Volume 33, Number 6, October 31, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 215-263

Reports of Decisions of:
THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
and
Miscellaneous Proceedings of Other Public Agencies

Readers are invited to submit for publication any decisions of these courts and any reports from other public bodies which are not generally reported and which would, because of the issues involved, be of interest to the legal community.

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CRIMINAL LAW—ROBBERY BY SUDDEN SNATCHING—IMMUNITY—STAND YOUR GROUND LAW—DEFENSE OF PROPERTY. A defendant was entitled to immunity from criminal prosecution under SYG law where the defendant used force to remove a lanyard containing keys to her disabled daughter's apartment, pantry, refrigerator, and medications from the neck of a home health aide who refused multiple requests to give the keys to defendant. The defendant established a prima facie case that she was justified in using non-deadly force where she reasonably believed that such conduct was necessary to terminate the aide's tortious interference with the defendant's personal property. A defendant seeking immunity for actions taken in defense of property is not required to prove entitlement to immunity by preponderance of evidence. Even if one key on the lanyard was not the defendant's actual property, but instead belonged to the aide's employer, the relevant question for purposes of SYG immunity was whether the defendant reasonable believed the property was hers.** *STATE v. URQUHART. Circuit Court, Eighth Judicial Circuit in and for Alachua County. Filed April 22, 2024. Full Text at Circuit Courts-Original Section, page 220a.*

- **CIVIL RIGHTS—PUBLIC EMPLOYEES—DISCRIMINATION—DISABILITY—ACCOMMODATIONS—DRUG USE—MEDICAL MARIJUANA. A county EMT, who has a valid license to use prescription medical marijuana and was placed on administrative leave after testing positive for marijuana in random urine screening, is entitled to protection under the Florida Civil Rights Act. The county violated the FCRA by not making an accommodation for plaintiff to use medical marijuana off-site. The plaintiff is a disabled individual under FCRA where it is undisputed that he suffers from anxiety and insomnia which significantly impacts his day-to-day life when unmedicated. The plaintiff is a qualified medical marijuana patient under section 381.986(2)(k), and Article X, section 29 of constitution requires that "qualified patients" be allowed to use medical marijuana off-site, and employers are required to make accommodations. Appeal pending.** *GIAMBRONE v. HILLSBOROUGH COUNTY. Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County. Filed December 10, 2024. Full Text at Circuit Courts-Original Section, page 238a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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

Bold denotes decision by circuit court in its appellate capacity.

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TRAFFIC INFRACTIONS

ZONING

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

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CIRCUIT COURTS—APPELLATE

Counties—Arbitration—Appeal of hearing examiner's rejection of subcontractor's claim for additional compensation for masonry work on county courthouse construction project is unmeritorious—No merit to argument that hearing examiner lacked subject-matter jurisdiction because he was from private arbitration company rather than being a government hearing examiner—Neither U.S. Constitution, Florida Constitution, state statutes, legal precedents, nor project agreement requires selection of government hearing examiner or prohibits selection of private arbitration company—Argument that decision is defective because it does not set forth basis for examiner's jurisdiction and has not been confirmed by any court lacks merit—Agreement expressly conferred jurisdiction on whomever parties selected as examiner and did not require that decision be confirmed—Subcontractor's brief fails to identify any legal support for other arguments made

JOHN BELL CONSTRUCTION, INC., Appellant, v. MIAMI-DADE COUNTY, PLENARY JUSTICE MIAMI, LLC, and TUTOR PERINI CORPORATION, Appellees. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2025-29-AP-01. August 26, 2025. An Appeal from Alternative Dispute Resolution, Jams Reference No. 1460009130. Counsel: Alexander E. Barthet and R. Brandon Deegan, for Appellant. Sophia Guzzo, for Appellee Miami-Dade County. Bernard Allen, for Appellee Plenary Justice Miami LLC. William C. Wright, for Appellee Tutor Perini Corporation.

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

OPINION

(PER CURIAM.) A careful review of the Initial Brief, and the relevant contracts between the parties, leads us to conclude that Appellant has demonstrated no basis for reversal of the hearing examiner's decision.[1]

Appellant is a masonry subcontractor of Appellee Tutor Perini Construction on a construction project for the building of a courthouse in Miami-Dade County. Appellee Plenary Justice LLC is the developer on the project and Tutor Perini is the design-builder. The relationship between the parties is controlled by the 167-page Project Agreement for the Design, Construction, Financing, Operation and Maintenance of the Miami-Dade County Civil and Probate Courthouse (Appendix 490) ("Agreement") and the 20-page subcontract between Appellant and Tutor Perini ("Subcontract") (Appendix 524).

For purposes of summary disposition, we accept the factual allegations in the Initial Brief as true. Appellant sought to increase the compensation for cement masons and tile setters on the Project from "$13.76/hr and $18.01/hr, respectively, to $32.09 for the entire bricklayer category." Initial Brief at 5-6. Section E of the Subcontract required Appellant to present any claim to Tutor Perini, Plenary Justice and Tutor Perini in turn are required to present the claim to Miami-Dade County on Appellant's behalf. (Appendix 530). *See also* Initial Brief at 15. This process was Appellant's sole remedy.

> All claims of Subcontractor arising out of acts or omissions of Owner or County shall be presented to Owner and/or County by Contractor on behalf of Subcontractor and finally resolved through the Design-Build Agreement's claims procedures, (arbitration, litigation or otherwise) particularly Article 18 (Dispute Resolution) and Article 26 (Equivalent Project Relief). . . . Subcontractor's sole remedy shall be to receive the amount received by Contractor from Owner or County with respect to such claims.

