pierre now wants his judgment vacated at a time when the State cannot prosecute this case at all. But the State, and the criminal justice system, have an interest in the repose of cases fairly and finally resolved. If Mr. Pierre can ask for a "do-over" long after the fact, at a time when the State cannot possibly hope to proceed against him, I see no reason why any defendant willing to be as patient as Pierre has been should not receive the same "do-over." In the criminal justice system that Mr. Pierre envisions (and that "Covert Ops" promises), no judgment, no outcome in the criminal courts will ever be truly final. The people of the State of Florida deserve a much better criminal justice system than that.

In considering the applicability of laches, the prejudice that must be considered begins with the prejudice to the State in its loss of the wherewithal to prosecute a putatively guilty defendant. But the prejudice that must be considered does not end there. Laches sounds in equity. As a matter of equity, the prejudice at issue in this matter extends well beyond the mere inability of the State, as a consequence of the passage of time, to prove its case.

It was a maxim at common law that a juror is incompetent to impeach the verdict. This principle is carried forward into contemporary Florida law. *See* Fla. Stat. § 90.607(2)(b) ("Upon an inquiry into the validity of a verdict . . . a juror is not competent to testify as to any matter which essentially inheres in the verdict"). No doubt the principal reason for the rule is the importance of finality of verdicts. But there is a secondary reason, also vital: the sanctity of jury service. Jurors are entitled to know that when their jury service is completed, the criminal justice system will let them go in peace, It will not pepper them endlessly with questions, demands, inquiries. If that is not the case—if a juror, having completed his service, is subject to being probed and pestered, harassed and hectored, perhaps for years, perhaps for decades—then the sanctity of jury service exists no more, and no sensible, fair-minded person will want to perform the duty of jury service.[8]

What, then, would a sensible, fair-minded venireperson think if he or she were to read the chilling language on "Covert Ops's" website? Its message is clear: Serve as a juror, if you dare—but know that if you return a verdict displeasing to "Covert Ops" and its clientele, "Covert Ops" will pursue you as endlessly, as relentlessly, as callously as Javert pursued Jean Valjean. And not just you: your loved ones as well; your children, if necessary. Live as long as you may, you will never outlive the shadow of your jury service. Decades from now, a lawyer bolstered by the facts, or the misimpressions, that "Covert Ops" has scavenged from public records—and from that ratsbane of fact-finding, social media—may demand a hearing at which you will be placed under oath and asked if you committed the crime of perjury when you omitted to mention some obscure incident, long since lost to memory, from the life of a distant relative.

But the minatory language of "Covert Ops's" website, although directed to jurors, is not confined to jurors. It extends to jurors' "family and friends, and everyone associated with the case (accusers/victims and their friends/family, law enforcement, witnesses, all courtroom personnel.)" To make baser metal of Martin Niemoller's golden words: First they came for the jurors, and I did not speak out because I was not a juror. Then they came for the jurors' families and friends, and I did not speak out because I was not a family member or friend. Then they came for victims and witnesses, and I did not speak out because I was not a victim or a witness. Then they came for me—the judge, or other "courtroom personnel"—and there was no one left to speak.[9]

The prejudice to which laches refers—the prejudice that laches demands that we consider—extends beyond mere hardship to the prosecution. Surely in this context it extends to jurors, and indeed to all those—juror family members and friends, other participants in the criminal justice process—whom "Covert Ops" promises to place under its microscope and examine like so many laboratory specimens. Thus considered, the laches analysis here could scarcely be simpler. Olson Pierre, having exhausted all legal remedies and avenues

properly available to him, waited a decade and a half to bring the motion at bar. *Vigilantibus et non dormientibus jura subveniunt*: the law protects those who are vigilant as to their rights and not those who sleep thereon. No reason deserving of any weight is offered to justify the delay. And in the other scale is the appalling prejudice to, and the shameful treatment proposed to be visited upon, jurors who honestly and reasonably believed that they had completed their civic duty nearly twenty years ago.

B. The motion at bar is also impermissibly successive, and subject to denial as such

When an initial motion for post-conviction relief raises a claim cognizable under Rule 3.850, and a subsequent motion is filed raising additional grounds, the defendant "must state legitimate reasons why the facts in support of his present claim were not known and could not have been known at the time of the filing of the first motion." *Pinder v. State,* 42 So. 3d 335, 337 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1882b] (citing *Christopher v. State,* 489 So. 2d 22, 24 (Fla. 1986)). The defendant is required to justify "the failure to raise the asserted issues in the first motion." *McKenley v. State,* 937 So. 2d 223, 225 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2278a]. Otherwise, the successive motion constitutes an abuse of process and may be dismissed. *Owen v. Crosby,* 854 So. 2d 182, 187 (Fla. 2003) [28 Fla. L. Weekly S615a. "A motion may be dismissed as improperly successive if it fails to allege new or different grounds for relief, and the prior determination of insufficiency was made on the merits of the claim." *Greene v. State,* 200 So. 3d 102, 103 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2751a]. The necessity for strict application of the rule against successive claims was explained by the Fourth District as follows:

> The procedural bars that prohibit the filing of untimely and successive post-conviction motions are critical to the proper administration of justice. . . . Were the courts of this state filled with stale, repetitive, and successive post-conviction motions raising claims in a piecemeal fashion, then justice for those raising timely, legitimate claims would be delayed and may ultimately be denied. For these reasons, a defendant seeking to bring an untimely or successive post-conviction motion must meet strict requirements for establishing the narrow exceptions to these procedural bars.

Erlsten v. State, 78 So. 3d 60, 61 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D175a].

Rule 3.850(h)(2) provides:

> A second or successive motion is an extraordinary pleading. Accordingly, a court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion.

This language is expressly intended to provide post-conviction "judges with an expedited route and procedure to summarily dismiss or deny many second or successive Rule 3.850 motions without having to substantively address the merits of the motion." *Woodrum v. State,* 359 So. 3d 1263, 1264 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D885c] (Lambert, C.J., concurring).

Keenly aware that the motion at bar is grossly untimely and indefensibly successive, Mr. Pierre and his post-conviction counsel offer an excuse. "Based on the scope and methods of the work performed and resources used [by 'Covert Ops'] in investigating the jurors in th[is] case, Defendant could not have, through the exercise of due diligence, uncovered the evidence of Foreperson Charles Moore's concealments within two years of [Mr. Pierre's] conviction and sentence becoming final." *Motion* 27.

This stunning assertion invites the obvious question: Why not? Did it actually take "Covert Ops Jury Investigations, LLC" more than two full years to conduct its investigation? If so, why doesn't Mr. Pierre's present motion, 30-plus pages in length, flatly assert as much? The obvious and unavoidable answer is: because such an assertion would be patent nonsense.

But even if we were to pretend that "Covert Ops" worked relentlessly on this investigation for two years and was unable to complete it, the law provides a solution. A timely-filed motion can be amended and supplemented—*as happened in this case.* And the post-conviction court has power, "for good cause shown to extend the two-year deadline for filing post-conviction motions under Rule 3.850." *State v. Boyd,* 846 So. 2d 458, 460 (Fla. 2003) [28 Fla. L. Weekly S320b] (internal quotation marks omitted). In *JeanCharles v. State,* 2025 WL 611131 (Fla. 4th DCA 2025) [50 Fla. L. Weekly D925a, the court held that, with respect to amended motions, a post-conviction court always retains discretion to adjudicate an untimely motion or afford additional time if, in the court's judgment, the interests of justice so require.

Mr. Pierre's present motion does not, emphatically does not, suggest that the Savy/"Covert Ops" team began its work sometime in 2010, shortly after Mr. Pierre's conviction was affirmed on direct appeal; and having worked tirelessly for the ensuing 15 years, they were only just now able to file the motion. No, that is not, certainly that is not, the position actually taken in the motion at bar. The position actually taken would, if accepted, work a complete revolution in the law of post-conviction procedure. The position actually taken is that a post-conviction claimant may wait as long as he pleases after his conviction has become final; may then hire the Savy/"Covert Ops" team, which will take as long as it needs to burrow into the private lives of (to quote again from the website), "the jurors, their family and friends, and everyone associated with the case (accusers/victims and their friends/family, law enforcement, witnesses, all courtroom personnel, etc.)" until something is unearthed to enable the post-conviction movant to claim his trial was less than acceptably fair; at which point the two-year clock will *just begin to run.* This is neither exaggeration nor misstatement. The "Covert Ops" website squarely promises would-be customers that "We have completed 105 investigations, and uncovered at least one biased juror on every jury. We are 100% successful because we do not stop searching until we find that biased juror." The message is clear. Convicted defendants can come to "Covert Ops" months, years, even decades after their convictions have become final. "Covert Ops" will sift and scrutinize the lives of former jurors and their families for months, years, even decades—will "not stop searching until we find that biased juror." And when they do, the defendant can file his post-conviction motion—months, years, even decades after the fact.

No conviction will ever be final. No post-conviction claim will ever be untimely. No criminal case will ever come to an end. No juror—or juror's relative, or juror's friend—will ever be free from scrutiny. Ever.

III. Conclusion

The motion at bar does not pose the question whether venirepersons can give answers in *voir dire* that are so willfully and consequentially false or misleading as to sabotage the selection of a fair and impartial jury. The answer to that question is: yes. *See, e.g., Smith v. State,* 283 So. 3d 1276 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2770c]. Rather, the motion at bar poses the question whether all judgments and sentences, however fairly and lawfully obtained, are amenable to sabotage decades after the fact if opportunists are sufficiently determined to spy and pry into the lives of jurors and their families until some trivia about them is unearthed. The

answer to that question is: no.

Defendant's Motion for Post-Conviction relief is respectfully denied. This is a final order. The movant has 30 days in which to appeal. Fla. R. Crim. P. 3.850(k). In the event of an appeal, the Clerk of Court is directed to append the motion at bar to this order for transmission to the appellate court. Fla. R. Crim. P. 3.850(f)(5). No motion for rehearing will be entertained. Fla. R. Crim. P. 3.850(j).

---

[1]In the present motion, as is all too common nowadays, counsel refers to a juror as being "biased against" Mr. Pierre. Traditionally, and correctly, the law uses "bias" to refer to an inclination or disposition *in favor of* a person or thing, and "prejudice" to refer to an inclination or disposition *against* a person or thing. *See, e.g.*, https://wikidiff.com/prejudice/bias (visited July 10, 2025).

[2]The referenced provision of the Florida Constitution guarantees to a criminal defendant a "trial by impartial jury." The motion at bar cites to the Sixth Amendment of the United States Constitution, which likewise guarantees to a criminal defendant a "trial by an impartial jury." For purposes of the present motion the two constitutional provisions are identical.

[3]In the alternative, the present motion prays for an evidentiary hearing. For purposes of the adjudication of the motion, I will assume that all the facts set forth herein culled from the motion are true. I make this assumption not because I think it likely to be so; I do not. (Just by way of example: the entire investigation conducted by "Covert Ops" hinges on the guess that the signature on a document associated with a real-estate transaction in 1993 is sufficiently identical to the signature on the verdict in this case in 2006 to justify the conclusion that the author of one signature must be the author of the other. This guess was made without—so far as the motion reveals—the aid of a handwriting analyst.) Rather, I make this assumption because even if all the facts alleged in the motion are true, Mr. Pierre is entitled to no relief.

NB, however, that in saying that I will assume all the facts alleged in the motion are true for present purposes, I do not and need not assume that conclusions or speculation drawn from those facts are true. Thus, for example, Mr. Pierre, citing to the niggling inaccuracies or incompleteness in Foreperson Moore's answers, leaps to the spectacularly unsupported conclusion that, "Clearly, this was a deliberate choice by a person who sought to secure a spot on Defendant's jury as a result of actual bias [*sic*; *see* n. 1, *supra*] against Defendant." *Motion* 32. But it matters not. Mr. Pierre's motion is subject to denial on procedural grounds, *see infra* pp. 9 *et seq.*

[4]In *Guardado v. Secretary, Florida Department of Corrections,* 112 F. 4th 958 (11th Cir. 2024) [30 Fla. L. Weekly Fed. C1235a], the Eleventh Circuit took the position that the Florida Supreme Court was employing the wrong standard for measuring claims of ineffective assistance of counsel in connection with the failure to strike a particular juror. In *Nixon v. State,* 2025 WL 15232 (Fla. 3d DCA 2025) [50 Fla. L. Weekly D100a], the Third District quite properly held that it was obliged to follow *Carratelli v. State,* 961 So. 2d 312 (Fla. 2007) [32 Fla. L. Weekly S390a], the governing Florida precedent, until such time, if any, as the Florida Supreme Court chooses to reject that precedent in favor of the standard set forth in *Guardado.* Because the case at bar does *not* involve a claim of ineffective assistance of counsel in connection with jury selection, I need not concern myself with this issue. *Guardado's* rejection of the "actual bias" standard is inapplicable to the claim made by Mr. Pierre.

[5]Unlike a claim of ineffective assistance of counsel in connection with the jury-selection process which, as a general rule, cannot be raised on direct appeal, *see Steiger v. State,* 328 So. 3d 926 (Fla. 2021) [46 Fla. L. Weekly S337a], a claim of the deprivation of the right to an impartial jury can and should be raised on direct appeal. That being the case, such a claim is likely procedurally barred if, as is the case here, it is brought on motion pursuant to Rule 3.850. "This rule does not authorize relief on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of judgment and sentence." Fla. R. Crim. P. 3.850(c)(7). Accordingly, the motion at bar is probably subject to denial as procedurally barred. Because the grounds for denial set out at 9 *et seq.* are more clearly controlling, however, I rest my decision on those grounds.

[6]A Rule 3.850 motion may be amended at any time prior to the post-conviction court's ruling as long as the amended motion is filed within the two-year limitations period prescribed by the rule. *Harris v. State,* 370 So. 3d 1040, 1044 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D1929a] ("a movant may amend his post-conviction motion at any time before the post-conviction court disposes of the motion or orders the State to respond"). When a defendant files a motion requesting leave to amend before the post-conviction court rules and before the limitations period expires, the court must allow the amendment prior to adjudicating the motion. *Prestano v. State,* 176 So. 3d 1280, 1281 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2448b].

[7]To the extent that principles of equity, such as laches, are applicable here, those principles teach that he who seeks equity must come with clean hands. *See, e.g., Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.,* 324 U.S. 806, 814 (1945). Query whether a criminal defendant who waits two decades, then maneuvers to set aside his judgment and sentence by invading and laying waste to the privacy of those who dutifully served on his jury—and that of their family members—can claim clean hands.

[8]The Florida Bar offers a "Handbook for Jurors" reflecting that a certain sanctity attaches to jury service, and to those who render it. "[Y]ou will, as a juror, serve as an officer of the court, along with the lawyers and the judges. As a juror, you are a part of the judicial system of our state, and your services are as important as those of the judge." *See* https://www.floridabar.org/public/consumer/pamphlet016/ (visited July 17, 2025).

[9]No, I do not presume to compare the merely trivial injustice sought to be worked by the motion at bar with the greatest human cataclysm of the 20th century. But the point of Pastor Niemoller's famous quote is that injustices that could be checked when they are merely trivial gain momentum if they go unchecked, and in time become too massive to be checked at all. That is an entirely appropriate consideration in the application of the doctrine of laches.

* * *

Torts—Defamation—Anti-SLAPP statute—Privilege—Media defendants—Media defendants' motion to dismiss action based on statements regarding plaintiff's use of credentials as news network contractor while simultaneously employed by political consulting firm is granted—Certain statements were privileged under Florida law where they were drawn directly from government records or were substantially true based on plaintiff's own pleadings—Statements that constitute nonactionable opinion or qualify as rhetorical expression are protected by First Amendment—Certain other statements challenged by plaintiff were not defamatory as a matter of law—Because further opportunity to amend would be futile to plaintiff's ability to state actionable claim, dismissal with prejudice is appropriate

KRISTEN HENTSCHEL, Plaintiff, v. JEFFREY PITTS, et al., MCNICHOLAS ASSOCIATES, INC., NATIONAL PUBLIC RADIO, INC., and FLOODLIGHT, INC., Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 24-CA-008705. Division C. July 17, 2025. Melissa M. Polo, Judge. Counsel: Sean Estes, Hoyer Law Group, PLLC, Tampa; and Dave Scher, Washington, DC, for Plaintiff. Carol Jean LoCicero and Linda Riedemann Norbut, Thomas & LoCicero PL, Tampa, for National Public Radio and Floodlight, Inc., Defendants. Sarah Jeck Hulsberg, Fisher, Tousey, Leas & Ball, Jacksonville, for Jeffrey Pitts, Defendant. David S. Johnson, Johnson Litigation Group, LLC, Tampa, for McNicholas & Assoc., Inc., Defendant.

ORDER GRANTING NEWS MEDIA DEFENDANTS' JOINT MOTION TO DISMISS

THIS CAUSE came before the Court on June 30, 2025, on the News Media Defendants' Joint Motion to Dismiss Pursuant to Anti-SLAPP Law (the "Motion")[1] filed by Defendants National Public Radio, Inc. and Floodlight, Inc. (collectively, the "News Media Defendants") pursuant to Florida Rule of Civil Procedure 1.140(b)(6). Having reviewed the Second Amended Complaint and the parties' submissions, considered the arguments presented by counsel, and being otherwise fully advised in the premises, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted against the News Media Defendants, and dismissal with prejudice is granted for the following reasons.