Tutor Perini—John Bell Construction Subcontract, § E (Appendix 530).

As required by the Agreement and the Subcontract, Plenary Justice and Tutor Perini presented Appellant's claim to the hearing examiner designated by the parties. Unfortunately for Appellant, the hearing examiner rejected the claim.[2] Despite the clear, unequivocal, and binding, terms of the Agreement, Appellant asks this Court to insert new terms into the Agreement based on a novel interpretation of separation of powers.

To support its challenge to the hearing examiner's decision, Appellant presents a number of arguments. All are unsupported by the law, by precedent, and/or the facts.

Appellant's primary argument is that the hearing examiner selected by the parties lacked jurisdiction to arbitrate the dispute between the parties, thus his decision must be reversed. Appellant summarizes its argument as follows:

> As the private tribunal was not empowered in accordance with Florida Constitutional restrictions on separation of powers and violated John Bell's due process rights, it cannot bind Appellant. The Project Agreement/ Prime Contract makes the County's Article 18 procedure the exclusive method for deciding claims. That process requires a Hearing Examiner whose authority is defined and limited by the public contract and applicable law. As the award was not conferred by a *government* Hearing Examiner but rather by a private arbitration company that was not conferred jurisdiction, the award is void.

Initial Brief at 11 (emphasis added).

Notwithstanding Appellant's assertion to the contrary, jurisdiction was explicitly conferred by the Agreement on whomever the Miami-Dade County and Plenary Justice/Tutor Perini selected to resolve disputes. There is literally no support in the law, and none is cited in the Initial Brief, for Appellant's claim that the selected hearing examiner lacked subject-matter jurisdiction. Neither the U.S. Constitution, Florida Constitution, Florida statutory law, Florida legal precedents, nor the Agreement, require the selection of a *government* hearing examiner, nor do they prohibit the selection of a private arbitration company.

Appellant argues that the decision does not set forth the basis for the hearing examiner's jurisdiction and that no court has confirmed the award. As noted, the Agreement expressly conferred jurisdiction to whomever the parties selected and does not require that any court confirm the hearing examiner's decision. Article 18 provides:

> The decision of the Hearing Examiner shall be conclusive, final, and binding on the parties, subject only to the limited right of review specified herein. If either party wishes to appeal the decision of the Hearing Examiner, such party may commence an appeal in the Appellate Division of the Circuit Court for the Eleventh Judicial Circuit of Florida (or similar appellate court of competent jurisdiction) no later than 30 calendar days from the issuance of the Hearing Examiner's written decision, it being understood that the review of the court shall be limited to the question of whether or not the Hearing Examiner's determination was arbitrary and capricious, unsupported by any competent evidence, or so grossly erroneous to evidence bad faith.

Agreement, 18.1(F).

Appellant next asserts—without citation—that the hearing examiner was required to be

> officially empowered by a municipality or other government body pursuant to ordinance, legislation, or rule to act as a judicial or quasi-judicial body to determine and award actual damages or otherwise make binding decisions that would deprive third parties, such as John Bell, of contractual compensation.

Initial Brief at 12. The Court is left to speculate about the source of such a requirement. Appellant fails to explain why the Agreement does not confer jurisdiction to a private tribunal. Appellant instead makes the naked assertion that the "Project Agreement/Prime

Contract, incorporated into Appellant's Subcontract for claims, provides a specific **public** dispute resolution mechanism." *Id.* (emphasis added). Despite our careful review, we find no support for this argument in the Agreement.

Appellant next argues that "Florida law requires strict compliance with the authority and procedure granted by law to a County-created adjudicative process. When a tribunal acts outside the scope of that authority, its decision is void." Initial Brief at 12. Following such a strong declaration of the law, we expected the Appellant would identify the procedures it alleges exist and were violated during the process below. Yet, the Initial Brief sets forth none.

Appellant also argues that "[b]ecause the authority of the decisionmaker was limited by the Florida Constitution; the public contract; and other applicable law, substitution of a private tribunal exceeded that authority and rendered the award void as to such claims." Initial Brief at 13. This Court is left to guess as to what provision of the Florida Constitution or the Agreement limited the hearing examiner, and what other "applicable law" applies because the Initial Brief fails to identify any.

Lastly, and remarkably, Appellant asserts that "[n]o government act occurred that would empower JAMS and the dispute resolution procedures in Article 18 did not authorize replacement of the County's appointed official for claims." Initial Brief at 13. Appellant willfully ignores the fact that the Agreement was signed by the Mayor of Miami-Dade County after approval by the Board of County Commissioners. Agreement at 1, 167. We are, again, left to speculate as to what additional "government act" Appellant believes was necessary and lacking to ratify the Agreement and empower the hearing examiner to resolve the parties' dispute.

In short, the glaring failure of the Initial Brief to provide legal support for its foundational assertions convinces this Court that no basis for reversal has been demonstrated, rendering this appeal unmeritorious.[3]

Affirmed.

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[1]*See Fla. Detroit Diesel v. Nathai*, 28 So. 3d 182, 184 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D414b] ("We have elected to review the order under the summary disposition procedure in rule 9.315(a) of the Florida Rules of Appellate Procedure. This rule authorizes an appellate court to summarily affirm an order of the lower tribunal if 'no preliminary basis for reversal has been demonstrated.' As explained in the court commentary to rule 9.315, the purpose of the summary affirmance procedure is to provide an expeditious method of deciding an appeal that is unmeritorious.").

[2]"[T]he examiner ruled in favor of Appellee, Miami-Dade County, in refusing Claimants' request for additional compensation that would flow down to subcontractor, John Bell." Initial Brief at 5. *See also* Initial Brief at 14 ("The lower tribunal rejected Claimants, Plenary Justice Miami, LLC and Tutor Perini Corporation's, arguments related to Claimants and their subcontractors responsibilities and obligations pertaining to an increase of wage rates for cement masons and tile setters. . ."); Hearing Examiner's Amended Decision at 15 (Appendix 340).

[3]Because we find that Appellant's argument is substantively unmeritorious, we do not address its arguments as to why we have jurisdiction over the instant appeal. We do note, however, that contrary to its Notice of Appeal, Appellant now admits it "was not a named 'Claimant' or 'Respondent' and not a direct participant in the arbitration/alternative dispute resolution proceeding, aside from testifying." Initial Brief at 4. *See* Agreement, Article 18.1 ("[i]f either *party* wishes to appeal the decision of the Hearing Examiner, such *party* may commence an appeal in the Appellate Division of the Circuit Court for the Eleventh Judicial Circuit of Florida (or similar appellate court of competent jurisdiction)") (emphasis added).

* * *

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CIRCUIT COURTS—ORIGINAL

Counties—Code enforcement—Commercial operation in residential zone—Special magistrate's finding that property owner is in violation of land development code by conducting dog rescue operation out of her personal residential property in rural residential zone is affirmed—Owner was not denied due process where she was provided reasonable notice of hearing and was represented at hearing during which she made multiple statements and submitted written brief—Further, review of record does not support claims that special magistrate denied owner the opportunity to cross-examine witnesses, shifted the burden of proof, and found her guilty of uncharged violations—No merit to argument that finding of commercial activity was not supported by competent substantial evidence where, even without proof of profits or remuneration, there is evidence of 40 - 60 dogs in outdoor kennels, noise, odor, traffic, volunteer staff, joint activities with county animal control, and advertisements—Argument that magistrate's order is deficient for not making clear findings and not including "Conclusions of Law" subsection lacks merit where magistrate's factual findings were sufficiently clear, and he addressed legal requirements and reached conclusions—No merit to argument that owner operates "home-based business" allowed by section 559.955 because number of volunteer workers who went to property for business purposes exceeds number allowed under statute

ALICIA D. BOPP, Appellant, v. GADSDEN COUNTY, FLORIDA, Appellee. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 24-CA-771. July 1, 2025. David Frank, Judge. Counsel: Louise Wilhite-St. Laurent, Panza Maurer, Tallahassee, for Appellant. Louis J. Baptiste and Stephen G. Webster, Webster + Baptiste, Tallahassee, for Appellee.

ORDER AFFIRMING SPECIAL MAGISTRATE

This cause came before the Court on direct appeal, with oral argument on June 2, 2025, and the Court having read the briefs, reviewed all exhibits, heard argument of counsel, and being fully advised in the premises, finds and concludes as follows.

This appeal is from a September 23, 2024 Order of the Gadsden County Code Enforcement Special Magistrate ("order") determining Appellant violated the Gadsden County Land Development Code, pursuant to a code enforcement board hearing on August 8, 2024 ("hearing").

I. Standard and Scope of Review

"Section 162.11 provides that '[a]n aggrieved party . . . may appeal a final administrative order of an enforcement board to the circuit court. . . .'[1] The plain reading of that section 'clearly provides' for a plenary appeal to the circuit court 'as a matter of right.' *Cent. Fla. Invs., Inc.*, 295 So. 3d at 294 (citing *City of Ocala v. Gard*, 988 So. 2d 1281, 1282-83 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2067b])." *MGM of W. Florida, LLC v. Manatee Cnty.*, 406 So. 3d 351, 353 (Fla. 2d DCA 2025) [50 Fla. L. Weekly D560a]. "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." Fla. Stat. 162.11 (2024). ". . .[B]ut reweighing evidence is an inappropriate activity for a reviewing court regardless of whether review is by certiorari or by plenary appeal." *Id.* at 354.

II. Facts and Procedural History

Following multiple citizen complaints, Gadsden County initiated a Code Enforcement proceeding against Appellant Alicia Bopp, who operates an organization known as Champs Chance, Inc., an animal rescue operation, out of her personal residence located at 376 Milton Street, Quincy, Florida. The property is zoned Rural Residential, a designation that expressly prohibits commercial operations such as boarding kennels and animal shelters unless the use is specially permitted through a variance or rezoning.

Code Enforcement Officer David Israel visited the property and observed a large-scale animal operation, which included over 50 outdoor kennels, several dogs on site, and evidence of a coordinated staff of volunteers. Officer Israel testified during the hearing that he witnessed "a business operation, not a hobby or incidental pet care" and that the scale and visibility of the setup were "consistent with a commercial kennel or animal boarding facility."

The County issued a Notice of Violation citing Subsection 4202(D)(5) of the Land Development Code, identifying the activity as a Class Il Commercial Use not permitted in the Rural Residential zoning district. The Notice stated:

> The operation of Champs Chance, Inc., as currently situated with outdoor dog kennels and ongoing intake and adoption activity, is not consistent with a Rural Residential zoning classification and is considered a prohibited use.