A. Background and Procedural History

Plaintiff Kristen Hentschel field her original Complaint on October 31, 2024. Doc. 4. On December 18, 2024, Plaintiff filed her First Amended Complaint. Doc. 9. On February 27, 2025, Plaintiff sought leave to file, and indeed filed, a Second Amended Complaint. Doc's 26-27. The now operative Second Amended Complaint asserts claims against the News Media Defendants for defamation (Count II) and defamation by implication (Count IV),[2] based on a December 21, 2022, article jointly published by the News Media Defendants titled "She was an ABC News producer. She also was a corporate operative" (the "Article").

The Challenged Statements

Plaintiff bases her defamation claims on eleven statements from the Article. At the hearing, counsel for Plaintiff contended that the eleven statements enumerated in the Second Amended Complaint are exemplary and non-exclusive. The Court exclusively considers the four corners of Plaintiffs' Second Amended Complaint as pled.[3] These statements relate to Plaintiff's use of credentials as an ABC

News contractor while simultaneously employed by a political consulting firm (Matrix), her interactions with public officials, and her alleged role in undercover tactics on behalf of Matrix clients. By Plaintiff's own admission, she was a freelance, behind-the-scenes field producer as an independent contractor for major news networks. SAC ¶11. Plaintiff also admits that in recognition of her work in journalism, she has an Edward R. Murrow award and has been nominated for two Emmy awards. *Id.* Plaintiff's work with ABC News began in 2016 as a freelancer. SAC ¶17. Also in 2016, Plaintiff was hired by Matrix as a contractor. SAC ¶12, 14.

The challenged statements from the Article, as set forth in paragraph 81 of the Second Amended Complaint ("SAC"), are as follows:

Statement 1: Hentschel primarily did work for Good Morning America. Among her assignments: helping with segments on NFL star Tom Brady and the disappearance and death of Gabby Petito, the young Florida woman who documented her cross-country trip on social media.
"Our setup for today. . . #lighting is everything," Hentschel once tweeted with a photograph of a TV reporting shoot. "Who's in the hot seat?"

The answer often proved to be people Pitts wanted her to confront.

Statement 2: "Residents say they aren't buying it," Hentschel declared in the news-style video she later posted online.

Statement 3: Hentschel traded on her work for ABC News at least three times to trip up Florida politicians whose stances on environmental regulations cut against the interests of major Matrix clients.

Statement 4: Hentschel's work stretched beyond Florida politicians and news conferences.
This past June, fitness instructor Kim Tanaka was sitting poolside at an upscale hotel in Atlanta when a reporter for Bloomberg News called with a startling question: Did Tanaka know that she had been spied on five years prior? Tanaka's boyfriend during that period was Tom Fanning, the CEO of energy giant Southern Company—a direct competitor of Florida Power & Light. The couple broke up in late 2017.
The reporter, Josh Saul, laid out the material he'd obtained in a leaked Matrix dossier, which included private information about her, Tanaka recalls.
But there was another shocker in the dossier. It didn't just contain old information pertaining to Tanaka—it contained recent and sensitive information about Fanning's wife, whom he married after breaking up with Tanaka. To Tanaka, it meant the spying had continued as recently as this year.

Statement 5: In a note sent this summer to an associate, Hentschel wrote that she was still working for Pitts.

Statement 6: Hentschel chased down Mast at a fundraiser featuring then-President Donald Trump.

Statement 7: Mast says, "Somebody came to threaten my family. That's very serious to me. It's a very serious line that was crossed."

Statement 8: A city investigation found no dead tortoises. In fact, it found no evidence at all that any of the reptiles had ever been present.

Statement 9: No one has identified the person who lodged the original baseless complaint about tortoises that Hentschel highlighted.

Statement 10: Hentschel told Mast's wife she was reporting for ABC.

Statement 11: The press conference turned out to be a sham. . .
Matrix paid Hentschel $2,000 a few weeks later for what was itemized as a "Miami Shoot," a Matrix ledger shows. Again, Florida Power and Light declined to comment for this story.

SAC ¶ 81 (individually and collectively, the "Statement(s)").

B. Discussion: Analysis and Application of Law

On a motion to dismiss, the legal sufficiency of a complaint is tested, not factual issues. *Neapolitan Enters., LLC v. City of Naples,* 185 So. 3d 585, 589 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D299a]. In ruling on a motion to dismiss, the trial court is limited to considering the four corners of the complaint along with attachments incorporated into the complaint. *Id.* The trial court must accept the complaint's factual allegations as true and draw reasonable inferences in the plaintiff's favor. *Hussey v. Collier Cnty.,* 158 So. 3d 661, 664 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2389c]. However, where the complaint is legally deficient, it must be dismissed. Fla. R. Civ. P. 1.140(b)(6). A plaintiff must plead ultimate facts supporting each element of their cause of action, mere statements of opinion or conclusions unsupported by facts will not suffice. Fla. R. Civ. P. 1.110(b); *Brandon v. Pinellas Cnty.,* 141 So. 2d 278 (Fla. 2d DCA 1962).

The trial court is limited to considering the four corners of the complaint, along with the attachments incorporated into the complaint. *Hussey v. Collier Cnty.,* 158 So. 3d 661, 664 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2389c]. In cases such as these, at the motion to dismiss phase a trial court may consider the alleged defamatory publication that is incorporated into the complaint by reference, including materials hyperlinked within the challenged publication. *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.,* 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]; *See also e.g., Skupin v. Hemisphere Media Grp., Inc.,* 314 So. 3d 353, 355-56 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a]. Florida law favors early dismissal of legally untenable defamation claims due to their chilling effect on the exercise of First Amendment rights. *Skupin,* 314 So. 3d at 357. To survive a motion to dismiss, a plaintiff must plead ultimate facts alleging: (1) a false and defamatory statement of and concerning them; (2) unprivileged publication to a third party; (3) fault; and (4) damages. *Mile Marker, Inc. v. Petersen Publ'g, L.L.C,* 811 So. 2d 841, 845 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D701c] (*internal citation omitted*). Plaintiff has not been successful in meeting the minimum threshold for pleading, despite opportunity to amend, and cannot do so.

I. Substantial Truth

It is well settled under Florida law that a publication is privileged if it is a fair and accurate or provides a "substantially correct" account of a public record or public officials' statements. *See Woodard v. Sunbeam Television Corp.,* 616 So. 2d 501, 502-03 (Fla. 3d DCA 1993); *see also Rigmaiden v. NBC Universal Media,* LLC, 307 So.3d 918, 918 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2237a]. This privilege permits media actors "to report accurately on the information received from government officials." *Rasmussen v. Collier Cty. Publ'g Co.,* 946 So. 2d 567, 570 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3112a]. For the privilege to apply, "[i]t is not necessary that it be exact in every immaterial detail or that it conform to the precision demanded in technical or scientific reporting. It is enough that it conveys . . . a substantially correct account" of the underlying official report. *Woodard,* 616 So. 2d at 502. Whether the account is substantially correct is a question of law to be decided by the Court and is appropriately raised via a motion to dismiss. *See Huszar v. Gross,* 468 So. 2d 512, 515-16 (Fla. 1st DCA 1985). Florida courts routinely dismiss defamation claims where the underlying publication is

substantially true because falsity is an essential element of a defamation claim. *See Readon v. WPLG, LLC,* 317 So. 3d 1229, 1234-35 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D836a]; *see also Phila. Newspapers v. Hepps,* 475 U.S. 767, 776 (1986).

The Court finds that the following Statements as challenged by Plaintiff are properly dismissed under the doctrines discussed above, because they are drawn directly from government records or statements, or are substantially true based on Plaintiff's own pleadings:

Statements 2, 3, 8, and 9: These Statements concern Plaintiff's involvement in creating a video about protected gopher tortoises potentially threatened by construction as the construction site of a new hospital in Stuart, Florida and her interactions with Florida Representative Toby Overdorf during the investigation that culminated in the video. *See* Motion, Ex. A; SAC ¶ 22. The Article accurately reports on the City of Stuart's investigation, which is embedded in the Article, and which found no evidence that tortoises were at the site or threatened. Motion, Ex. C. The Article also quotes Rep. Overdorf's statement that Hentschel "flashed an ABC News card" when she interviewed him, which is privileged as a statement made by an elected official. Plaintiff disputes the Article's characterization because she that she did not personally post the video, but admits she produced it on behalf of Matrix and "sent the video file of the one-day shoot to" the corporate operative who hired her. *See* SAC ¶¶ 14-15, 27-28, 30-32, 34. There is no indication that Plaintiff did so with the belief that the video content was in any way privileged or for internal use by Matrix only, and Plaintiff created the video using a "shot list" provided by Matrix. SAC ¶ 28. Plaintiff does not dispute in her Opposition that the Article reports that she was "listed as the . . . media contact" on the website where the video was posted. Motion, Ex. A. Given those admissions, it is immaterial whether she pushed the button to post the video or not as the inaccuracy is immaterial to the gist or sting of the article. *See McCormick v. Miami Herald Pub. Co.,* 139 So. 2d 197, 200 (Fla. 2d DCA 1962). These Statements are either substantially true or privileged under Florida law.

Statements 3, 6, 7, and **10:** These Statements stem from two separate incidents involving U.S. Representative Brian Mast. First, the Article reports that Plaintiff entered Rep. Mast's gated community, and upon encountering Rep. Mast's wife at the Mast residence identified herself as affiliated with ABC News. The Article goes on to report that Mr. Mast's wife called the St. Lucie County Sheriff's Office and Plaintiff was subsequently issued a trespass warning—details drawn directly from a St. Lucie County Sheriff's Office report. Motion, Ex. D. Rep. Mast's own statements regarding how he perceived Plaintiff's conduct to be "threatening" to his family are also at issue. Motion, Ex. A.

Plaintiff disputes whether she "trespassed," denies identifying herself as an ABC News reporter to Mrs. Mast, and challenges the "threatening" implications of her conduct at Rep. Mast's residence. However, each of these Statements is drawn directly from or supported by the Sheriff's report and public statements by Rep. Mast—both which are also embedded within the Article. Motion, Ex. D and A. The privilege applies to fair and accurate accounts of official records and statements, even when the underlying documents may contain inaccuracies. *See Woodard v.* 616 So. 2d at 502; *Ortega v. Post-Newsweek Stations, Inc.,* 510 So. 2d 972, 976 (Fla. 3d DCA 1987); *El Amin v. Miami Herald,* 9 Media L. Rep. 1079, 1081 (Fla. 11th Jud. Cir. 1983). Accordingly, these Statements are privileged. Plaintiff's own SAC also lends credibility towards the substantial truth of these Statements, as Plaintiff imbedded a still image of the Ring camera footage from the Mast residence further supporting that Plaintiff entered the Mast's gated community and rang Rep. Mast's doorbell. SAC ¶ 42 at page 16. Plaintiff conceded that all of this statement is truthful, except she denies flashing ABC News credentials and states her behavior was not threatening.

Second, Plaintiff challenges the Statement that she "chased down Mast at a fundraiser featuring then-President Donald Trump." Although she denies attending a fundraiser, the same sheriff's report states she had been "following the victim [Rep. Mast] to several locations for several weeks." Motion, Ex. D. Whether or not the location was a fundraiser that the then-President attended is immaterial as the gist of the Statement is supported by the public record and thus protected as a fair and substantially accurate report. *McCormick,* 139 So. 2d at 200.

Statements 1, 3, and 5: Plaintiff admits she worked for both ABC News and Matrix at the same time. SAC. ¶¶ 12, 14, 81(1). Plaintiff disputes having written a note as referenced in Statement 5, but acknowledges that the substance of the purported note (that she performed work for Defendant Jeffrey Pitts in the summer of 2022) is truthful. Reporting on statements from elected officials such as then-Mayor Stoddard and Rep. Mast that she identified herself with ABC News credentials is privileged. Describing her dual roles in overlapping projects is substantially true and not defamatory. In Plaintiff's SAC she concedes that she worked for Pitts, as the Article reports.

Statements 4 and 5: Plaintiff's own SAC admits that she traveled to Atlanta, Georgia, despite being a Florida resident, to further the goal of befriending Kim Tanaka at Pitts' urging, while working for Pitts. Pitts had hired plaintiff to befriend Tanaka and called it a "fun project." SAC ¶ 55. Plaintiff subsequently alleges that "unknowingly to Plaintiff, Pitts. . .ma[d]e it appear that Plaintiff was spying on Ms. Tanaka, identifying Plaintiff as the new 'spy.' " SAC ¶¶ 55-57, 59, 81(4), 81(5). Taking Plaintiff's contention is that she was misled regarding the truth of her own actions as true, it is unclear how the News Media Defendants were expected not to be misled when Plaintiff did not even know the truth of her own actions. Although Plaintiff argues that she was unaware her actions would be framed in this way by Matrix as a result of Mr. Pitts, the Article reflects the narrative set forth in her own pleading: Plaintiff sought out Tanaka in Atlanta to be her personal trainer, even though she lives in Florida, befriended her as part of a work assignment that had an ulterior motive; and Plaintiff herself unknowingly did the spying by reporting back to Mr. Pitts. SAC ¶¶ 55-59. The Article's reporting is substantially true and therefore not actionable.

II. Opinion and Rhetorical Hyperbole

Rhetorical hyperbole and opinions are statements that cannot be proven true or false and are not actionable under Florida Law as a provably false statement is essential to recovery in a defamation action. *Byrd v. Hustler Magazine, Inc.,* 433 So. 2d 593, 595 (Fla. 4th DCA 1983). Whether a statement is provably false is a question of law, and statements of pure opinion are protected from defamation actions by the First Amendment. *See Skupin,* 314 So. 3d at 356, 357. Dramatic, attention-grabbing phrasing and rhetorical flourishes are generally protected from defamation claims as a matter of law. *See Dulgarian v. Stone,* 420 Mass. 843, 850 (1995); *Fudge v. Penthouse Int', Ltd.,* 840 F.2d 1012, 1016 (1st Cir. 1988).

The Court finds that the following Statements either constitute nonactionable opinion or qualify as rhetorical expression protected by the First Amendment:

Statements 1 and 5: Plaintiff challenges the suggestion made in the Article that she put people in the "hot seat" and the republication of Rep. Mast's opinion expressing his perspective that she had "crossed" a "very serious line" and acted in a "threaten[ing]" manner by showing up at his home. The first is a stylized description of Plaintiff's reporting work, quoting *her own* tweet. SAC ¶ 81(1). Whether the subjects of her work were put in the "hot seat" (which is often a part of investigative journalism) is not an assertion of fact subject to empirical proof as it is non-actionable opinion. *See, e.g., Cole v. Westinghouse Broad. Co., Inc.,* 435 N.E.2d 1021, 1027 (Mass. 1982). The second statement concerning Rep. Mast's quoted speech

is an attributed quote from a public official expressing a subjective, personal perception based on an encounter documented in a police report. Neither is actionable under Florida law. *See Turner v. Wells,* 879 F.3d 1254, 1265-66 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C539a]; *Miami Child's World, Inc. v. Sunbeam Television Corp.,* 669 So. 2d 336, 336 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D619b].

III. Lack of Defamatory Meaning

Florida courts serve a "prominent function" in defamation cases by acting as gatekeepers that determine as a matter of law whether a statement is capable of carrying a defamatory meaning. *See e.g., Byrd,* 433 So. 2d at 595; *Smith v. Cuban Am. Nat. Found.,* 731 So. 2d 702, 704 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b]. In doing so, courts must evaluate the publication as a whole and reject strained or implausible interpretations. *Byrd,* 433 So. 2d at 595. The legal standard considers how the statement, viewed in context, is understood by the "common mind," not under "extreme" or tortured readings. *Valentine v. C.B.S., Inc.,* 698 F.2d 430, 432 (11th Cir. 1983).

Here, the Court finds that Plaintiff challenges facially non-defamatory statements that are not reasonably capable of supporting a defamation claim, as follows:

Statement 1: Plaintiff takes issue with the alleged implication that she reads into the Article that Plaintiff "deliberately subjected Pitts' opponents to the 'hot seat.'" SAC ¶ 81(1). There is nothing defamatory about a journalist placing public figures in the "hot seat." In fact, Plaintiff herself has used these words to describe her own reporting practices.

Statement 6: Similarly, Plaintiff challenges the Statement that she "chased down Mast at a fundraiser." SAC ¶ 81(6). Plaintiff denies attending such an event, but nonetheless, the Statement does not imply anything defamatory as it describes a common practice in journalism where reporters pursue public figures in an effort to pursue the story they are investigating.

Statement 2: The Article says Plaintiff "posted" a news-style video regarding the gopher tortoise investigation. SAC ¶ 81(2). Plaintiff challenges only that she "posted" it, asserting that someone else published the video. However, Plaintiff admits that she produced the video at her employer's direction and sent it to them without any indication that the video was for internal use by Matrix only or in any way privileged. *Id.* ¶¶ 27, 34. The Article describing Plaintiff as posting the video is not defamatory when Plaintiff admits that she produced and shared the video with Matrix.

Statement 9: The Article also states that "no one has identified the person who lodged the original baseless complaint" in the gopher tortoise incident. SAC ¶ 81(9). This Statement does not refer to Plaintiff or suggest any misconduct on her part.[4] It focuses on the investigation's status and is not defamatory.