Appellant received a notice that she would have to respond to the violation at a hearing that was held before the Special Magistrate on August 8, 2024. Appellant appeared at the hearing, testified under oath, and submitted a post-hearing legal memorandum. Appellant acknowledged that she operates the rescue from the subject property and testified that "we intake strays, we coordinate with County Animal Control, and we house animals in outdoor enclosures." She further testified that she had "between 40 and 60 dogs on the property at any given time" and that she relied on "volunteer staff who come and go daily" to assist with operations.

Several witnesses testified at the hearing regarding the disruptive impact of the dog rescue operation, including persistent barking, odor, traffic disturbances, and concerns about public health and safety due to the number of dogs kenneled on Appellant's property.[2]

Testifying on behalf of the County, Planning and Zoning staffer Ellen Andrews explained that the County's LDC prohibits animal related commercial uses in this zoning district, stating: "The use here falls under our definition of a Class Il Commercial Use. That includes veterinary offices, kennels, and shelters with outdoor facilities. It is not permitted in Rural Residential zoning without a special exception."

Chapter 2 of the Gadsden County Land Development Code contains a definition section that contains the following language:

> Section 2000. Interpretation. The following rules shall be observed in the application and interpretation provision of this Code, except when the context clearly requires otherwise.
>
> The word "***includes***" shall not limit a term to the specified examples, but it is intended to extend its meaning ***to all other instances or circumstances of like kind or character***.

The Gadsden County Land Development Code defines Class Il Commercial uses as follows:

> Class II Commercial Uses
>
> Class Il, General Commercial land use activities ***include*** those activities which require outdoor storage, have higher trip generation rates and/or the potential for greater nuisance to adjacent properties than Class I, General Commercial land use activities. Class Il General Commercial land use activities are considered Special Exception uses and require review by the Planning Commission and approval by the Board of County Commissioners.
>
> . . .
>
> 5. Veterinary offices and animal hospitals, with outside kennels.

The order, issued on September concluded that Appellant's use of the property "constitutes a Class Il Commercial Use under

S 4202(D)(5) of the Gadsden County Land Development Code." The Order specifically found that: "The scope of activity conducted on the premises, including the number of animals, the presence of volunteers, and the visibility of kennels and infrastructure, clearly exceeds what is permitted as a home occupation or residential accessory use."

The Magistrate ordered that Appellant "cease and desist all unauthorized commercial activity" within thirty days, with the opportunity to apply for a special exception or variance through the County's land use process.

Specifically, the Special Magistrate ruled that:

A. The operation of the non-profit corporation constitutes a Class H commercial use as defined Gadsden County LDC Chapter 4, subsection 4202.

B. The Corporation violates this section when using this property for a commercial use that includes outdoor dog kennels. Although this section does not specifically discuss an animal shelter, this Court finds that the operation of an animal shelter is sufficiently similar to the operation of a veterinary office or animal hospital.

C. This Court hears arguments that Champs Chance, Inc. does not produce revenue, and should not be considered a commercial enterprise. This begs the question as to why the landowner would operate this endeavor as a corporation and not simply as a hobbyist without a business or corporate designation. It appears that the commercial nature of the activities on the property are precisely what is being cited as the violation for the activities on the property.

D. This Court orders that the non-profit corporation, Champs Chance, Inc. immediately cease and desist all commercial activities on this property. This includes the operation of outdoor dog kennels and the operation of Champs Chance, Inc, in all functions and operations.

E. The caveat to this Order is that if the corporation, Champs Chance, Inc., applies for a special variance with Gadsden County on or before September 25, 2024, this order will be stayed for such time as it takes for the completion of the processing and final determination of the special variance by Gadsden County.

F. This Court reiterates that the function of this Court is to determine whether a use of a property violates the Gadsden County Land Development Code. The function of this Court is not to grant variances for or within the Gadsden County Land Development Code.

III. Appellant's Arguments

Appellant's arguments will be addressed in turn.

A. The Appellee instituted a code enforcement action without legal basis by relying on an anonymous complaint, meaning that the entire proceeding failed to satisfy the essential requirements of law.

Neither party sufficiently addressed this challenge. Appellant seemed to forgo the matter. Regardless, neither party described the initial complaint with enough detail to know if it was anonymous or not. The matter was not meaningfully addressed at oral argument, nor in the record of the code enforcement hearing, and it is not even mentioned in the order. Accordingly, it will not be addressed as part of this appeal.

B. The Appellee violated Appellant's fundamental procedural due process rights by failing to inform Appellee of the nature of the use of her property that was violative of the LDC, failing to provide sufficient or timely notice of the Special Hearing or any procedures applicable to the Special Hearing, preventing Appellant from cross-examining any witnesses against her, shifting the burden of proof to the Appellant to prove her land use was compliant with unspecified portions of the LDC, and finding Appellant in violation of uncharged portions of the LDC.

"The amount of due process required in a quasi-judicial haring is not the same as that to which a party to a full judicial hearing is entitled and such hearings are not controlled by the rules of evidence and procedure." *Reinhardt v. City of Dunedin Code Enforcement Board*, Case No. 14-000009AP-88B (Fla. 6th Cir. App. Ct. July 24, 2014) [22 Fla. L. Weekly Supp. 11b]. "A quasi-judicial hearing meets basic due process requirements if parties are provided notice of hearing and opportunity to be heard. Opportunity does not mean that there must be actual evidence presented, it is that an opportunity is given when notice has been duly provided; it means a time in which a party may present evidence, which was provided to Respondent." *Id*. "Further, while local government code enforcement matters are quasi-judicial proceedings, the amount of due process required here is not controlled by any set procedure. *Id.,* citing *Elaine Morris, Trustee, Truliet Investments, LLC v. City of Orlando, Florida* Case No. 2014-CV-52-A-O (Fla. 9th Cir. App.Ct. Feb, 19, 2015).