Statements 4 and 5: Plaintiff claims the Article implies that she "spied" on Ms. Tanaka. SAC ¶81(4). However, the Article contradicts that implication by expressly stating that the News Media Defendants could not independently verify whether Pitts hired Plaintiff to spy. Motion, Ex. A. The express disclaimer negates the alleged defamatory gist as it explicitly negated Plaintiff's claim. *See Bott,* 949 So. 2d at 296-97. Further, even if Plaintiff denies having written a "note" indicating she was still working for Pitts while befriending Ms. Tanaka in 2022. The existence of such a note does not suggest wrongdoing or cause reputational harm and concerns an undisputed statement regarding employment, which is not defamatory. *See Smith,* 731 So. 2d at 704. By Plaintiff's own admission, she befriended Ms. Tanaka at the urging of Mr. Pitts and passed information along about Ms. Tanaka to Mr. Pitts, periodically.

Statement 11: Plaintiff also argues that the Article falsely implies that she orchestrated or attended a "sham" press conference or was working for Florida Power and Light ("FPL"). The Article expressly attributes the press conference to a private detective and Dan Newman, "a political operative with financial links to Matrix." Motion, Ex. A. The Article does not implicate Plaintiff in the planning or execution of the press conference. Plaintiff's own pleading denies her involvement, further undermining her implication theory. *See Jews for Jesus,* 997 So. 2d at 1106. To be actionable as defamation by implication, the implication must be both false and defamatory despite literal truth. *Id* .at 1107-08. Here, Plaintiff's implication claim fails because the term "sham" is opinion and the surrounding facts do not support Plaintiff's strained implications. *See Ozyesilpinar v. Reach PLC,* 365 So. 3d 453, 460 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1004a]. Further, the Article's reference to a separate payment from Matrix is undisputed. SAC ¶ 81(11).

The Court finds that none of the challenged Statements are defamatory as a matter of law and therefore dismisses the cause of action arising from them. Further, despite opportunity to amend—Plaintiff has only added to the credibility to the substantial truthfulness of the News Media Defendants' statements as reported in the article at issue. The Court finds that because further opportunity for amendment would be futile to Plaintiff's ability to state an actionable claim, dismissal with prejudice is appropriate.

It is therefore **ORDERED AND ADJUDGED** that the News Media Defendants' Motion is **GRANTED.** Counts II and IV against the News Media Defendants are hereby dismissed **WITH PREJUDICE**. The Court retains jurisdiction to resolve the News Media Defendants anti-SLAPP argument and request for fees.

---

[1]The parties stipulated to defer consideration of the anti-SLAPP arguments raised by the News Media Defendants' Motion. Accordingly, this Order addresses only the arguments surrounding Rule 1.140(b)(6) and the Court reserves ruling the Defendants' anti-SLAPP arguments. The anti-SLAPP portion of the Motion remains pending and will be resolved after the parties schedule it for a separate hearing.

[2]In her opposition to the Motion, Plaintiff argues that the Second Amended Complaint asserts a claim for invasion of privacy against the News Media Defendants. It does not. The face of the pleading makes clear that Count III is pled solely against Defendant Pitts. The Court will not consider Plaintiff's arguments concerning a claim that was never pled against the News Media Defendants.

[3]At the hearing, counsel for Plaintiff argued that social media posts including statements previously alleged to be at issue were still operative under the SAC despite not being included in Plaintiff's list of challenged statements. Plaintiff does not have the benefit of arguing allegations raised in both the original, First Amended and now Second Amended Complaint. Plaintiff did not seek leave to file a Third Amended Complaint to re-allege the statements that are omitted from the Second Amended Complaint. Insofar as the Court heard oral argument over these statements, the Court declines to include them in the analysis present in this Order as they are not contained within the four-corners and attachments made to the Second Amended Complaint.

[4]For this reason, this Statement is also not "of and concerning" Plaintiff and is therefore not actionable on this additional ground. *See, e.g., Thomas v. Jacksonville Television, Inc.,* 699 So. 2d 800, 805 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2287e].

* * *

Insurance—Insolvent insurer—Florida Insurance Guaranty Association—FIGA cannot be held liable for insolvent insurer's breach of insurance contract

EVELYNE OLIBRICE, Plaintiff, v. FLORIDA INSURANCE GUARANTY ASSOCIATION, INC, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21015480. Division 18. June 11, 2025. Fabienne E. Fahnestock, Judge. Counsel: The Roller Law Group, Miami Beach, for Plaintiff. Hernandez & Valois, P.A., Ft. Lauderdale, for Defendants.

ORDER ON FLORIDA INSURANCE GUARANTY ASSOCIATION'S MOTION TO DISMISS COUNT I OF PLAINTIFF'S AMENDED COMPLAINT AND STRIKE PLAINTIFF'S CLAIMS FOR INTEREST AND COSTS

THIS CAUSE having come before this Court on FLORIDA INSURANCE GUARANTY ASSOCIATION's ("FIGA") Motion to Dismiss Count I of Plaintiff's Amended Complaint and to Strike Plaintiff's claims for interest and costs, and the Court having heard argument of counsel on June 4, 2025, and being otherwise duly

advised in the premises, it is thereupon;

ORDERED AND ADJUDGED:

1. FIGA's Motion to Dismiss Count I (Breach of Contract) is **GRANTED**. FIGA's obligations arise solely under the Florida Insurance Guaranty Association Act, Chapter 631, Part II, Florida Statutes, and not from the insurance contract of the insolvent insurer. Accordingly, FIGA cannot be held liable for breach of contract. **Count I is DISMISSED with no leave to amend.**

2. Plaintiff's claims for costs and interest are STRICKEN BY AGREEMENT of the parties, as confirmed on the record.

3. FIGA is ORDERED to file their Answer to Plaintiff's Amended Complaint within ten (10) days from the entry of this Order.

* * *

Child support—Magistrates—Recusal—General magistrate who recused himself from matter did not have authority to assign matter to alternate magistrate—Once magistrate or hearing officer recuses or disqualifies from case, court must vacate referral to that magistrate and enter new order of referral to successor magistrate or hearing officer

DOMINIQUE LOUIS, Petitioner, v. DANYIEL LOUIS, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. FMCE16015351 (33). July 8, 2025. Johnathan D. Lott, Judge. Counsel: Dominique Louis, Pro se, Plaintiff. Yolanda L. Fox, for Respondent.

ORDER VACATING REFERRAL TO GENERAL MAGISTRATE

Before the Court is an apparent issue of first impression: what happens when a General Magistrate to whom a proceeding has been referred recuses or disqualifies from a case?

On April 8, 2025, trial and other matters in this case were referred to the General Magistrate. Separately, the same day, child support matters were referred to the Hearing Officer. On April 27, 2025, Petitioner objected to the referral. The next day, this Court entered an order overruling his objection as untimely.

On May 9, 2025, the General Magistrate / Hearing Officer entered a recommended order recusing herself from the matter and assigning the mater to an alternate General Magistrate / Hearing Officer. The same day, this Court entered an order ratifying and approving the Order.

On May 19, 2025, Petitioner objected to the referral to an alternate General Magistrate.

The proper procedure after a General Magistrate or Hearing Officer is recused or disqualified from a matter is for the Court to vacate the referral at the time of recusal and enter a new order of referral to the subsequent General Magistrate / Hearing Officer. Although neither this Court nor the parties were able to locate any authority directly bearing on the point, this is the best reading of the plain language of Rule 12.490.[1]

"Unlike an Article V judge, a magistrate has no inherent authority but has only the authority permitted by rule." *Humphrey v. Humphrey,* 296 So. 3d 536, 539 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1124e]. "The judicial power granted to judges under the Florida constitution is not delegable and cannot be abdicated in whole or in part by the courts." *Id.* "To that end, rule 12.490(b)(1) requires that before a general magistrate hear a family law matter, a trial court must enter an order of referral and that the parties consent to the referral to the general magistrate." *Toledano v. Garcia,* 338 So. 3d 1009, 1013 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D351a].

Rule 12.490 does not address what happens when a magistrate disqualifies or recuses. But it contains language suggesting that a referral does not carry with a case when a magistrate recuses. The Rule provides that "No matter can be heard by a general magistrate without an appropriate order of referral and the consent to the referral of all parties." Rule 12.490(b)(1). And it makes clear that "Consent" pertains to "a specific referral." *Id.* Further, the Rule provides that "The order of referral must state with specificity the matter or matters being referred and the name of the specific general magistrate to whom the matter is referred." Rule 12.490(b)(3).

The Rule's emphasis on the requisite specificity of the referral carries the day. Once a magistrate recuses or disqualifies, the existing order of referral necessarily ceases to have the required specificity, as it no longer states "the name of the specific general magistrate to whom the matter is referred."

Accordingly, in order to ensure compliance with the Rule, once a General Magistrate or Hearing Officer recuses or disqualifies from a case, the Circuit Judge must vacate the (now defective) referrals to that official and enter new orders of referral to any successor magistrate or hearing officer. *Cf. Toledano,* 338 So. 3d at 1013 ("[I]t is well established that where a general magistrate addresses matters beyond those referred by the trial court, any findings of fact and recommendations on that issue are a nullity.").

That is how this Court will proceed. It is ORDERED:

(1) This Court's April 8, 2025 referrals to the General Magistrate and Hearing Officer are VACATED.

(2) By separate order, this matter will be referred to the General Magistrate and Hearing Officer now assigned to this case.

---

[1]Dicta in *Quincoces v. Quincoces*, 10 So. 3d 657, 659 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D729a] is consistent with this interpretation. *See id.* ("Although the trial court remanded the case to the magistrate to conduct the hearing, the magistrate recused herself and the mother objected to another magistrate hearing the matter.").

* * *

Child custody—Relocation—Hearing—Time restrictions—Objection to use of chess clock to limit each party to equal share of time in three-hour hearing is overruled—Use of clock is within trial court's authority to efficiently manage proceedings, three hours is ample and appropriate amount of time for relocation trial, and neither party objected to timekeeping or suggested that time was insufficient until after time ran out

DOR ATIYA, Petitioner, v. TOMER SHPERLING, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. FMCE25000275 (33). July 15, 2025. Johnathan D. Lott, Judge. Counsel: Daniel B. Saltzman, for Petitioner. Joshua L. Fisher, for Respondent.

ORDER OVERRULING OBJECTION TO TIMEKEEPING

How is a Court to balance the demands of judicial economy with providing every litigant with their full day in Court?

This Court has developed an answer: the chess clock. Hear this out.

This Court set up a chess clock for this hearing, as it often does with contested hearings. It used the chess clock at www.chessclock.org. It assigned 90 minutes to each litigant and strictly kept time. Each party could use their 90 minutes as they saw fit—for argument, examination of their own witnesses, or cross examination of the other side's witnesses. The timers were paused during housekeeping, breaks, and times of technical difficulties. The browser with the chess clock was projected on a large screen in the courtroom that was visible to both parties throughout the hearing. Both parties were also apprised by the Court about the time limit throughout the hearing.

These rules were announced at the beginning of the hearing. The hearing was previously coordinated for 3 hours, from 1:30pm to 4:30pm. Neither party, at any time before the countdown began, argued that the 90 minutes allotted would be insufficient, or provided good cause that more time was necessary. The Court, sua sponte, extended the time by 5 minutes per side.

This chess clock system is the ideal way to balance the demands of fairness to the parties with fairness to *all litigants.* This division has

nearly 1,000 cases on its docket at any given time. About 150 cases a month are filed in the division. There are not enough business hours in the year for each case to be afforded an hour of trial time. This division is specially setting trial days six or seven months out, which is *not even bad* for this Circuit.

In short, judicial economy demands that each case gets the amount of time it *needs*, and not the amount of time the parties *want.*

The chess clock system ensures fairness and due process to the parties in such a system. Both parties are allocated the same amount of time to present their case. They can allocate that however they want, and they are informed up front that they need to use their time judiciously. If they spend all their time cross examining the other side's witnesses, for example, they won't have much time left to present their own case in chief. But that decision rests solely on them, and they will reap the rewards and suffer the consequences of their strategic calculations (or miscalculations) in case presentation. There is no universe, for example, where they would not have time or a right to present their case in chief, because they had the ability to use their time however they saw fit. If a Petitioner spends a disproportionate amount of time on their case in chief, the Respondent may choose to spend a disproportionate amount of time cross examining those witnesses, or may choose to spend a disproportionate amount of time on his own case in chief, in which case the Petitioner would have little time reserved to cross examine his witnesses. Again, both parties will reap the fruits or follies of their own allocation decisions.

And what is the alternative? If time is not limited, then it is unlimited. And what happens towards the end of the day when lawyers and court staff need to go home to pick their kids up? The trial gets continued? For how long? Six months out like the rest of the litigants awaiting trial? Do these parties get priority over the others? Why should they? And how is that possibly fair to *these* litigants who have been waiting months for their own trial and *still* don't get resolution?

Continuing the hearing indefinitely so that everyone can have all the time they want is unacceptable. And failing to keep time strictly will result in one side unfairly consuming more time to the detriment of the other. After all, "the trial court has a duty to control the proceedings, ensuring that both sides have a fair share of the court's time." *Smith v. Smith,* 964 So. 2d 217, 219 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2041a]. And absent strictly keeping time, due process may demand continuing the hearing, because everyone has a right to fully and fairly present their case. "The failure to give a party the chance to present witnesses or testify violates the fundamental right of a full and fair opportunity to be heard in judicial proceedings." *Julia v. Julia,* 146 So. 3d 516, 521 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1792b] (cleaned up) (quotations and citations omitted); *accord Vollmer v. Key Dev. Properties, Inc.,* 966 So. 2d 1022, 1027 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2505a] ("The right to be heard includes the right to introduce evidence at a meaningful time and in a meaningful manner.") (cleaned up).[1]

The chess clock preserves and protects these rights at the ***front end***, rather than the back end, of trial. It ensures that every party has the same ***opportunity*** to present their case. *Cf. Pettry v. Pettry*, 706 So. 2d 107, 108 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D542a] ("Due process requires that a party be given the *opportunity* to be heard and to testify and call witnesses on his behalf. . .") (emphasis added). It ensures both finality and fairness to the parties at hand and the other 1,000 sets of parties waiting for their day in Court.

In *Sullivan v. Sullivan,* 736 So. 2d 103, 105 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1473a], the Fourth District approved of a similar system. There, "[a]t the commencement of trial, the trial court announced it had a day and a half and that the time would be equally split between the parties' presentations. During the trial, the court periodically advised counsel how they were managing their time." The Court approved of this system:

> The trial court has authority under section 90.612, Florida Statutes (1997), to efficiently manage trial proceedings, including "avoiding the needless consumption of time." While pre-established time limits must flex with circumstances, the time of a trial judge is not an infinitely elastic commodity. There are other cases waiting to be heard. A full and fair hearing does not require a trial court to allow unlimited time. Imposing fair and predetermined time limits does not, standing alone, deprive a party of due process of law. Given the heavy obligations of trial courts to manage judicial resources efficiently, the trial court's procedure in this case was responsible and appropriate.

Id. at 105-06 (citations omitted).

Accordingly, the chess clock system is fundamentally different from cases in which courts have found that failing to afford additional time denied due process. *Cf., e.g., Julia*, 146 So. 3d at 520 ("Although the trial court made statements that the parties would be given equal time and that the Wife would get the opportunity to present her case-in-chief, no such opportunity was presented. The Wife was not able to call any witnesses on her behalf or present argument of counsel at the end of the Husband's case in violation of the guarantees of due process."); *Walters v. Petgrave*, 248 So. 3d 1202, 1203 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1339b] ("[O]n that second day, despite the court having stated repeatedly that the mother would have the opportunity to present her case-in-chief, the circuit court ultimately stated that due to its time limitations, the mother would not have the opportunity to present her case-in-chief . . . This was error."); *Stamler v. Stamler,* 407 So. 3d 1265, 1270 (Fla. 2d DCA 2025) [50 Fla. L. Weekly D853b] ("Though the trial court's adherence to the one-hour time limitation set for the hearing is understandable, due process required that the trial court complete the hearing and allow Former Husband the opportunity to present evidence on the disputed factual issue of what he had already reimbursed and what he had not"); *Pino v. Pino,* 380 So. 3d 1194, 1197 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D538b] ("[T]he trial court abused its discretion when it did not provide Former Husband with the same opportunity to be heard as Former Wife."); *Domnin v. Domnina,* 361 So. 3d 382, 384 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1060b] ("However, the circuit court's termination of the hearing without the husband having been given an opportunity to present his case-in-chief before the circuit court ruled on the wife's motion was a denial of due process."). Unlike cases in justice was administered "arbitrarily with a stopwatch," *Woodham v. Roy,* 471 So. 2d 132, 134 (Fla. 4th DCA 1985), justice is being administered *fairly and equally* with a stopwatch.

Parties are, of course, entitled to enough time to fairly present their case. Here, this matter was set for a half day, from 1:30pm-4:30pm. (In fact, the hearing went closer to 5:30, after accounting for breaks, housekeeping discussions, technical slowdowns, etc.) In this Court's experience, that is an ample and appropriate amount of time for a relocation trial. This Court considered appropriate factors in setting this time, including "length of trial, number of witnesses, amount of evidence, importance of the case, number and complexity of issues, amount involved and press of time." *Woodham,* 471 So. 2d at 134. Such time under all the circumstances was "reasonable and [w]ould permit counsel an adequate opportunity to relate the factual argument to the governing principles of law." *Id.*

But moreover, no party ever suggested (before time ran out) that there would not be enough time. No party raised an issue when the Court allocated 90 minutes per side and explained the rules and rationale on the record. Allowing parties to raise such an objection at the back end removes any incentive for the parties to use their time efficiently. It would allow parties all the time they want, rather than the time they need.

At the conclusion of time, and the evidence, Respondent objected to the timekeeping and asked for additional time to present another witness. That objection is overruled. Respondent *had* time to present that witness. He *chose* to use that time for other purposes.

For these reasons, Respondent's objection is OVERRULED.

---

[1]It is, of course, axiomatic that trial courts have great discretion over the control and management of their dockets in order to promote judicial economy. *E.g., Pino v. Pino,* 380 So. 3d 1194, 1197 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D538b] ("[T]he trial court does have discretion in how it gives a party the opportunity to be heard."); *Saldana v. State,* 295 So. 3d 1235, 1238 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1116a] ("Courts have *wide latitude* to regulate court proceedings before them 'in order that the administration of justice be speedily and fairly achieved in an orderly and dignified manner") (cleaned up) (emphasis in original); *D.W. v. State*, 388 So. 3d 1161, 1165 (Fla. 2d DCA 2024) [49 Fla. L. Weekly D1346a] ("In the absence of a controlling statute or overriding rule of procedure, the method of conducting a trial is within the reasonable discretion of the trial court.") (cleaned up) (quotation omitted); *Condo. Owners Org. of Century Vill. E., Inc. v. Century Vill. E., Inc.,* 428 So. 2d 384, 386 (Fla. 4th DCA 1983) ("[I]n arranging logistics trial courts should be accorded maximum discretion, particularly in these litigious days when dockets in this area are uniformly overcrowded. The trial judges are truly on the firing line and so are in a much better position to determine how to handle their dockets."); *Woodham v. Roy,* 471 So. 2d 132, 133 (Fla. 4th DCA 1985) ("[T]he limitation of the time for argument must of necessity, within reasonable bounds, rest in the discretion of the trial court.") (quotation omitted); *Brown v. State,* 894 So. 2d 137, 154 (Fla. 2004) [29 Fla. L. Weekly S764a] ("[M]atters regarding the length of legal argument and the length of a proceeding generally fall within a trial court's discretion.").

* * *

Torts—Automobile accidents—Vicarious liability—Transportation network companies cannot be held vicariously liable for TNC driver's actions where driver is independent contractor as matter of law under TNC statute, there was no criminal wrongdoing on part of companies, companies fulfilled their obligations under TNC statute with respect to driver, and companies were not owners or bailees of vehicle driver was driving at time of accident—Plaintiff did establish that joint venture relationship existed between companies and TNC driver—TNC driver was neither agent nor apparent agent of companies—TNC statute expressly forbids claims against companies based on any alleged theory of vicarious liability, including agency or apparent agency—Negligence—Direct negligence claim against companies fails as matter of law where companies owed no legal duty to plaintiff to promote safe driving, prevent negligent or reckless driving, or warn TNC driver against excessive speed—No merit to claim that TNC statute imposes duty on companies to warn TNC drivers of excessive speed—Final judgment is entered in favor of companies

GABRIEL PIERRE, Plaintiff, v. GUSTAVO LOPEZ PARRIA, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE22009555. Division 08. March 20, 2025. David A. Haimes, Judge. Counsel: Ruben J. Paillere, The Justice League of Florida, PLLC, Miami Beach, for Plaintiff. Crystal J. Valencia and Versa Jones Adams, Roig Lawyers, Miami, for Uber Technologies, Inc. and Raiser-DC, LLC, Defendants.

ORDER GRANTING DEFENDANTS UBER AND RASIERS' AMENDED MOTION FOR SUMMARY JUDGMENT AND FINAL SUMMARY JUDGMENT AS TO DEFENDANTS UBER AND RASIER

THIS CAUSE having come before the Court at a special set hearing on February 25, 2025, upon Defendants, UBER TECHNOLOGIES, INC. ("Uber") and RASIER-DC LLC'S (also incorrectly sued as "RASIER, LLC" AND "RASIER, LLC d/b/a RASIER (FL), LLC") ("Rasier") (collectively, "Uber Defendants"), Amended Motion for Final Summary Judgment filed on January 3, 2025, and the Court having considered the Motion, after hearing argument of counsel, reviewing the case authorities, and being otherwise fully advised in the premises, it is hereupon:

ORDERED AND ADJUDGED that Defendants Uber and Rasiers' Amended Motion for Final Summary Judgment is GRANTED. Accordingly, Final Judgment is entered as to Defendants, UBER TECHNOLOGIES, INC, RASIER-DC, LLC, RASIER, LLC and RASIER, LLC d/b/a RASIER (FL), LLC.

Based on all record evidence and case law supporting Uber Defendants' Amended Motion for Final Summary Judgment, the Court holds that the Uber Defendants have established that Mr. Parria was an independent contractor pursuant to Florida's TNC Statute, and there can be no liability, direct or vicarious, found against Uber Defendants. Mr. Parria was not an agent, apparent agent, or joint venturer of the Uber Defendants and the Uber Defendants were not directly negligent as they had no duty to design the driver version of the Uber Application ("Driver App") to prevent or warn Mr. Parria of any alleged unsafe driving. **Accordingly, Defendants Uber and Rasier's Amended Motion for Final Summary Judgment is GRANTED.**

ANALYSIS

A. TNC Drivers are Independent Contractors and Uber Defendants cannot be held Vicariously Liable for TNC Drivers' Actions

1. TNC drivers, like Mr. Parria, are independent contractors. This is supported by precedent, the TNC statute Fla. Stat. § 627.748, the contract between Mr. Parria and the Uber Defendants and all evidence and case law provided in the Uber Defendants' Amended Motion for Summary Judgment. *See McGillis v. Dep't of Econ. Opp'y*, 210 So. 3d 220 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D301c]; *see also* Fla. Stat. § 627.748 (9) and Uber Defendants' Amended Motion for Summary Judgment generally and at Ex. C, D, E and F.

2. The TNC Statute, Fla. Stat. § 627.748, categorizes TNC drivers, such Mr. Parria, as independent contractors provided that the following four criteria are met: (1) The TNC does not unilaterally prescribe specific hours during which the TNC driver must be logged on to the TNC's digital network; (2) The TNC does not prohibit the TNC driver from using digital networks from other TNCs; (3) The TNC does not restrict the TNC driver from engaging in any other occupation or business; (4) The TNC and TNC driver agree in writing that the TNC driver is an independent contractor with respect to the TNC.

3. All of these factors have been satisfied and therefore, Mr. Parria is an independent contractor as a matter of law and is not controlled by the Uber Defendants. Fla. Stat. § 627.748(9); *see also McGillis v. Dep't of Econ. Opp'y*, 210 So. 3d 220 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D301c]. Specifically, Mr. Parria was responsible for the hours he worked, for the vehicle he used, was not prohibited from engaging in any other occupation or business, and Mr. Parria entered into an agreement, the Platform Access Agreement ("PAA"), which unambiguously states that Mr. Parria is an independent contractor.

4. Additionally, the TNC Statute expressly provides that TNCs are not liable for harms to persons or property arising out of the use, operation, or possession of a motor vehicle operating as a TNC vehicle while the driver is logged on to the digital network if:

1. There is no negligence under this section or criminal wrongdoing under the federal or Florida criminal code on the part of the TNC;
2. The TNC has fulfilled all of its obligations under this section with respect to the TNC driver; and
3. The TNC is not the owner or bailee of the motor vehicle that caused harm to persons or property.

See Fla. Stat. § 627.748 (18).

5. Here, the Uber Defendants have established that they complied with the requirements of the TNC statute. The Uber Defendants were not negligent under the TNC statute and there was no criminal wrongdoing on the part of the Uber Defendants; the Uber Defendants fulfilled all of their obligations under the TNC statute with respect to Mr. Parria; and the Uber Defendants were not the owner or bailee of

the vehicle Mr. Parria was driving during the time of the subject accident.

6. Accordingly, this Court finds that Mr. Parria was at all relevant times an independent contractor and not an agent, apparent agent or joint venturer of the Uber Defendants and the Uber Defendants cannot be held vicariously liable for Mr. Parria's actions pursuant to Florida's TNC statute.

B. TNC Drivers are not Joint Venturers of the Uber Defendants

7. Mr. Parria is an independent contractor, as expressly provided in the TNC Statute. Fla. Stat. § 627.748(9). He is not a joint venturer of the Uber Defendants. As elaborated in the Uber Defendants' Amended Motion for Summary Judgment, a joint venture must arise out of a contract, either express or implied.

8. In addition to proving the essentials of an ordinary contract, in contracts creating joint ventures there must be: (1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits and (5) a duty to share in any losses which may be sustained. *Kislak v. Kreedian*, 95 So.2d 510, 516 (Fla. 1957). Plaintiff fails to establish all of the elements of a joint venture relationship. There is no record evidence establishing any of these elements.

9. The Uber Defendants established that Mr. Parria entered into the PAA wherein it was explicitly agreed that Mr. Parria did not have a joint venture relationship with the Uber Defendants. Plaintiff provided no record evidence, affidavit, or declaration contesting the Uber Defendants' Declaration or Mr. Parria's deposition testimony that Mr. Parria entered into the PAA.

10. Additionally, the Uber Defendants did not exert control over Mr. Parria, an independent contractor, as defined by the TNC Statute. *See* Fla. Stat. § 627.748 (9). The Uber Defendants did not unilaterally prescribe specific hours during which Mr. Parria must be logged on to their digital network; the Uber Defendants did not prohibit Mr. Parria from using digital networks from other TNCs; and the Uber Defendants did not restrict Mr. Parria from engaging in any other occupation or business.

11. Plaintiff failed to establish record evidence to satisfy the common law elements of joint venture established by *Kislak*. *See Kislak v. Kreedian*, 95 So.2d 510, 516 (Fla. 1957). Moreover, Plaintiff failed to provide any evidence to refute the Uber Defendants' evidence that Mr. Parria was an independent contractor as provided by the TNC Statute.

12. For these reasons, no joint venture existed between the Uber Defendants and Mr. Parria and the Uber Defendants are entitled to summary judgment on Plaintiff's joint venture claims.

C. TNC Drivers are not Agents of the Uber Defendants

13. The TNC statute is dispositive on the issue of agency, a vicarious action, as the TNC statute expressly precludes vicarious liability claims against TNCs, like the Uber Defendants, based on any alleged theory of vicarious liability, including agency. *See* Fla. Stat. § 627.748(18).

14. In an effort to dispute summary judgment as to Plaintiff's agency allegations against the Uber Defendants, Plaintiff pointed to the fact that Mr. Parria provided his driver's license, proof of insurance, vehicle registration, and underwent a background check to support that the Uber Defendants controlled Mr. Parria and that Mr. Parria was therefore an agent of Defendants. This Court finds this to be evidence of compliance with Florida's TNC regulations, and not evidence of the requisite control over Mr. Parria to establish agency. *See* Fla. Stat. § 627.748 (12)(a)1.-3. It is well-established that merely complying with statutory regulations is not evidence of control. The TNC statute espouses the requirements that must be met by TNCs, like Defendants, and drivers, like Mr. Parria; these requirements are not requirements of the Uber Defendants. Plaintiff cannot attribute the minimal level of control that is mandated by the applicable TNC statute to the Uber Defendants.

15. Additionally, this Court finds Plaintiff's assertion that agency is a factual question for the jury to be without merit. Florida Courts have considered similar agency arguments to the ones brought in this case, which involve individuals who utilize software applications to connect with potential customers while operating their independent businesses enjoy an autonomy that categorically falls outside the scope of an employment and agency relationship under Florida law. These Courts have concluded that drivers who utilize a digital platform to connect with potential customers are considered independent contractors and not agents at the summary judgment level.

16. Based on the entirety of the record evidence, Plaintiff has failed to present any competent evidence to create an issue of material fact sufficient to preclude summary judgment based on agency. Therefore, Mr. Parria was not an agent of the Uber Defendants and therefore, the Uber Defendants' Amended Motion for Summary Judgment as to Plaintiff's agency claims is granted.

D. TNC Drivers are not Apparent Agents of the Uber Defendants

17. The TNC statute is also dispositive on the issue of apparent agency, another vicarious action, as the TNC statute expressly precludes vicarious liability claims against TNCs, like the Uber Defendants, based on any alleged theory of vicarious liability. *See* Fla. Stat. § 627.748(18). The Court reviewed the Uber Defendants' Amended Motion for Summary Judgment, supporting declaration, the pleadings, and case law attached thereto, and finds that Mr. Parria was not an apparent agent of the Uber Defendants, and, therefore, the Uber Defendants are entitled to judgment in their favor on the apparent agency claim.

18. Apparent agency requires a showing of three elements: "(a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation." *MDVIP, Inc. v. Beber*, 222 So. 3d 555, 563-64 (Fla. 4 Dist. Ct. App. 2017) [42 Fla. L. Weekly D1248a] "Reliance on apparent authority 'must be ***reasonable*** and rest in the actions of or appearances created ***by the principal***.' " *Id*. at 520 (quoting *Lensa Corp. v. Poinciana Gardens Ass'n*, 765 So.2d 296, 298 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1997a]).

19. Here, Plaintiff has not sufficiently provided record evidence to satisfy each of the elements of apparent agency as Plaintiff has not provided record evidence to support that the Uber Defendants made any representation to Plaintiff that Mr. Parria was their agent, that Plaintiff relied on that representation, or that Plaintiff changed his position in reliance of such representation.

20. Moreover, pursuant to the TNC Statute, Mr. Parria is an independent contractor and Uber Defendants cannot be held vicariously liable for his actions.

21. Accordingly, the Court finds no apparent agency relationship between the Uber Defendants and Mr. Parria who was at all relevant times using the Driver App to provide services as an independent contractor. As such, the Court finds that Mr. Parria was not an apparent agent of the Uber Defendants and therefore, the Uber Defendants are entitled to summary judgment in their favor as to Plaintiff's Apparent Agency claim.

E. Plaintiff's Direct Negligence Claim Against the Uber Defendants Fails as a Matter of Law as No Legal Duty was Owed by the Uber Defendants

22. Plaintiff further alleged that the Uber Defendants owed a duty to the general public and specifically to Plaintiff to exercise reason-

able care in the operation of its business; specifically to operate its ridesharing business through the use of technology that promotes safe driving and that the Uber Defendants breached their duty to Plaintiff, by, *inter alia*, requiring Mr. Parria to use a defective app, failing to prevent the app from being operated by Mr. Parria while actively driving, promoting reckless and distracted driving and failing to warn Mr. Parria of his speed.

23. Plaintiff later alleged in his Response to the Uber Defendants' Amended Motion for Summary Judgment and again at the hearing, that the Uber Defendants owed Plaintiff an alternative duty to warn Mr. Parria of his speed during the subject "Prearranged ride," citing to the definition of "Prearranged ride" found at Fla. Stat. § 627.748(1)(b). Plaintiff argued that the Uber Defendants owed a limited duty to Plaintiff to warn Mr. Parria of his speed while Mr. Parria was on a prearranged ride. This assertion was never made in the operative Fourth Amended Complaint or any of Plaintiff's numerous prior iterations of his Complaints.

24. Florida Statute § 627.748(1)(b) defines "Prearranged ride" as:

> (1)DEFINITIONS.—As used in this section, the term:
>
> . . .
>
> (b)"Prearranged ride" means the provision of transportation by a TNC driver to a rider, beginning when a TNC driver accepts a ride requested by a rider through a digital network controlled by a transportation network company, continuing while the TNC driver transports the rider, and ending when the last rider exits from and is no longer occupying the TNC vehicle. The term does not include a taxicab or street hail service and does not include ridesharing as defined in s. 341.031, carpool as defined in s. 450.28, or any other type of service in which the driver receives a fee that does not exceed the driver's cost to provide the ride.

See Fla. Stat. § 627.748(1)(b).

25. Generally, in order to prevail on a claim of negligence, Plaintiff must show that (1) defendants owed a duty to Plaintiff, (2) that the defendants breached that duty, (3) that the breach was the proximate cause of the injuries, and that the plaintiff suffered damages resulting from those injuries. *See Vincent v. C.R. Bard, Inc.*, 944 So. 2d 1083, 1085 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2829a]. For the reasons that follow, Plaintiff has not met this burden.

26. Establishing the existence of a duty under negligence law is the minimum threshold legal requirement that opens the courthouse doors.

27. This Court rejects Plaintiff's arguments that the Uber Defendants owed Plaintiff a duty to promote safe driving, prevent drivers from negligent or reckless driving, or to warn drivers of their potential excessive speed. The Uber Defendants provided established case law in their Amended Motion for Summary Judgment from cases throughout the state and nation to support that the Uber Defendants owed Plaintiff no duty arising from the use or misuse of the Driver App. The Court finds these holdings well supported and applicable to the direct negligence claim against the Uber Defendants proffered by Plaintiff.