Appellant was provided reasonable notice of a violation regarding commercial activity at her residence. She was given reasonable notice of a hearing with the Special Magistrate on the same. She attended the hearing, was represented, made multiple statements on the record, and submitted a written brief with legal arguments.

Further, the Court disagrees that "review of the record created before the enforcement board" support's Appellant's contention that the Special Magistrate denied her the opportunity to cross examine witnesses, shifted burdens, or found her guilty of "uncharged" violations.

Accordingly, Appellant was not denied the due process to which she was entitled.

C. The Order is not supported by competent substantial evidence because the record contains no evidence that Appellant is operating a Class IT commercial business, there is no allegation or evidence that the Appellant operated a Veterinary Office, Animal Hospital, or Animal Shelter, and the existence of dog kennels is not itself sufficient to find that the use was commercial.

"The rulings of a trial court arrive in appellate courts with the presumption of correctness and appellate courts must interpret the evidence in a manner most favorable to sustain the trial court's rulings." *Francius v. Carlos Auto Rental Services, Inc.*, 394 So.3d 157, (Mem)-158 (Fla. 3d DCA 2024) [49 Fla. L. Weekly D1526a], reh'g denied (Aug. 21, 2024) (citation and quotation omitted). This applies to the findings and conclusions of a special magistrate.

"It is well-established that the appellate court does not re-weigh the evidence or the credibility of witnesses." *Lahodik v. Lahodik*, 969 So. 2d 533, 535 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2793a] (citations omitted). "Similarly, the appellate court does not assess whether it is possible to recite contradictory record evidence which supports arguments rejected below, nor does it retry the case or substitute its judgment for the trial court's on factual matters supported by competent, substantial evidence." *Id*. "[C]ase[s] may not be retried on appeal, and a ruling which is supported by competent, substantial evidence will be upheld even though there may be some persuasive evidence to the contrary." *Id*. (citation to quote omitted).

Here, "review of the record created before the enforcement board" shows there was sufficient evidence of commercial activity, even without proof of profit or even remuneration. There was evidence of numerous dog kennels, numerous dogs, noise, odor, traffic, a complement of volunteer staff, reimbursement of expenses, joint activities with Gadsden County Animal Control, and advertisements. Appellant admitted operating Champs Chance, Inc. on the premises and housing 40-60 dogs in outdoor kennels.

The County was not required to find or prove that Appellant operated a "veterinary office [or] animal hospital with outside kennels." The word "include" in the relevant code section makes those uses examples, not an all-inclusive list, *see* discussion of definitions in Chapter 2, Section 2000 above.

Important here is that a certain amount and pattern of normally "residential" activities can become "commercial" in nature. *Bennett v. Walton Cnty.*, 174 So.3d 386 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1452a]; *See also Investment Management Marla, LLC, Appellant, v. Town of Southwest Ranches, Appellee*. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-

021028 (AP). L.T. Case Nos. 2023-108 and 2023-118. November 21, 2024 [32 Fla. L. Weekly Supp. 408a] ("The Bruno business is operational 6 days out of the week. There are about 10-12 cars parked at the Property at any given time. There is a sign at the entrance of the Property that reads 'Bruno Happy Dogs.' The property is surrounded by a fence, and portions of the fence have a cloth or netting attached to the fence.")

The record of the code enforcement board reflects competent and substantial evidence of commercial activity in violation of the ordinance.

D. The Order fails to provide clear findings of fact and contains no conclusions of law. The Order also granted relief to the County that goes beyond the statutorily granted allowance to Appellant to use her personal residence for a home-based business.

The Special Magistrate was not required to include in his order a subsection titled "Conclusions of Law." To require so would elevate form way over substance. His factual findings were clear enough and he did address legal requirements and reached conclusions.

Regarding "home-based business," Appellant relied on Florida Statute 559.955, which allows a certain amount and type of home-run business while preserving the residential quality of the surrounding neighborhood.[3]

The statue requires that "[t]he employees of the business who work at the residential dwelling must also reside in the residential dwelling, except that up to a total of two employees or independent contractors who do not reside at the residential dwelling may work at the business." The statute does not define the words "employee" or "independent contractor."

Investment Management Marla, LLC is instructive. In that case, the homeowner argued that a veterinarian and dog trainer should not be counted towards the employee/independent contractor limit because they were both unaffiliated with the homeowner. *Id*. Regarding the veterinarian, the homeowner pointed out that she has her own business and did not work for the homeowner. *Id*. Regarding the dog trainer, the homeowner noted that the homeowner did not earn money from referrals. *Id*.

The Broward circuit court held that: "Section 559.955(3)(a), Florida Statutes, does not limit its application to employees or independent contractors to those who are formal employees or work at the business everyday. By its terms, the statute applies to those employees or independent contractors who work at the residential dwelling. Thus, the Special Magistrate was correct in finding that the veterinarian and dog trainer both counted towards the statutory limit of employees." *Id*.

In the present case, Appellant's counsel confirmed that "two to four individuals went to the property on average for any business purpose during the time of the violation." Even if some or all have been referred to as "volunteers," they counted for purposes of the statute. The number, therefore, exceeds the maximum allowed under the statute.