28. Moreover, the Court finds that the definition of "Prearranged ride" found in the TNC Statute, and the TNC Statute in whole, does not prescribe a duty for the Uber Defendants to warn TNC drivers, like Mr. Parria, of their potential excessive speed and that any finding to the contrary would turn the TNC statute on its head.

29. The legislature made the decision to enact the TNC Statute that governs TNCs and based on that statute, TNCs, like the Uber Defendants, are immune from liability. Here, the Uber Defendants have satisfied the requirements of the TNC Statute. The Uber Defendants did not owe any additional duties not prescribed by the TNC Statute. Moreover, the Uber Defendants do not owe Plaintiffs a duty to prevent drivers from potential reckless driving or warn drivers of potential excessive speed, nor do the Uber Defendants owe a duty to prevent accidents from happening. Prescribing these additional duties to TNCs, like the Uber Defendants, to warn drivers of their speed would punish TNCs for simply developing apps regardless of whether they have the capability to do so, and is not consistent with established law and the TNC statute.

30. TNC drivers, like Mr Parria, are independent contractors and the Uber Defendants do not control them. It is the duty of TNC drivers like Mr. Parria—not Uber and Rasier—to exercise reasonable care, be alert to potential dangers, and to safely operate their vehicles. The Uber Defendants are not required to design a fail-safe app that controls or warns of a driver's speed and actions while driving.

31. As Plaintiff failed to establish the threshold negligence element of duty, Plaintiff's direct negligence claim against the Uber Defendants must fail. Accordingly, the Court finds that the Uber Defendants are entitled to summary judgment in their favor as to Plaintiff's direct negligence claim.

CONCLUSION

32. The Court finds that, as argued by the Uber Defendants, Mr. Parria is an independent contractor as defined under the TNC statute, Fla. Stat. § 627.748, not a joint venturer, agent or apparent agent of the Uber Defendants, and the Uber Defendants cannot be held vicariously liable for Mr. Parria's actions. Therefore, there is a lack of genuine issue of material facts as to Plaintiff's claims asserted against the Uber Defendants based on Joint Venture, Agency, and Apparent Agency and the Uber Defendants are entitled to judgment as a matter of law as to Counts II, III, and IV of Plaintiff's Fourth Amended Complaint.

33. As to Plaintiff's direct negligence allegation against the Uber Defendants, the Court finds that the Uber Defendants did not owe a duty to Plaintiff to design its app to prevent drivers from negligent or reckless driving, or to warn drivers of their potential excessive speed. The Uber Defendants have met their burden demonstrating that when evidence is viewed in the light most favorable to Plaintiff, there is a lack of genuine issue of material fact as to the Direct Negligence claim asserted against the Uber Defendants, therefore the Uber Defendants are entitled to judgment as a matter of law as to the remaining Count V of Plaintiff's Fourth Amended Complaint.

34. **ORDERED AND ADJUDGED that Defendants, Uber Technologies, Inc. and Rasier-DC, LLC's (also incorrectly sued as "Rasier, LLC" and "Rasier, LLC d/b/a Rasier (FL), LLC") Amended Motion for Final Summary Judgment is GRANTED.**

35. **Accordingly, for the reasons stated herein and set forth on the record, FINAL JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS, UBER TECHNOLOGIES, INC, RASIER-DC, LLC, RASIER, LLC and RASIER, LLC d/b/a RASIER (FL), LLC.**

36. The Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees.

37. Plaintiff, GABRIEL PIERRE, takes nothing by this action and Defendants, UBER TECHNOLOGIES, INC, RASIER-DC, LLC, RASIER, LLC and RASIER, LLC d/b/a RASIER (FL), LLC, shall go hence without day.

* * *

Volume 33, Number 5
September 30, 2025
Cite as 33 Fla. L. Weekly Supp. ____

COUNTY COURTS

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Bad faith—Argument that insurer's payment of other providers' bills at 2007 limiting charge was more than it was required to pay and was, therefore, gratuitous and in bad faith, fails as matter of law—Case law holds that gratuitous payments are those that are made on untimely claims and that bad faith requires bad faith in handling of plaintiff's claim, not claim by third party

EMERY MEDICAL SOLUTIONS, INC., a/a/o Tod Struck, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County, Civil Division. Case No. 2024-SC-031464-O. July 11, 2025. Heather Guarch, Judge. Counsel: Benjamin Jones, Lake Mary, for Plaintiff. Philip A. Coffaro, II, Allstate Client Legal Services, The Law Offices of Dolina Lordeus Lascaze, Ft. Lauderdale, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come on before the Court on June 2, 2025, upon Defendant's Motion for Final Summary Judgment and Plaintiff's Memorandum in Opposition to Defendant's Motion for Final Summary Judgment Regarding Exhaustion of Benefits and Plaintiff's Cross-Motion for Final Summary Judgment, and the Court having considered the record, having heard argument of counsel, and being otherwise duly advised in the premises, finds as follows:

I. UNDISPUTED FACTS

Defendant issued a policy of insurance that provided $10,000.00 in PIP benefits to the claimant, Tod Struck. Mr. Struck was in a motor vehicle accident on October 23, 2023 while the policy was in full force and effect. Mr. Struck then assigned his benefits to Emery Medical (Plaintiff). On or about January 22, 2024, Defendant tendered a sum of $10,000.00 in PIP benefits to various medical providers including the Plaintiff, for medical treatment rendered to Tod Struck. On August 19, 2024, Plaintiff filed a Complaint for breach of contract against Defendant. Defendant pled exhaustion of benefits in its Answer and Affirmative Defenses. Plaintiff filed a reply alleging bad faith.

II. SUMMARY JUDGMENT STANDARD

Pursuant to the newly amended Florida Rule of Civil Procedure 1.510(a) "[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." Fla. R. Civ. P. 1.510(a). In applying the amended rule, "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re: Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d at 75 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 25056 91 L. Ed. 2d 202 (1986)). The burden of proving the existence of material fact does not shift to the opposing party until the moving party has met its burden of proof. *Johnson v. Deutsche Bank Nat'l Trust Co. Americas*, 248 So.3d 1205, 1207-08 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1071a] citing *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So.3d 251 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2233a]. "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." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475, U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Plaintiff and Defendant rely on the same summary judgment evidence which consists of a sworn declaration, business records certification, the insurance policy, explanation of benefits, and the medical bills.[1] The Court finds there is no genuine issue as to material fact, and therefore summary judgment is appropriate.

III. ANALYSIS

Defendant argues that benefits were exhausted, and therefore no additional payment was owed to Plaintiff. Defendant relies on *Northwoods*, *Simon*, and *Stand-Up MRI*. *Northwoods Sports Medicine & Physical Rehab., Inc. v. State Farm Mutual Auto. Ins. Co.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a], see also *Simon v. Progressive Express Ins. Co.*, 904 So.2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b] and *Progressive American Ins. Co. v. Stand-Up MRI of Orlando,* 990 So.2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a] Plaintiff argues that Defendant improperly adjusted the bills because certain CPT codes were adjusted using the limiting charge rather than the applicable fee schedule. In support of this position, Plaintiff relies on *SimonMed. Progressive Express Insurance Co. v. SimonMed Imaging,* 363 So.3d 1196 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D990a]. Plaintiff further argues because Defendant has a venue selection clause in the policy, that Defendant is bound to follow the rationale in *SimonMed* and must adjust medical bills based on the applicable fee schedule, not the limiting charge; ignoring *SimonMed* and adjusting in this manner constitutes bad faith.

Once an insurer has paid out $10,000.00 in PIP benefits for valid claims, it cannot be liable for additional PIP benefits, absent bad faith. *Northwoods Sports Medicine & Physical Rehab., Inc. v. State Farm Mutual Auto. Ins. Co.,* 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a], see also *Simon v. Progressive Express Ins. Co.,* 904 So.2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b] and *Progressive American Ins. Co. v. Stand-Up MRI of Orlando*, 990 So.2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]. None of these holdings define what a "showing of bad faith" is in the context of a PIP litigation matter. The sole example of "bad faith" referenced in the *Geico*, *Northwoods,* and *Faderani* are payments of untimely bills constitute gratuitous payments. Plaintiff has failed to prove that the Defendant paid an untimely bill, thus made a gratuitous payment, and thus improperly exhausted benefits.

As mentioned in *Geico Indemnity Co. v. Gables Ins. Recovery, Inc., a/a/o Rita M. Lauzan*, the Third District Court of Appeals adopted the position of the Fourth and Fifth District Courts of Appeal as set forth in *Northwoods, Simon* and *Progressive American* wherein it was held that "in the absence of a showing of bad faith, a PIP insurer is not liable for benefits once benefits have been exhausted." 159 So. 3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a]. The Third District Court then concluded that "*Coral Imaging* only applies where the PIP insurer exhausts benefits by improperly paying untimely bills." *Id*. *Coral Imaging* holds exhaustion of benefits is only considered not valid, and does not count towards the $10,000.00 in PIP benefits, when untimely submitted claims are paid. *Coral Imaging Services v. Geico Indemnity Ins. Co.,* 955 So. 2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a].

Plaintiff's argument that the payment at the 2007 Limiting Charge was more than the Defendant was required to pay, thus gratuitous and therefore, bad faith fails as a matter of law. In *Faderani* the Fourth District Court of Appeal plainly stated its position on whether an "improper" payment constituted bad faith with the following: "Were we to write on a clean slate, and except for untimely payments, *we would hold that an insurance company's 'improper' payments to another provider do not constitute bad faith sufficient to overcome the insurance company's exhaustion of benefits defense* to a provider who sues for payment after the policy limits have been exhausted." *Progressive Select Ins. Co. v. Dr. Rahat Faderani, DO, MPH, P.A.*

a/a/o Roberson Pierre, 330 So.3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a]. Furthermore, the *Faderani* court understood that bad faith required bad faith in the handling of the Plaintiff's claim, not a claim by a third party (i.e., Next Medical LLC). As the Plaintiff has alleged that that bad faith was based upon the way Defendant allegedly overpaid a third-party, there is no evidence that the Defendant acted in bad faith. "Improper" payments are insufficient to meet the standard for bad faith and overcome the exhaustion of benefits defense.

While Plaintiff makes a tempting argument, the Court will ultimately reject it. *SimonMed* held the applicable schedule governing the insurer's obligation to reimburse a provider, as the insured's assignee in a PIP case was the participating physicians fee schedule for Medicare Part B for the services, supply and care rendered and certified conflict with the Third District Court of Appeal. The Court notes *SimonMed* involved a breach of contract claim where the provider claimed they were underpaid by the insurer based on the insurer adjusting pursuant to the Medicare Part B fee schedule, as opposed to the Limiting Charge. *Progressive Express Insurance Co. v. SimonMed Imaging,* 363 So.3d 1196 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D990a]. Nothing in *SimonMed* addresses exhaustion. Plaintiff also relies on the *Progressive Select Ins. Co. v. In House Diagnostic Services, Inc. a/a/o Darryl Frazier,* to support the assertion Defendant committed bad faith by paying a third-party medical provider pursuant to the 2007 Limiting Charge on the basis that Defendant knew or should have known about case law determining that the 2007 Limiting Charge is improper. 359 So. 3d 817 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D860g] see also *Priority Medical Centers, LLC a/a/o Susan Boggiardino v. Allstate Ins. Co.,* 319 So. 3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b]. While this argument makes sense—the venue selection clause binds the insurer to the law in that jurisdiction (here, the Sixth District Court of Appeal), insurer adjusted using the Limiting Charge, not the Medicare Part B fee schedule, therefore benefits were improperly exhausted, it ignores the litany of cases holding that gratuitous payments are those that are untimely and that bad faith pertains to handling of the actual Plaintiff's claim.

The Court notes that while the Fourth District found the 2007 Limiting Charge improper, it certified conflict with the Third District, which held the methodology proper for PIP reimbursement. Where such a conflict exists, reliance on one district court of appeal's approved methodology does not constitute bad faith under § 627.736, Fla. Stat.

As Defendant points out, and the Court cannot ignore, Plaintiff was paid in the same manner, utilizing the same fee schedule. It seems inconsistent for a Plaintiff to allege bad faith and a breach of contract where it was paid more than it "should" have been paid prior to the exhaustion of the $10,000.00 in PIP benefits. Further, there was no benefit to the Defendant paying this higher fee schedule for the bills it received prior to exhaustion of benefits.

In the instant matter, the Defendant issued all payments to the various medical providers that were reimbursed portions of the available $10,000.00 in PIP benefits properly for timely submitted bills. Pursuant to the ruling in *Stand-Up MRI,* payment of the contract in total is not an indication of improper behavior by the insurer. There is no responsibility of the insurer for an "insured's over-use of this policy." *Id.* at 6. Where Defendant "paid the claims in a reasonable manner in the order they were submitted" there is no benefit to Defendant and no means of demonstrating bad faith on its part. *Raemisch Chiropractic, a/a/o Orlando Alvarez v. State Farm Mut. Auto. Ins. Co.,* 28 Fla. L. Weekly Supp. 1029b (Fla. 9th Jud. Cir. 2020).

ORDERED and **ADJUDGED** that:

1. Defendant's Motion for Final Summary Judgment is **GRANTED** and Plaintiff's Memorandum in Opposition to Defendant's Motion for Final Summary Judgment Regarding Exhaustion of Benefits and Plaintiff's Cross-Motion for Final Summary Judgment is **DENIED.**

2. Final Judgment is hereby entered in favor of ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY. Plaintiff shall take nothing from this action and Defendant shall go hence without day.

[1]Docket Entry 25

* * *

ANANDHI VANGAL, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2024-CC-007014-O. June 16, 2025. Martha C. Adams, Judge. Counsel: Samantha Huffman, Serrano Cagan & Cagan, Maitland, for Plaintiff. Amanda M. Crane, Cole, Scott & Kissane, P.A., Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on May 28, 2025, Defendant's Motion For Final Summary Judgment and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

ORDERED AND ADJUDGED

1. The Court determined that there are competing expert opinions and an issue of fact exists for the jury to decide regarding the cause of the loss.

2. Defendant's Motion for Final Summary Judgment is DENIED

* * *

Traffic infractions—Citations—Failure to include applicable civil penalty and defendant's signature—Dismissal

STATE OF FLORIDA, Plaintiff, v. CARLOS RODRIIGO RODRIGUEZ JARRIN, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2025TR034951. July 17, 2025. Kevin M. Kohl, Judge. Counsel: Ira D. Karmelin, The Ticket Clinic, Kissimmee, for Defendant.

ORDER ON MOTION TO DISMISS WITHOUT PREJUDICE

THIS CAUSE having come before the Court for arraignment and Defendant's Motion to Dismiss Without Prejudice on July 15, 2025, and after reviewing the citation and case law, and being fully advised in the premises of this motion. Dated this *Thursday, July 17, 2025* in POLK Florida.

ORDER OF COURT

ORDERED AND ADJUDGED that Defendant's motion to dismiss without prejudice is HEREBY GRANTED. The Court finds that the citation in the Instant Cause, alleging an improper left turn resulting in the death of another, is an infraction requiring a mandatory court appearance. As such, pursuant to section 318.14(2), Florida Statutes (2024), the citation must contain the applicable civil penalty and Defendant's signature. 1 *State v. Quevedo-Munoz,* 32 Fla. L. Weekly Supp. 190a (Fla. Osceola Cty. Ct. 2024); 1 *State v. Rivera Valentin,* 32 Fla. L. Weekly Supp. 189b (Fla. Osceola Cty. Ct. 2024); *State v. Soto,* 32 Fla. L. Weekly Supp. 43b (Fla. Osceola Cty. Ct. 2024). The citation in the Instant Cause contains neither the civil penalty nor the Defendant's signature. As such, the Instant Cause is HEREBY DISMISSED WITHOUT PREJUDICE. Law enforcement may serve Defendant with another uniform traffic citation that comports with all requirements of the law within applicable time periods.

* * *

Insurance—Venue—Mandatory forum selection clause—Waiver—Untimely motion—Insurer waived right to transfer venue and exercise any rights under forum selection clause by failing to timely bring motion before court

SOUTH ORLANDO CHIROPRACTIC CARE, LLC., a/a/o Natacha Hyppolite, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-014102-CC-25. Section CG02. June 27, 2025. Gloria Gonzalez-Meyer, Judge. Counsel: Antonella Dos Santos, Dos Santos Law, P.A., Miami, for Plaintiff.

ORDER ON DEFENDANT'S AMENDED MOTION TO DISMISS AND/OR MOTIONTO TRANSFER VENUE RE: VIOLATION OF MANDATORY FORUM SELECTIONCLAUSE & FORUM OF NON-CONVENIENS

THIS CAUSE having come before the Court and the Court, having reviewed the motion, the Court filings and heard argument on Defendant's Amended Motion to Dismiss and/or Motion to Transfer Venue Re: Violation of Mandatory Forum Selection Clause & Forum of Non Conveniens the Court and being otherwise advised in the premises, it is hereby:

ORDERED AND ADJUDGED that:

1. Defendant's Amended Motion to Dismiss and/or Motion to Transfer Venue Re: Violation of Mandatory Forum Selection Clause & Forum of Non Conveniens is DENIED.

2. The Defendant filed its Motion to Transfer Venue but failed to take any action to set the motion for hearing for over two years and three months after the commencement of litigation. Such delay is inconsistent with the requirements of diligent motion practice and undermines the orderly administration of justice.