Accordingly, Florida Statute 559.955 does not apply to Appellant's operation and, thus, cannot provide ground for appeal.

For the reasons above, the ruling of the Special Magistrate is AFFIRMED.

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[1]"A special magistrate shall have the same status as an enforcement board under this chapter." Fla. Stat. 162.03(2) (2024).

[2]These neighbors' complaints corroborated the County's findings and illustrated the incompatibility of Appellant's use with Rural Residential zoning.

[3]". . .[W]hile preserving the residential quality of the surrounding neighborhood" would have been an additional issue if the number of employees were not dispositive, see below.

* * *

Torts—Breach of fiduciary duty—Abuse, neglect, or exploitation of vulnerable adult—Count asserting claim for breach of fiduciary duty dismissed for failure to state cause of action—Adult protective services—Count seeking damages based on violation of section 415.1111, is also dismissed for failure to state cause of action—Statute requires that civil action against any person who establishes, controls, conducts, manages, or operates nursing home must be brought pursuant to section 400.023

THERESA MARINO, by and through KAREN SANDY LENT, attorney-in-fact, Plaintiff, v. RETIREMENT THREE, LLC; et al., Defendants. Circuit Court, 5th Judicial Circuit in and for Sumter County. Case No. 2025-CA-201. June 13, 2025. Erin Daly, Judge. Counsel: A. Lance Reins, Tampa, for Plaintiff. Robin N. Khanal and Tiffany V. Colbert, Quintairos, Prieto, Wood & Boyer, P.A., Orlando, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT (II) OF PLAINTIFF'S COMPLAINT AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT V OF PLAINTIFF'S COMPLAINT

THIS COURT having considered Defendant Retirement Three, LLC's Motion to Dismiss Count (II) of Plaintiff's Complaint, filed on May 15, 2025; Defendant Stanley H. Sternefeld's Motion to Dismiss Count V of Plaintiff's Complaint, filed on May 15, 2025; and having reviewed the Court file; finds as follows:

1. Plaintiff's Complaint, filed on April 11, 2025, asserts the following counts: (I) Non-Lethal Negligence Damages against Retirement Three, LLC; KR Management, LLC; and Stanley H. Sternefeld; (II) Breach of Fiduciary Duty Retirement Three, LLC; (There are no counts (III) and (IV)); and (V) Violation of Florida Statutes § 415.1111 Stanley H. Sternefeld. Plaintiff attached a Durable General Power of Attorney.

2. Defendant Retirement Three, LLC asserts count (II) is impermissible and should be dismissed.

3. Defendant Stanley H. Sternefeld asserts count (V) is impermissible and should be dismissed.

4. Florida law is well-settled that the trial court's standard of review regarding a motion to dismiss is as follows:

> The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.

Huet v. Mike Shad Ford, Inc., 915 So.2d 723, 725 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2728b]

Thus, this Court must confine its gaze to the four corners of the Complaint, "accept as true" the Plaintiff's allegations, and determine whether the Plaintiff has properly alleged a valid cause of action against the Defendant.

5. Plaintiff failed to assert a cause of action for Breach of Fiduciary Duty. *See Barnett Bank of W. Florida v. Hooper*, 498 So.2d 923 (Fla. 1986); *Inversiones Inmobiliarias Internacionales de Orlando Sociedad Anomina v. Barnett Bank of Cent. Fla., N.A.*, 584 So. 2d 110, 111 (Fla. 5th DCA 1991) (a fiduciary relationship under Florida law is a legally imposed relationship which will be found to exist where a relation of trust and confidence exists between the parties, that is, where confidence is reposed by one party and a trust accepted by the other.) Consequently, count (II) should be dismissed.

6. Plaintiff's claim for violation of Florida Statutes §415.1111 in count (V) fails to assert a cause of action. Section 415.111 provides that that any civil action for damages against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part II of chapter 400 relating to its operation of the licensed facility shall be brought pursuant to s. 400.023.

Based upon the foregoing, it is hereby;

ORDERED AND ADJUDGED: That;

1. Defendant Retirement Three, LLC's Motion to Dismiss Count (II) of Plaintiff's Complaint is **GRANTED**.

2. Defendant Stanley H. Sternefeld's Motion to Dismiss Count V of Plaintiff's Complaint is **GRANTED**.

3. Counts (II) and (V) of Plaintiff's Complaint is hereby **DISMISSED**.

4. Plaintiff has 20 days from the date of this order to file an Amended Complaint that sufficiently asserts a cause of action and comports with Florida substantive law and the Florida Rules of Civil Procedure.

5. Failure to file the Amended Complaint within the time allowed may result in the imposition of sanctions or may require Plaintiff to seek further leave of Court to amend.

* * *

Criminal law—Robbery by sudden snatching—Immunity—Stand Your Ground law—Defense of property—Defendant who used force to remove lanyard containing keys to her disabled daughter's apartment, pantry, refrigerator, and medications from neck of home health aide who refused multiple requests to give keys to defendant is entitled to immunity from prosecution under SYG law—A defendant seeking immunity for actions taken in defense of property is not required to prove entitlement to immunity by preponderance of evidence—Defendant established prima facie case that she was justified in using non-deadly force when she reasonably believed that such conduct was necessary to terminate aide's tortious interference with defendant's personal property—Even if one key on lanyard was not defendant's actual property, but belonged instead to aide's employer, state presented no evidence that defendant's belief that all keys were hers was unreasonable—Motion for declaration of immunity and dismissal is granted

STATE OF FLORIDA, Plaintiff, v. LAURA LYNNE URQUHART, Defendant. Circuit Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2023-CF-003491-A. Division IV. April 22, 2024. William E. Davis, Judge. Counsel: Christopher Andrew Holz, Gainesville, for Plaintiff. Caleb S. Kenyon, Turner O'Connor Kozlowski, P.L., Gainesville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR DECLARATION OF IMMUNITY AND DISMISSAL

The Court heard Defendant's Motion for Declaration of Immunity and Dismissal under F.S. 776.032 and F.S. 776.031 on March 7, 2024. The State presented the sworn testimony of Latoya Powell and Andrew Maddox. The Defendant submitted a sworn statement that was included in her motion and the sworn testimony of Dan White. Based on the evidence and arguments presented, the Court makes the following findings of fact and conclusions at law:

I. Legal Standard

a. F.S. 776.031, use or threatened use of force in defense of property, provides in part:

> (1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to prevent or terminate the other's trespass on, or other tortuous or criminal interference with, either real property other than a dwelling or personal property lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

b. F.S. 776.032 provides in part:

> (1) A person who uses or threatens to use force as permitted in F.S. 776.012, F.S. 776.013, or F.S. 776.031, is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened, unless the person against whom force was used or threatened is a law enforcement officer, as defined in F.S. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) *Not applicable.*
>
> (3) *Not applicable.*
>
> (4) In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).

II. Defendant's Sworn Statement

As the Defendant's sworn statement within her motion established a prima facie claim of self-defense immunity, the burden shifted to the State to prove by clear and convincing evidence that the Defendant was not entitled to immunity from criminal prosecution. § 776.032(4), Fla. Stat.; *see also Jefferson v. State,* 264 So. 3d 1019, 1026 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D135a].

III. State's Presentation of Evidence

a. The State presented the sworn testimony of three witnesses: Latoya Powell, Dominque Johnson, and Andrew Maddox.

b. Latoya Powell testified that on May 27, 2023, she was employed by APMJR Services, LLC, owned by Andrew Maddox. On that night, Ms. Powell was providing home health care services to Ms. Urquhart's disabled, adult daughter—Danielle White. Ms. Powell wore around her neck a lanyard with multiple keys. Ms. Powell testified that the lanyard, and one of the multiple keys on the lanyard were the property of her employer. The other keys on the lanyard included keys to Danielle's mailbox, refrigerator, and apartment. Ms. Powell acknowledged that Ms. Urquhart is Danielle's mother and legal guardian. On May 27, 2023, Ms. Urquhart requested Ms. Powell give her the lanyard and keys, and Ms. Powell refused. Ms. Urquhart then retrieved the lanyard and keys by pulling the lanyard over Ms. Powell's head. Ms. Powell testified that the Defendant did not hit, punch, tackle, kick, or use any force greater than was necessary to pull the lanyard over Ms. Powell's head.

c. Andrew Maddox testified that he owned APMJR Services, LLC and was Ms. Powell's employer on May 27, 2023. Mr. Maddox's company contracted with Dan White to provide home health care services for Ms. Urquhart's disabled, adult daughter—Danielle White. Maddox testified that he bought a safe, with a key, to hold Danielle White's medications. He testified that he never received money from Dan White for the purchase of the safe. Mr. Maddox further testified that the key to the medicine safe was similar looking, albeit different, to the key to the refrigerator.

IV. Defense Presentation of Evidence

a. By sworn statement contained in her motion, Ms. Urquhart is the court appointed legal guardian of her disabled, adult daughter—Danielle White. Danielle White suffers from Prader-Willi syndrome, necessitating restricted access to food, drinks, and medications. Ms. Urquhart rents an apartment for Danielle and provides almost daily onsite care to Danielle. To protect Danielle, her pantry, refrigerator, and medication safe are kept under lock and key. The keys to these locks are kept on a lanyard and are the property of Ms. Urquhart as Danielle's legal guardian. The lanyard and keys are entrusted to home healthcare workers when Ms. Urquhart is not physically present with Danielle. On May 27, 2023, Latoya Powell was the home health care worker present with Danielle. On that night, Ms. Urquhart visited her daughter at her apartment, at which point Ms. Powell stepped outside with the lanyard and keys around her neck. Ms. Urquhart requested the lanyard and keys from Ms. Powell so she could provide Danielle

with her bedtime snack and medication. Ms. Powell repeatedly refused to give the lanyard and keys to Ms. Urquhart. Ms. Urquhart then grabbed the keys and lifted the lanyard over Ms. Powell's head. Ms. Urquhart believed this was required as Ms. Powell had refused to return the lanyard and keys that belonged to her as guardian for Danielle.

b. Dan White testified that he is the father of Ms. Urquhart's disabled, adult daughter—Danielle White. He contracted with Maddox's company to provide home health care services for Danielle. He testified that Ms. Urquhart is the legal guardian of Danielle and that all property provided for Danielle's care by Mr. White was entrusted to Ms. Urquhart. Dan White testified that he purchased the lanyard that Ms. Powell's wore on the night of the incident. The defense introduced a receipt into evidence corroborating Mr. White's purchase of the lanyard (Defense Exhibit 4). Mr. White testified that he assembled the keys to the mailbox, refrigerator, and apartment on the lanyard, and that the same keys remained on the lanyard when he inspected it a week after the incident. Mr. White testified that he did not place any safe key on the lanyard, nor was there a safe key on the lanyard when he inspected it a week after the incident. Mr. White testified that the safe was accessed by a code and further testified the safe code was "2233." He stated that Mr. Maddox purchased a safe for Danielle's medications, but only after Mr. White placed $1,000 into an account for Danielle's care. Mr. Maddox was given access to the account and withdrew money from the account prior to the purchase of the safe. Despite numerous requests from Mr. White, Mr. Maddox never provided an accounting of what Maddox used the withdrawn funds to purchase.