3. All deadlines established by the Uniform Pre-Trial Order have long since expired. The parties have engaged in and completed mediation, and the case is otherwise trial-ready. The Defendant's attempt to now litigate venue is untimely and disruptive to the progression of this matter.

4. Although the Defendant purports to rely on a mandatory venue clause, the Court finds that the right to enforce such a clause has been waived. Pursuant to Florida Rule of Civil Procedure 1.140(b), objections to venue must be raised in the first responsive pleading or by motion filed prior to or contemporaneously with the answer. The Defendant failed to do so. Moreover, the Uniform Case Management Order and applicable administrative orders of the Florida Supreme Court require timely prosecution of motions and adherence to case management deadlines. The Defendant's conduct is in direct contravention of these mandates

5. The Court finds that due to its failure to timely bring its motion before the Court, the Defendant has abandoned its Motion to Transfer Venue and, therefore, has waived its right to transfer venue and to exercise any rights under the contractual venue clause.

6. The Court further finds that this case is factually and procedurally distinguishable from *Open MRI Guys of Palm Beach, LLC v. Progressive*, 400 So. 3d 673 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D1950b]. In Open MRI, the defendant promptly filed its motion to dismiss and transfer venue along with a motion to stay proceedings, and both motions were timely set and heard before the court without engaging in substantive litigation. In contrast, the Defendant in this case failed to pursue its motion for over two years, only attempting to set it for hearing after the parties reached an impasse in mediation and after all pretrial deadlines had lapsed. This conduct reflects a clear intent to delay and frustrate the judicial process.

7. Additionally, the Defendant made an ore tenus request at the hearing to depose the claimant within 60 days. Although this issue was not noticed for hearing, the Court, in the interest of fairness and completeness of the record, grants this request.

* * *

Insurance—Homeowners—Standing—Insured's action against insurer—Because assignment of benefits to remediation company was invalid as matter of law under section 627.7152, insured retained all rights under policy and has standing to pursue claim against insurer—Insurer's partial payment to remediation company under emergency services cap does not extinguish its obligation to pay remainder of appraisal award—Moreover, insurer is equitably estopped from denying insured's right to pursue claim where insurer sent letter saying that it would be paying money to insured, not to remediation company, and insured paid company to settle work with them in reliance on that letter—Further, many services for which insured seeks reimbursement were not emergency services for which insurer paid remediation company directly—Insurer's motion for summary judgment is denied

SHERRY CARNEY, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX24025303. Division 62. July 3, 2025. Woody Clermont, Judge. Counsel: Isha Kumar and Daniela Coy, Milber, Makris, Plousadis & Seiden, LLP, for Plaintiff. Karina Rios, The Professional Law Group, PLLC, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on Defendant, CITIZENS PROPERTY INSURANCE CORPORATION'S, Motion for Summary Judgment. The Court has reviewed the motion, the response, the pleadings and their attachments, the insurance policy, the assignment, the sworn affidavits, the response to request for admissions, the correspondence, the photographs, diagrams, and other attachments, and writes this detailed order regarding how it decided the summary judgment. *See Rkhub Logistics LLC v. Eastern Auto Motor Corp.,* 344 So. 3d 485, 486, 2022 WL 3050346, at *1 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1628a] ("it will not be enough for the court to make a conclusory statement that there is or is not a genuine dispute as to a material fact."). This Court reviewed the applicable law, the file, and being otherwise duly advised in the premises, hereby FINDS and ORDERS as follows:

This action arises from a homeowner's insurance policy issued by Defendant, under which Plaintiff submitted a claim related to a 2022 loss. Plaintiff, the named insured under the policy, initially executed an Assignment of Benefits (AOB) in favor of a remediation company for services rendered post-loss. The Defendant disputed the validity of the AOB under section 627.7152, Florida Statutes (2022), and asserted that the AOB was invalid and unenforceable due to noncompliance with statutory requirements, including the failure to provide a written, itemized, per-unit cost estimate as required under section 627.7152(2)(a)4. Despite contesting the AOB's validity, Defendant paid $3,000 to the remediation company, citing the emergency services cap under §627.7152(2)(c), but refused to pay the remaining balance of the appraisal award for this portion of the claim directly to Plaintiff. Defendant now argues that Plaintiff lacks standing to recover the remaining $9,108.85 of the appraisal award, having partially paid the remediation company under the AOB. However, Florida courts have held that when an AOB is invalid under section 627.7152, the claim brought by the assignee must be dismissed. *See Kidwell Group, LLC v. United Prop. & Cas. Ins. Co.,* 343 So. 3d 97 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b]; *Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp.,* 261 So. 3d 613 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2178a].

The effect of an invalid assignment is that the insured (assignor) retains all rights under the policy, including standing to pursue any benefits owed. Defendant cannot simultaneously maintain that the

AOB is invalid and then use the invalid assignment to shield itself from paying the appraisal award to the insured. Such a position is internally inconsistent and unsupported by applicable law. The Court finds that the AOB is invalid as a matter of law under section 627.7152, and that Plaintiff, as the insured, has standing to pursue the claim. Defendant's partial payment to the remediation company under a statutorily capped provision does not extinguish its obligation to satisfy the remainder of the appraisal award, because the right to pursue the action belongs to the insured when standing is not transferred due to an invalid and unenforceable AOB. Citizens understood this rule, because that is precisely what its September 5, 2023, and October 4, 2023, letters were doing: telling Direct Dry Up it could not pay them directly because the assignment was invalid. Citizens changed its course, and yet nothing changed legally about its position—it still maintains the AOB is invalid.

Unenforceable Contracts

In general courts are not permitted to give validity to or enforce illegal contracts or that violate public policy. *See McMullen v. Hoffman,* 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899) (holding that no court will lend its assistance in any way towards carrying out the terms of an illegal contract). For example, when a party filed a motion to stay arbitration on the grounds that the contract was usurious, the trial court denied it, and the Fifth District Court of Appeal reversed because sending a case based on arbitration when the contract itself is illegal would breathe life into a contract that should not be enforced by the court. *Party Yards, Inc. v. Templeton,* 751 So.2d 121, 124 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D248a].

Where the contract contains a clause that is illegal, a court ought not to enforce the illegal term, as a contract cannot give validity to an otherwise illegal act. *Brumby v. City of Clearwater,* 108 Fla. 633, 149 So. 203 (1933); *Nizzo v. Amoco Oil Co.,* 333 So. 2d 491 (Fla. 3d DCA 1976). This rule is based on the rationale that no legal remedy exists for an illegal agreement. *D. & L. Harrod, Inc. v. U.S. Precast Corporation,* 322 So. 2d 630 (Fla. 3d DCA 1975); *Gonzalez v. Trujillo,* 179 So. 2d 896 (Fla. 3d DCA 1965).

The Fourth District Court of Appeal likewise follows this rule. *Katz v. Woltin,* 765 So. 2d 279, 280 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1960a]. "The contract being illegal, no action may be brought on it, whether in law or in equity." *Id*. The Florida Supreme Court has held that party to the contract suspected of being illegal may raise its illegality as an issue. *Local No. 234 of United Ass'n of Journeymen and Apprentices of Plumbing v. Henley & Beckwith, Inc.,* 66 So.2d 818, 823 (Fla. 1953). "This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." *Id*.

Not every contract that violates a statute is illegal, but where a particular provision is violated and the statute indicates the agreement is not enforceable for this violation, then courts should not enforce it. *See Well Done Mitigation, LLC v. Citizens Property Insurance Corporation,* 2025 WL 1774727, at *3 (Fla. 2d DCA 2025) [50 Fla. L. Weekly D1397d]; *Gale Force Roofing & Restoration, LLC v. Am. Integrity Ins. Co. of Fla.,* 380 So. 3d 1242, 1246 (Fla. 2d DCA 2024) [49 Fla. L. Weekly D387a] (affirming dismissal of complaint with prejudice where the assignment agreement violated section 627.7152(2)(a)2). In essence, the framework of section 627.7152, Florida Statutes does exactly this: it takes an assignment which is a contract, and it tests it for legal validity as to whether it complies with subsection (2). § 627.7152(2), Fla. Stat. (2022) ("An assignment agreement that does not comply with this subsection is invalid and unenforceable.") (emphasis added); *see also Ellis v. Titan Restoration Construction, Inc.,* 408 So. 3d 776, 779 (Fla. 4th DCA 2025) [50 Fla. L. Weekly D622c].

Standing

Standing is a legal doctrine that determines whether a party has the right to bring a lawsuit in court based on being the real party in interest. Fla. R. Civ. P. 1.210(b) ("All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and any person may be made a defendant who has or claims an interest adverse to the plaintiff "). "Standing is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson,* 952 So. 2d 498, 505 (Fla. 2006) [31 Fla. L. Weekly S763a]. To have standing, a party must show that they have suffered a concrete, particularized injury that is actual or imminent, not hypothetical. "In its broadest sense, standing is no more than having, or representing one who has, 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.' " *Kumar Corp. v. Nopal Lines, Ltd.,* 462 So. 2d 1178, 1182 (Fla. 3d DCA 1985) (quoting *Sierra Club v. Morton,* 405 U.S. 727, 731, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). The injury must be traceable to the conduct of the defendant and likely to be redressed by a favorable court decision. Without standing, the court lacks jurisdiction to hear the case. This is so that a defendant might be protected "from facing a subsequent similar action brought by one not a party to the present proceeding and to ensure that any action taken to judgment will have its proper effect as res judicata . . . ." *Kumar,* 462 So. 2d at 1182 (quoting *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Mgmt., Inc.,* 620 F.2d 1, 4 (1st Cir. 1980)).

In the instant case, the Defendant is seeking double the protection. Defendant is maintaining that the Direct Dry Up's assignment is invalid and unenforceable. On this issue, both parties agree—when asked on the record on July 2, 2025, counsel for Defendant represented that it still maintains that the assignment is invalid and unenforceable. This aligns with Citizens' September 5, 2023 letter from Adjuster Jason Watkins, where it wrote "its provisions do not comply with the requirements necessary to make it valid" and ". . .the agreement does not contain the requirements necessary to make it compliant with the applicable statute, any reimbursement for services related to the agreement will be mailed directly to the insured if the claim is determined to be a covered loss". A carbon copy of this letter was sent to "The Professional Law Group, PLLC, Sherry Carney". An email communication was sent by Contingent Worker Sherrice Baines, on October 4, 2023, indicating to Direct Dry Up that "Your water services are being included in the appraisal (which is still open and in the process of being completed) due to the non-compliant AOB received."

Citizens' argument is that it does not owe this reimbursement of this portion of the claim to Direct Dry Up, because the assignment is invalid and unenforceable. Citizens equally argues that it does not owe this reimbursement of this portion of the claim to Sherry Carney either. In effect, taken to its logical conclusion, Citizens feels that neither Sherry Carney nor Direct Dry Up LLC have standing to bring a lawsuit against it for this portion of the claim. With all due respect, this argument is internally inconsistent, because the effective end result is that Citizens is arguing that no one has standing to sue it over a dispute for this portion of the claim. That is not the state of the law, and the courts cannot ratify this kind of position.

Citizens' argument is however, that it voluntarily paid Direct Dry Up LLC on the grounds that even though the assignment is invalid and unenforceable, that Sherry Carney is still bound by it, so it is protecting her by paying $3,000 to Direct Dry Up LLC as a good insurer should, as opposed to paying her $12,108.85 because it is paying in accordance with its policy in good faith—no harm, no foul. The Court

understands that the argument is that Citizens is contending it is an invalid assignment but still "an assignment". An invalid assignment, however, is essentially "invalid" and this Court can take no part in giving that invalid assignment force.

The Court does not believe that Citizens is paying $3,000 to Direct Dry Up out of the kindness of its heart. If it had not owed $12,108.85 under the Appraisal Award, it would likely contend Direct Dry Up is entitled to nothing Citizens is taking a statute which was designed to protect an insured and using it to bypass paying the full $12,108.85. This action works to the insured's detriment by claiming the insured is still bound to Direct Dry Up, knowing that the Legislature's statutory language deems their assignment "invalid and unenforceable" to protect the insured from it.

While general contracts are assignable, the general rule does not apply when the assignment violates a statute. *Gables Ins. Recovery Inc. v. Citizens Prop. Ins. Corp.,* 261 So. 3d 613, 619 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2178a] (citing *Hall v. O'Neil Turpentine Co.,* 56 Fla. 324, 47 So. 609, 612 (1908)); *see also Park v. Wausau Underwriters Ins. Co.,* 547 So. 2d 213, 215 (Fla. 4th DCA 1989) (noting the general rule that where a contract is violative of a statute or public policy it will not be enforced by the courts). To accept Citizens' position, this Court would have to give enforcement validity to an invalid assignment in denying Carney the right to go forward with this action; the Court ruling this way forces the Court to enforce an invalid assignment, which goes against *Park,* which provides that an agreement like this which violates a statute, is in fact an 'illegality'. *Park,* 547 So. 2d at 215 (citing *Talco Capital Corp. v. Canaveral International Corp.,* 225 F.Supp. 1007, 1013 (S.D.Fla. 1964), aff'd, 344 F.2d 962 (5th Cir. 1965)).

Contracts which are void or invalid in this way ought not to be enforced in the courts. *See Bond v. Koscot Interplanetary, Inc.,* 246 So. 2d 631, 634 (Fla. 4th DCA 1971) ("The foregoing citations indicate the broad general rule that an agreement which violates a statute or is contrary to public policy is illegal, void and unenforceable as between the parties."). As the Third District held in *Gables Insurance Recovery,* "The Matusow assignment violated a state statute, section 626.854(11)(b), because it agreed to give Gables Recovery more than twenty percent of what is collected on the insurance claim. Thus, Matusow did not validly assign her claim, and without the assignment, Gables Recovery did not have standing to sue Citizens." *Gables Ins. Recovery,* 261 So. 3d at 627. It seems puzzling now that Citizens having pushed for this result in *Gables Ins. Recovery* and other cases it pursued appeals on this issue, now believes that an invalid assignment can effectively now transfer standing from the insured as assignor to the assignee even if the assignment violates the statute. It is not even as if Citizens is claiming the assignment is valid—which would lend credence to the standing argument.

Insurers have argued in the district courts that when the trial courts dismiss the remediation companies' claims based on invalid assignments, that it is the law, because an invalid assignment cannot grant standing to the assignee. *Holding Insurance Companies Accountable, LLC v. American Integrity Insurance Company of Fla.*, 399 So. 3d 1232, 1235 (Fla. 5th DCA 2025) [50 Fla. L. Weekly D111a]. "And without a valid assignment, HICA has no standing to sue American Integrity for its alleged breach of Caruso's insurance policy." *HICA,* 399 So. 3d 1235 (citing *Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp.,* 261 So. 3d 613, 627 (Fla. 3d DCA 2018) [30 Fla. L. Weekly D2622b]. Standing is in the policyholder or insured initially, and an assignment seeks to *transfer* standing from the insured (assignor) to the remediation company (assignee). If the assignment is invalid, which Citizens continue to argue, the right to bring the cause of action does not transfer, and thus standing remains with the insured. *Progressive Exp. Ins. Co. v. McGrath Community Chiropractic,* 913 So. 2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]. As *McGrath Community Chiropractic* noted in a case where a provider obtained an assignment after it had filed a lawsuit that:

> Thus the assignment of PIP benefits is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place. If the insured has assigned benefits to the medical provider, the insured has no standing to bring an action against the insurer. *Livingston v. State Farm Mut. Auto. Ins. Co.,* 774 So.2d 716, 718 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D533c]. In this case, the converse is true. If on the date the Provider filed the original statement of claim Mr. Joseph had not assigned benefits to the provider, only Mr. Joseph had standing to bring the action. It follows that the Provider would have lacked standing under these circumstances, and the case should have been dismissed.

Id. at 1285 (emphasis added).

In *Progressive Exp. Ins. Co. v. Hartley,* an assignment in a Personal Injury Protection (PIP) case was found to be invalid, because it was made out to a fictitious business entity that had not renewed its fictitious name registration. 21 So. 3d 119 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D2229c]. Progressive to avoid being found not having to pay certain benefits to the insured directly, adamantly argued that the assignment was still valid despite being made to a business no longer recognized under Florida law. *Hartley,* 21 So. 3d at 120-121. The Fifth District found otherwise and additionally observed, "Furthermore, if we were to accept Progressive's argument, no party could bring an action against Progressive for the alleged unpaid PIP benefits." *Id*. at 120-121. The trial court had "concluded that Hartley had retained his right to claim PIP benefits due under his insurance policy" and the Fifth District affirmed the decision of the circuit court. *Id*. at 120.

Equitable estoppel

The Court equally sees an equitable estoppel problem.

To satisfy the reliance prong of equitable estoppel, the party asserting the defense must prove that he or she made a detrimental change of position based on a belief in the misrepresented fact. *Schroeder v. Peoplease Corp.,* 18 So. 3d 1165, 1168 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1960a]. Thus, the elements of equitable estoppel are "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *Id*. (citations omitted).

The letters from Citizens on September 5, 2023, and October 4, 2023, made it very clear that Citizens would be paying the money to the insured and that Citizens would not make any payments to Direct Dry Up, directly, because the assignment violated the statute in numerous different ways. Plaintiff relied on these representations to her detriment. Citizens then changed its position, and sent money to Direct Dry Up, after it sent a letter to the Plaintiff indicating that it would give her $7,885.86 for water mitigation services and $4,222.99 for tarp services. This is indicated in the Affidavit of Sherry Carney dated May 17, 2025. This is in Exhibit 4, attached to the Affidavit, where Stephan McMillan signed off on behalf of Citizens. This was the Appraisal Award decision, which was signed off by two people, the Appraiser on December 27, 2023, and the Adjuster on December 29, 2023 (which by its terms, makes it binding on both sides). After promising those amounts in the Award, Citizens took the position that it would honor Direct Dry Up's invoice and cap the payment at $3,000. The letter attached indicated that water mitigation and tarp services would be paid for separately. Plaintiff paid $12,000 to Direct Dry Up to settle the work with them. This is the harm, the change in

position detrimental to Plaintiff.

At the hearing on July 2, 2025, Citizens suggested that Plaintiff get its money back, because the statute forces Direct Dry Up to be limited to the $3,000 cap and that its invalid assignment should prevent Direct Dry Up from going after Plaintiff for the rest. Section 627.7152, Florida Statutes provides at subsection (7)(a):

> Notwithstanding any other provision of law, and except as provided in paragraph (b), acceptance by an assignee of an assignment agreement is a waiver by the assignee and its subcontractors of claims against a named insured for payments arising from the assignment agreement. The assignee and its subcontractors may not collect or attempt to collect money from an insured, maintain any action at law against an insured, claim a lien on the real property of an insured, or report an insured to a credit agency for payments arising from the assignment agreement. Such waiver remains in effect after the assignment agreement is rescinded by the assignor or after a determination that the assignment agreement is invalid.

§ 627.7152(7)(a), Fla. Stat. (2022). The damage is done already, however, as the insured negotiated with Direct Dry Up, to avoid Direct Dry Up from coming after the insured for nonpayment.

Emergency Services and Scope

Plaintiff also argues that even were the assignment valid (which it is not by agreement of Plaintiff and Defendant), that it is a qualified assignment, because many of the services are not what qualifies for Citizens to apply the $3000 cap to. Section 627.7152, Florida Statutes provides at subsection (2)(c):

> If an assignor acts under an urgent or emergency circumstance to protect property from damage and executes an assignment agreement to protect, repair, restore, or replace property or to mitigate against further damage to the property, an assignee may not receive an assignment of post-loss benefits under a residential property insurance policy in excess of the greater of $3,000 or 1 percent of the Coverage A limit under such policy. For purposes of this paragraph, the term "urgent or emergency circumstance" means a situation in which a loss to property, if not addressed immediately, will result in additional damage until measures are completed to prevent such damage.

§ 627.7152(2)(c), Fla. Stat. (2022).

An assignment is a contract, and contracts "should receive a construction that is reasonable, practical, sensible, and just." *Universal Prop. & Cas. Ins. Co. v. Johnson,* 114 So. 3d 1031, 1036 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D950a] (quoting *State Farm Mut. Auto. Ins. Co. v. Fischer*, 16 So. 3d 1028, 1031 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1833b]). A contract should be interpreted in a manner consistent with reason and probability. *BKD Twenty-One Mgmt. Co. v. Delsordo,* 127 So. 3d 527, 530 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2541c] (citing *King v. Bray,* 867 So. 2d 1224, 1227 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D632a]). "In construing the language of a contract, courts are to be mindful that 'the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.' " *Murley v. Wiedamann,* 25 So. 3d 27, 29 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2332a] (quoting *Taylor v. Taylor,* 1 So. 3d 348, 350 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D229a]).

Defendant attached to its Motion for Summary Judgment a copy of the Direct Dry Up Contract for Non-Emergency Services, Assignments of Benefits, Direct Payment Authorization, and Hold Harmless Agreement dated July 30, 2023, and which had a date of loss of September 28, 2022, and which indicated the inspection had not taken place until nearly eleven months later. This is a genuine dispute of fact that if these were not emergency services, even assuming arguendo the finder of fact was told to treat the assignment as valid, that Plaintiff could in fact obtain a verdict in its favor whether the statutory cap was properly applied or not. Plaintiff's response to the request for admission to state that the work was to prevent further damage to the property is not an admission it was done for urgent or emergency circumstances. A finder of fact could find it was not urgent or an emergency.

In a case where the assignment is qualified, and limited in scope, it may be wrong to take away standing from the insured to bring claims for matters outside of the scope of what was contemplated for reimbursement under section 627.7152(2)(c), i.e. non-emergency services.

Florida recognizes that "[a]n assignment of benefits can be tailored to the work that a contractor performs." *Salyer v. Tower Hill Select Ins. Co.*, 367 So. 3d 551, 554 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D1118a] (citing *Brown v. Omega Ins. Co.,* 322 So. 3d 98 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1694b]; *Sidiq v. Tower Hill Select Ins. Co.*, 276 So. 3d 822 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1969a]; and *Nicon Constr., Inc. v. Homeowners Choice Prop. & Cas. Ins. Co.*, 249 So. 3d 681 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1076a]. "These cases show that an assignment of benefits to a third-party contractor does not foreclose a homeowner's standing to sue his or her insurer when the assignment is limited to work the contractor performs, and the contractor performs either a specific category of work (*Sidiq*) or no work at all (*Brown*)" *Id.* at 555. "The question . . . is the scope of that assignment." *Sidiq*, 276 So. 3d at 825. The scope of the assignment is determined by the intent of the parties. *Sidiq*, 276 So. 3d at 827; *Nicon*, 249 So. 3d at 682.

"Consistent with *Nicon* and *Sidiq*, when the entire contract is reviewed together with its purpose, we conclude that this AOB did not deprive the insureds of standing to assert their claim for breach of contract and the right to sue for damages." *Brown*, 322 So.3d at 102. In this case, considering that many of the services could be interpreted as not being urgent services (they were done months and months later after Hurricane Ian) within the meaning of the subsection concerning the $3,000 cap, that this would not limit Plaintiff from pursuing recovery from amounts that clearly were not emergency services, i.e. the tarping services, etc. A finder of fact could find that some services sought by Plaintiff on the water remediation and tarp services were not part the services Citizens reimbursed Direct Dry Up LLC subject to the cap.

Appraisal Award

Litigation may indeed still sometimes be necessary, when an insurer refuses to pay what even its own adjusters determine to the amount of an insured's loss. *See, e.g.,Wilson v. Federated Nat. Ins. Co.*, 969 So. 2d 1133 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2679f] ("Wilson was compelled to file suit against Federated when Federated refused to pay what even its own adjusters determined to be the amount of Wilson's loss. Then, after the appraisal process resulted in an award to Wilson of significantly more than the adjusters had estimated, Federated continued to fail to pay the full amount of his loss."). It is true that a court should not confirm an appraisal of an award, where the insurer has paid in full, to therefore create a basis for an award of attorney's fees. *See State Farm Florida Ins. Co. v. Silber,* 72 So. 3d 286, 290. However, there is a dispute over the $9,108.85 because Citizens insists it did nothing wrong to just pay the $3,000 cap amount to Direct Dry Up on an invalid and unenforceable assignment. Yet there are numerous genuine conflicts over facts, that do not conclusively determine that Citizens has fulfilled all its obligations as a matter of law. The parties also disagree on the state of the law. The only thing they do agree on is that Direct Dry Up's assignment was invalid and unenforceable.

Summary Judgment

Under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), summary judgment must be granted unless the nonmoving party

produces evidence on which a reasonable jury could return a verdict in their favor. Plaintiff is the nonmovant here, which bears that burden after Citizens has made its initial showing. This Court finds that the evidence brought forth by Plaintiff is probative enough that a reasonable jury could find in her favor in satisfaction of the requirement of the Celotex trilogy which precludes there being a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

It is **ORDERED AND ADJUDGED**:

Defendant's Motion for Summary Judgment is DENIED.

* * *

Contracts—Warranties—Magnuson Moss Warranty Act—Affirmative defenses—Conclusory statements without alleging ultimate facts that would support the alleged defenses—Affirmative defenses stricken with leave to amend

ASHLEE PAKNIS, Plaintiff, v. VOLKSWAGEN GROUP OF AMERICA, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO25014696. Division 60. July 18, 2025. Allison Gilman, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Brendan P. Smith, Fort Lauderdale, for Defendant.

ORDER GRANTING MOTION TO STRIKE

THIS CAUSE, having come before this Honorable Court on July 17, 2025 on the Plaintiff's, ASHLEE PAKNIS, an individual ("Plaintiff") Motion to Strike Affirmative Defenses ("Motion"). Plaintiff was represented at the hearing by Joshua Feygin, Esq. Defendant was represented by Brendan Smith, Esq. After hearing argument of counsel and being otherwise fully advised in the premises, the Court hereby finds as follows:

In the operative complaint at bar before this Court, Plaintiff has alleged a breach of the Magnusson Moss Warranty Act, 15 U.S.C. 2310(d)(1), *et. sequi*. On April 1, 2025, Defendant filed its Answers and Affirmative Defenses in this action. [DE 7]. Defendant interposed twenty-four (24) affirmative defenses. *Id.*, pgs. 2-4.

Properly pled, "[a]ffirmative defenses are in the nature of confession and avoidance." *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton*, 467 So.2d 311,312 (Fla. 5th DCA 1985). "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse. *St. Paul Mercury Ins. Co. v. Coucher*, 837 So.2d 483 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D131b]. The pleader of an affirmative defense cannot simply state conclusions without alleging ultimate facts, which would support the defense alleged. *Zito v. Washington Federal Savings & Loan Assoc. of Miami Beach*, 318 So.2d 175 (Fla. 3d DCA 1975), cert denied, 330 So.2d 23 (Fla. 1976).

Based upon the above authorities, the Court hereby strikes the following affirmative defenses with leave to amend:

1. As a first affirmative defense, VWGoA alleges that the Plaintiff or some third party over whom VWGoA had no control, abused and/or misuse the subject vehicle, and same was the legal cause of damages alleged by Plaintiff. Misuse and/or abuse are expressly excluded from VWGoA's limited written express warranty.

2. As a further affirmative defense, VWGoA alleges that it has complied with and satisfied all warranty obligations to the extent that it may be required to do so.

3. As a further affirmative defense, VWGoA alleges that in the event Plaintiff does recover in this action, VWGoA is entitled to a reasonable offset for use of the subject vehicle.

4. As a further affirmative defense, VWGoA alleges that the subject vehicle does not suffer from a nonconformity or defect which would entitle Plaintiff to recover under the Magnuson-Moss Warranty Act.

5. As a further affirmative defense, VWGoA alleges that Plaintiff may not recover under a theory of breach of warranty under the Magnuson-Moss Warranty Act since the subject vehicle was repaired.

6. As a further affirmative defense, VWGoA alleges that Plaintiff has failed to give VWGoA (a)notice of a failure to comply with the terms of VWGoA's Limited Warranty and (b) an opportunity to cure any failure to comply, as required under Chapter 681 and 15 U.S.C. 2310(e). *Bailey v. Monaco Coach Corp.,* 305 F.Supp.2d 1036 (N.D. Ga. 2004); *Royal Typewriter Co., v. Xerographic Supplies Corp.,* 719 F. 2d 1092 (11 Cir. 1983) (n.15 -18); Fla. Stat. 672.607(3)(a)(2004).

7. As a further affirmative defense, VWGoA alleges that Plaintiff has failed to mitigate their damages and, their recovery is restricted thereby.

8. As a further affirmative defense, VWGoA alleges that the subject vehicle was accompanied by a limited written express warranty issued by VWGoA that sets forth that "the sole exclusive remedy against Volkswagen. . . shall be for the repair or replacement of defective parts as provided herein." Plaintiff's remedies, if any, are governed strictly thereby and therefore Volkswagen's liability herein shall not exceed the cost of correcting manufacturing defects.

9. As a further affirmative defense, VWGoA alleges that any malfunctions) with respect to the subject vehicle were the result of neglect, misuse, abuse, or unauthorized modifications or alterations by Plaintiff or some third party over whom VWGoA had no control.

10. As a further affirmative defense, under Florida law, "stigma" damages based upon the speculative notion that value is diminished merely because repairs are performed is not a cognizable damage under a repair contract/warranty such as VWGoA's limited written express warranty here. *Orkin Exterminating Co., Inc. v. DelGuidice,* 790 So.2d 1158, 1161-1162 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1716a]; rev. denied 821 So.2d 294 (Fla. 2002). *See also Siegle v. Progressive Consumers Ins. Co.,* 788 So.2d 355 (Fla.4th DCA 2001) [26 Fla. L. Weekly D1125a] approved by *Siegle v. Progressive Consumers Ins. Co.,* 819 So.2d 732 (Fla. 2002) [27 Fla. L. Weekly S492a]; *Rezevskis v. Aries Ins. Co.,* 784 So.2d 472, 474 (Fla.3d DCA 2001) [26 Fla. L. Weekly D725a]; rev. denied, 828 So.2d 388 (Fla. 2002) (nowhere does that obligation include liability for loss due to "a stigma on resale resulting from 'market psychology' that a vehicle that has been damaged and repaired is worth less than a similar one that has never been damaged").

11. As a further affirmative defense, VWGoA alleges that Plaintiff has failed to assert a claim for damages for which relief can be granted. *Bailey v. Monaco Coach Corp.,* 350 F. Supp 2d 1036 (N.D. Ga.).

12. As a further affirmative defense, 15 U.S.C. 2304 is inapplicable to a "limited" warranty. *Ocana v. Ford Motor Company, et al.,* 992 So.2d 319 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2325a]; *Chaurasia v. General Motors Corp.,* 126 P.3d 165 (Ariz. App. 2006); *Lambert v. Monaco Coach Corp.,* 2005 WL 1221485 (M.D. Fla. 2005), See also *MacKenzie v. Chrysler Corp.,* 607 F.2d 1162, 1166 n.7 (5th Cir. 1979) (remedies in 15 U.S.C. 2304 are applicable to 'full' warranties).

13. As a further affirmative defense, the Magnuson-Moss Warranty Act does not apply in this case because there are no allegations or evidence showing VWGoA failed to comply with the terms of its limited written express warranty. *Ocana v. Ford Motor Company, et. al., supra; Chaurasia v. General Motors Corp.,* 126 P.3d 165 (Ariz. App. Div. 1).

14. As a further affirmative defense, Plaintiff's damages, if any, are governed by the terms of VWGoA's limited written express warranty.

15. As a further affirmative defense, Plaintiff is not entitled to incidental and consequential damages as such damages have been

properly disclaimed pursuant to VWGoA's limited written express warranty.

16. As a further affirmative defense, VWGoA's warranty satisfied its essential purpose.

17. As a further affirmative defense, Plaintiff's damages are limited to the difference in value at the time of purchase between the vehicle as warranted and the vehicle as purchased.

18. As a further affirmative defense, VWGoA alleges that Audi Fort Lauderdale is not its sales agent. *Ocana v. Ford Motor Company, et. al., supra; Mobile Oil Corporation v. Bransford,* 648 So. 2d 119 (Fla.1995) [20 Fla. L. Weekly S11a]; *Ortega v. General Motors*, 392 So. 2d 40 (Fla.4th DCA 1980).

19. As a further affirmative defense, VWGoA alleges that even if Audi Fort Lauderdale is its sales agent, that is insufficient to create the privity required to create a right to revoke acceptance. *Watson v. Coachmen Recreational Vehicle Co., Inc.,* 2006 U.S. Dist. LEXIS 15087 (S. D. Ill. 2006); *Owens v. Mitsubishi Motors North America,* 2004 U.S. Dist. LEXIS 21764 (N.D. Ill. 2004); *Finch v. Ford Motor Company,* 327 F. Supp. 2d 942 (N.D. Ill. 2004).

20. As a further affirmative defense, VWGoA alleges that Plaintiff may not revoke acceptance as to VWGoA, a remote manufacturer where no direct vertical privity of contract exists.

21. As a further affirmative defense, VWGoA states that Plaintiff cannot prove that the vehicle was not repaired within a reasonable time.

22. As a further affirmative defense, VWGoA states that Plaintiff did not provide VWGoA with a reasonable number of repair attempts, i.e. notice of an alleged breach and an opportunity thereafter to cure.

23. As a further affirmative defense, VWGoA alleges that Plaintiff's damages are not a sum certain and, therefore, Plaintiff may not recover prejudgment interest.

24. As a further affirmative defense, VWGoA alleges that Plaintiff failed to complete the mandatory pre-conditions required to bring suit under 15 U.S.C. §2310. Specifically, Plaintiff failed to go through the mandatory information dispute resolution program provided by VWGoA. Plaintiff was required to submit her claim to the Better Business Bureau Auto Line Program prior to filing lawsuit for damages under the Magnuson-Moss Warranty Act.

Accordingly, it is hereby: **ORDERED AND ADJUDGED**:

1. Plaintiff's Motion is hereby **GRANTED**.

2. Defendant shall have THIRTY (30) days to amend their affirmative defenses.

* * *

Consumer law—Florida Consumer Collection Practices Act—Debt collection—Small claims action against creditor— Standing—Redressable injury—Plaintiff failed to establish her standing to bring action alleging creditor violated FCCPA by sending electronic mail communication after 9 p.m. but before 8 a.m. in plaintiff's time zone where plaintiff's statement of claim offered only conclusory allegations of harm in form of annoyance, aggravation, and stress—Attempt to collect debt—Email did not qualify as an attempt to collect a debt where email simply informed plaintiff that a payment would be processed in the future and did not contain any demand for payment, threats of any kind, or reference to debt collection activity—Section 559.72(17), which prohibits persons from communicating with a debtor between the hours of 9 p.m. and 8 a.m. in the debtor's time zone without debtor's prior consent, applies only to telephone calls, not emails—Finally, plaintiff consented to receive email attached to her statement of claim, as well as all others sent by creditor, when she opened her account and again when she obtained the payment plan at issue

DANESHKA BALESTIER DIAZ, Plaintiff, v. AFTERPAY US SERVICES, LLC, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 24-CC-054641. April 22, 2025. Mary Lou Cuellar-Stilo, Judge. Counsel: Benjamin W. Raslavich, for Plaintiff. Zachary D. Miller and Jaqueline A. Simms-Petredis, for Defendant.

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION OF DEFENDANT AFTERPAY US SERVICES, LLC

THIS CAUSE is before the Court upon the Motion for Summary Disposition (Dkt. 10) (the "Motion") of Defendant Afterpay US Services, LLC ("Afterpay"). Having reviewed and considered the record, including the parties' submissions on the Motion, and hearing argument on April 4, 2025 (the "Hearing"), the Motion is GRANTED.

I. BACKGROUND

A. Plaintiff's Allegations and Testimony.

In the Amended Complaint (Dkt. 4, the "Complaint), Plaintiff Daneshka Balestier Diaz ("Plaintiff") alleges that she is a customer of Afterpay and that "[w]ithin the two years preceding the commencement of this action, Defendant sent at least one electronic mail communication to Plaintiff in connection with the collection of [a debt] after 9 p.m. but before 8 a.m. in Plaintiff's time zone." (Dkt. 4 ¶¶ 19-20). According to an email attached to Plaintiff's Complaint, Plaintiff received an email from Afterpay that, in pertinent part, said "Just a friendly reminder that a payment of $25.11 is due in 4 days," and appears to show a scheduled repayment using a Mastercard belonging to Plaintiff. (Dkt. 4 ¶ 20 & Ex. A.)

Plaintiff submitted a Declaration, dated April 2, 2025, alleging, among other things, that she received the email on her cellphone, she understood the communication to be an attempt to collect a debt and that the email caused her "annoyance, aggravation, and stress." (Dkt. 16, Notice of Filing and Ex. 1 thereto.)

Plaintiff alleges Afterpay violated section 559.72(17) of the Florida Consumer Practices Act, Florida Statutes sections 559.55-559.785 (the "FCCPA) when the email was delivered to her email inbox. (Dkt. 4 ¶¶ 23-29.) On those grounds, Plaintiff seeks statutory damages, attorneys' fees and costs.

B. Plaintiff's Account and Agreements.

Afterpay submitted a declaration testifying that Afterpay's buy now pay later ("BNPL") platform offers point-of-sale extensions of credit to both in-store and online customers to fund discrete, low-dollar transactions. (Dkt. 10, Ex. A, Declaration of Salim Tarazi ("Tarazi Decl.") ¶ 3). Afterpay's BNPL product allows consumers to purchase a product and pay for it over time in four installments without any interest.

Afterpay testified that Plaintiff first became a customer on October 1, 2020. (Dkt. 10 ¶ 8. Since that date, Plaintiff has opened five (5) separate agreements with Afterpay, whereby Afterpay financed her purchases. See Id., (Dkt. 10 ¶ 8). Plaintiff's relationship with Afterpay is governed by (1) Terms of Service that she agreed to on October 1, 2020, when she opened her account, as well as (2) a series of Installment Agreements she entered into with Afterpay each time she used Afterpay to finance her purchases. (Dkt. 10 ¶¶ 9-16).

The Terms of Service applicable to Plaintiff's Afterpay account specifically state:

10. CONSENT TO ELECTRONIC COMMUNICATIONS.

10.1 By clicking to accept this Agreement, you are deemed to have executed this Agreement electronically. You consent to electronically receive and access via email or your Afterpay Account all records, disclosures and notices related to your Account or the Services that we would otherwise be required to provide you in paper form. Your consent to receive records, disclosures and notices electronically will remain in effect until you withdraw it. You may withdraw your consent to receive further records, disclosures and notices electroni-

> cally at any time by sending an email to uslegal@afterpay.com with "Revoke Electronic Consent" in the subject line. Any withdrawal of your consent to receive records, disclosures and notices electronically will be effective only after we have a reasonable period of time to process your request for withdrawal.

(Dkt. 10 ¶ 10 and Ex. A thereto).

On October 7, 2023, when Plaintiff used Afterpay to make the $100.43 purchase from Shein US Services, LLC that originated the "Payment Plan" that led to the email over which Plaintiff is suing, Afterpay notified Plaintiff the transaction was approved, and she was directed to an installment consent screen with an expandable payment schedule. (D k t . 1 0 ¶ 13). Before completing the purchase, Plaintiff was required to affirmatively acknowledge and accept the terms of the Installment Agreement. (Dkt. 10 and Ex. B thereto).

The Installment Agreement also contains a section governing electronic communications, stating, in pertinent part:

> 13. Express Written Consent to Receive Short Message Service ("SMS") Communications & Email Communications and Marketing.
>
> (a) . . . You expressly consent to be contacted by us, our agents, representatives, affiliates, or anyone calling on our behalf for any and all purposes arising out of or relating to this Agreement at any. . .electronic address you provide or at which you may be reached. You agree we may contact you in any way . . . You also expressly consent to the receipt of electronic communications in connection from the merchant, Afterpay or any third party, that is engaged by Afterpay to collect any amount owed under this Agreement.

(Dkt 10, Exh. B)

Plaintiff was required to click "Confirm" to complete the purchase using her Afterpay account as a payment method. (Dkt. 10, Exh. B ¶ 15). Plaintiff was free to close out of the Afterpay webpage at any time before marking the checkbox or clicking "Confirm" without incurring any fee or penalty, and she could have chosen to use another payment method to complete her purchase. (Dkt. 10, Exh. B, ¶ 15). Plaintiff did not do so. Instead, she affirmatively marked the checkbox and clicked "Confirm." (Dkt. 10, Exh. B ¶ 15).

C. The Summary Disposition Briefing.

On December 5, 2024, Afterpay filed the Motion (Dkt. 10). On March 20, 2025, Plaintiff filed her Response in Opposition to the Motion (the "Opposition") (Dkt. 14). On March 27, 2025, Afterpay filed its Reply Brief. (Dkt. 15). On April 2, 2025, Plaintiff filed her Notice of Filing, which included her own declaration along with a printout from the Florida Senate on proposed amendments to the FCCPA. (Dkt. 16).

II. SUMMARY DISPOSITION STANDARD

Florida's Small Claims Court Rules provide a mechanism for parties to request the Court summarily dispose of a case if there is no triable issue of fact. *See* Fla. Sm. Cl. R. 7.135 ("At pretrial conference or at any subsequent hearing, if there is no triable issue, the court shall summarily enter an appropriate order or judgment."); *see also Save A Lot Car Rental, Inc. v. Tri J. Co. Towing & Recovery, Inc.*, 325 So. 3d 285, 287 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1846a] ("Florida Small Claims Rule 7.135 directs that a trial court must enter a summary disposition at a pretrial conference or subsequent hearing if it determines that there is no triable issue."). Rule 7.135 allows parties to raise issues without the necessity of pretrial motions or defensive pleadings. *See Linden v. Auto Trend, Inc.*, 923 So. 2d 1281 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D933d]. The small claims rules provide the Court with flexibility without adhering to the formal rules of civil procedure. *See Morburger v. J. Reporting, Inc.*, 318 So. 3d 619, 621 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D903a].

III. ANALYSIS

A. Plaintiff Does Not Have Standing to Bring This Claim.

"In Florida, judicial authority and the courts emanate from article V, section 1 of the Florida Constitution." *Southam v. Red Wing Shoe Co., Inc.*, 343 So. 3d 106, 109 (Fla. 4th DCA 2002) [47 Fla. L. Weekly D1483a]. Access to the courts is derived from article I, section 21 (1968), which states "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." "Redress" is defined as being "the receiving satisfaction for an injury sustained." Black's Law Dictionary (4th ed. 1968). "Injury" is further defined as "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property." Black's Law Dictionary (4th ed. 1968).

Relying on decisions by the U.S. Supreme Court, in *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) [30 Fla. L. Weekly S331a], the Florida Supreme Court "articulated the three requirements for standing" *Citizens for Responsible Dev., Inc. v. City of Dania Beach*, 358 So. 3d 1 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D361a], stating as follows:

> There are three requirements that constitute the "irreducible constitutional minimum" for standing. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 120 S. Ct. 1858, 146 L.Ed.2d 836 (2000). First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L.Ed.2d 135 (1990). Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). Third, a plaintiff must show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Stevens*, 529 U.S. at 771, 120 S. Ct. 1858.

907 So. 2d at 1113 n.4 (emphasis added).

Thus, "[a]lthough there is no precise formula to divine the line between an interest that is sufficient for standing purposes, and one that is not, Florida courts look to three familiar concepts—injury, causation, and redressability—to assess a plaintiff's standing." *Cmty. Power Network Corp. v. JEA*, 327 So. 3d 412, 415 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D2002a]. "Under these concepts, a plaintiff must first identify an actual or imminent injury that is concrete, distinct, and palpable." *Id*.

Plaintiff has demonstrated no redressable injury. In *Pet Supermarket, Inc. v. Eldridge*, 360 So. 3d 1201, 1206 (Fla. 3rd DCA 2023) [48 Fla. L. Weekly D958a], the court "found no merit" to the plaintiff's contention "that his allegation of a statutory violation of the [Telephone Consumer Protection Act (TCPA)] alone establish[ed] his standing to bring suit." The court stated that "[a] purely illegal action in the absence of resulting harm does not confer standing on an individual." *Id*. (quoting *Olen Props. Corp. v. Moss*, 981 So. 2d 515, 517 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1024b]); *see also Saleh v. Miami Gardens Square One, Inc.*, 353 So. 3d 1253, 1255 (Fla. 3rd DCA 2023) [48 Fla. L. Weekly D136a] (affirming dismissal of federal statutory claim for lack of standing and noting that plaintiff admitted he did not suffer an actual harm) (*citing Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) [26 Fla. L. Weekly Fed. S128a] (holding that "a bare procedural violation, divorced from any concrete harm" does not confer standing)).

This case presents less of an injury than was considered inadequate to confer standing in *Pet Supermarket*. Plaintiff only offers conclusory allegations of harm (i.e., "annoyance, aggravation, stress and an invasion of his [sic] privacy") deemed insufficient in prior cases. Thus, Plaintiff's FCCPA Claim is dismissed for lack of standing.

B. Afterpay Was Not Collecting Consumer Debt.

For the FCCPA to apply, the purpose of the communication at issue must be "collecting consumer debts." Fla. Stat. § 559.72. The

FCCPA does not cover all communications between a creditor and a debtor and "communications which are informational in nature are outside the application of" the FCCPA. *Hurtubise v. P.N.C. Bank, N.A.,* No. 512013AP000015APAXWS, 2015 WL 3948192, at *4 (Fla. Cir. Ct. Jan. 5, 2015) [22 Fla. L. Weekly Supp. 782a] (finding the communication at issue was informational only and not an attempt to collect a debt); *see also Brown v. Select Portfolio Serv'ng, Inc.*, No. 16-62999-CIV, 2017 WL 1157253, at *4 (S.D. Fla. Mar. 24, 2017).

Further, interpretation of the FCCPA must align with federal courts' interpretation of the analogous provisions of the federal Fair Debt Collection Practices Act ("FDCPA"). See Fla. Stat. § 559.77(5) ("In applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the [FDCPA]."). To state a claim under the FDCPA, a plaintiff must allege that "the plaintiff has been the object of collection activity arising from consumer debt[.]" *Ziemniak v. Goede & Adamczyk, PLLC*, No. 11-cv-62286, 2012 WL 5868385, at *2 (S.D. Fla. Nov. 19, 2012) (citing *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1360-61 (S.D. Fla. 2000)). This threshold determination is identical under either the FDCPA or FCCPA.

"Communications that are merely 'informational' do not constitute debt collection activity" under the FDCPA. *See Wood v. Citibank, N.A.*, No. 8:14-cv-2819-T-27EAJ, 2015 WL 3561494, at *3 (M.D. Fla. June 4, 2015) (finding that a notice of account transfer to a third-party debt buyer was not a debt collection communication subject to the FDCPA); *see also Daley v. Bono*, 420 F. Supp. 3d 1247, 1258 (M.D. Fla. 2019) (finding that statements containing balance information and detachable payment coupons, but no demands or threats for failure to pay, were not debt collection activity).

The Eleventh Circuit has addressed what it means for a communication to be made "in connection with the collection of a debt" on several occasions. In *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216-17 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C986a], the court held that a law firm's dunning letter was "in connection with the collection of a debt" because it (a) demanded full and immediate payment, (b) threatened collection and attorney's fees if the full payment was not paid, and (c) was accompanied by documents which stated that the law firm was attempting to collect a debt." Two years later, in *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299, 1303 (11th Cir. 2014) [25 Fla. L. Weekly Fed. C4a], the court held that a letter from a law firm advising that a consumer was behind in her residential mortgage payments was "in connection with the collection of a[ ]debt" because it (a) listed the amount due to the lender, (b) indicated that failure to dispute the amount would result in the debt being assumed valid by the lender, and (c) stated that it was for the purpose of collecting a debt.

The email at issue here does not contain any of the information deemed relevant by the Eleventh Circuit in finding that a communication is subject to the FCCPA or FDCPA. An email from a creditor simply informing a consumer that a payment will be processed in the future, which does not contain any demand for payment, threats of any kind, or references to debt collection activity, is not a communication made in connection with the collection of a debt. Because the FCCPA does not cover the email at issue, Plaintiff's Complaint is dismissed.

C. Subsection 17 Applies to Telephone Calls Only, Not Emails

Plaintiff brings this suit under a statutory provision that does not apply to emails. Subsection 17 prohibits persons from "[c]ommunicating with [a] debtor between the hours of 9 p.m. and 8 a.m. in the debtor's time zone without the prior consent of the debtor." Fla. Stat. 559.72(17). Then, the subparts (a) and (b) of Subsection 17 clarify that the referenced time zone will govern "the time a telephone call is received[.]" Fla. Stat. § 559.72(17)(a) (emphasis added). Subpart (b) then outlines the presumption that applies when an area code is not assigned to a specific geographic area, "such as with toll-free numbers[.]" The Second District Court of Appeal has specifically stated that Section 559.72(17) applies only to phone calls:

> Section 559.72 prohibits specified debt collection practices. For example, it prohibits a debt collector from using threats of force or violence, wrongful disclosure of information, abuse or harassing techniques, abusive language, and improper timing of collection phone calls.

Brindise v. U.S. Bank Nat. Ass'n, 183 So. 3d 1215, 1219 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D223a] (citing Fla. Stat. §§559.72(2), (5), (6), (8), and (17)) (emphasis added).

Additionally, Plaintiff assumes that the broad definition of the noun "communication" in Fla. Stat. § 559.55(2) should be used interchangeably with the phrase "communicate with the debtor" found in § 559.72(17). But, Subsection 17 does not prohibit "communication between the hours of 9 p.m. and 8 a.m."; rather, it provides one must not "communicate with the debtor" during those hours. Plaintiff wants the Court ignore the phrase "with the debtor" altogether, something this Court cannot do.

Emails are an easily ignored, passive form of communication. Emails do not demand the reader's immediate attention. Emails can be blocked, automatically forwarded to a folder, or easily deleted. Moreover, Afterpay specifically allowed Plaintiff and other customers to opt out of electronic communication altogether. Plaintiff did not do so. Moreover, the sender of an email cannot control the exact time the email is received.

Subsection 17 does not have to produce illogical results. Instead, this Court interprets it the way the Florida legislature intended—to prevent unwanted telephone calls. Because Subsection 17 only restricts phone calls, Plaintiff's Complaint is dismissed for this additional reason.

D. Plaintiff Consented to the Emails

Subsection 17 only prohibits debt collection communications between 9 p.m. and 8 a.m. if made "without the prior consent of the debtor." Fla. Stat. 559.72(17) (emphasis added). Plaintiff expressly consented to receive the email attached to her Statement of Claim, as well as all others sent by Afterpay. When Plaintiff opened her Afterpay account in 2020, she specifically consented to receiving electronic communications. Then, when Plaintiff obtained the Payment Plan at issue, she again consented to communications in the Installment Agreement.

The consent Plaintiff provided to Afterpay was part of a bargained-for exchange. Plaintiff received funds from Afterpay to finance her purchase. In exchange, she agreed to receive email communications from Afterpay regarding her Payment Plan. In doing so, Plaintiff provided prior consent to receive the email at issue, as Subsection 17 specifically permits. Plaintiff's claim is dismissed because she consented to the email.

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

1. Afterpay's Motion for Summary Disposition is GRANTED.
2. Judgment is hereby entered for Afterpay.
3. This case is DISMISSED.

* * *