V. Analysis

a. The State first claims that Ms. Urquhart must prove she is entitled to immunity by a preponderance of the evidence, arguing that F.S. 776.032(4) does not apply to defense of property immunity pursuant to section 776.031.

b. However, "[s]ection 776.032(4) . . . applies to ***all*** Stand Your Ground immunity hearings" including section 776.031. *Love v. State,* 286 So. 3d 177, 190 (Fla. 2019) [44 Fla. L. Weekly S293a] (emphasis added). "The text of section 776.032(4) directs a party seeking immunity from criminal prosecution to 'raise[ ]' a 'prima facie claim' of self-defense as described in section 776.032(1). . . referring to section 776.032(1)'s inclusion of the affirmative defenses of justifiable self-defense and use of force set forth in sections 776.012, .013, and **.031**." *Jefferson v. State,* 264 So. 3d 1019, 1026 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D135a] (emphasis added) *quoting* § 776.032(4), Fla. Stat. (2017).

c. Ms. Urquhart was charged with Robbery By Sudden Snatching pursuant to F.S. 812.131. Section 812.131 requires the State prove that a defendant took property "from the victim's person." To take property from a victim's person, a defendant necessarily must "actually and intentionally touch[ ]" the victim, i.e. use force. *See* § 784.03, FLA. STAT. (2023). Consequently, Battery is an enumerated lesser included offense of Robbery by Sudden Snatching. *See* Fla. Std. Jury Instr. (Crim.) 15.4. Ms. Powell testified that Ms. Urquhart used force when retrieving the lanyard by intentionally touching Powell against her will. Thus, Battery is a necessary element of Robbery by Sudden Snatching in this case, meaning section 776.031 applies to Ms. Urquhart's use of force. *See Pitts v. State,* 989 So. 2d 27, 31 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1631b].

d. Ms. Urquhart raised a prima facie claim of self-defense immunity from her sworn statement contained in her motion. The State had the burden of proof by clear and convincing evidence to overcome Ms. Urquhart's "prima facie claim of self-defense immunity from criminal prosecution" for her use of force "as permitted in. . .F.S. 776.031." § 776.032, Fla. Stat. (2023).

e. The Court finds that the State did not meet its burden based on the testimony and evidence provided during the hearing on March 7, 2024.

f. Ms. Urquhart's sworn statement established a prima facia case that she was justified in using non-deadly force "against [Ms. Powell] when and to the extent that [Ms. Urquhart] reasonably believe[d] that such conduct [was] necessary to prevent or terminate [Ms. Powell's] tortious or criminal interference with . . . personal property lawfully in . . . her possession or in the possession of . . . a person whose property . . . she has a legal duty to protect." § 776.031(1), Fla. Stat. (2023).

g. The State attempted to prove Ms. Urquhart was not justified in using force by showing (1) Ms. Powell was lawfully in possession of the lanyard and keys; (2) one of the keys on the lanyard did not belong to Ms. Urquhart; and (3) Ms. Urquhart's use of force was unreasonable because Ms. Powell was not engaging in wrongful behavior.

h. It was uncontested that on May 27, 2023, Ms. Powell was in possession of a lanyard containing ***multiple*** keys that opened several locks in and to Danielle White's apartment. Ms. Powell herself attested that one of the keys opened Danielle's apartment, which is rented by Ms. Urquhart for her adult, disabled daughter, Danielle.

i. Ms. Powell testified that the lanyard and ***one*** of the keys on that lanyard belonged to Maddox's company. This Court finds that Ms. Powell's claim that the lanyard was owned by her employer was not credible as it is inconsistent with the testimony of Mr. White and the documentary evidence of purchase. Mr. White's testimony that he assembled the lanyard with multiple keys for locks in and to Danielle's apartment was not refuted. This Court finds Mr. White's testimony credible.

j. Ms. Urquhart presented documentary evidence that she is the legal guardian of Danielle White, which was uncontested by the State.

k. Mr. White testified that he purchased the lanyard and keys at issue for the care of his daughter, Danielle, and that Ms. Urquhart is entrusted with all property he purchased for Danielle's care. The State presented no evidence to the contrary.

l. Through the testimony of Ms. Powell and Mr. Maddox, the State presented some evidence that ***one*** of the keys, a safe key, was on the lanyard around Ms. Powell's neck at the time of the incident. Ms. Powell and Mr. Maddox claimed that the safe key was the property of Ms. Powell's employer. The defense presented testimony by Mr. White claiming he provided the funds for the purchase of the safe and key for Danielle's care. Mr. White also testified that the safe key was not on the lanyard when he saw the lanyard a week after the incident.

m. Regardless, the State presented no evidence that the remaining keys on the lanyard belonged to anyone other than Ms. Urquhart as legal guardian of Danielle.

n. Even if part of the property retrieved by Ms. Urquhart is not her actual property, i.e., she was mistaken about one key on the lanyard, the relevant question for purposes of Stand Your Ground immunity is whether Ms. Urquhart "reasonably believed" the property was hers. § 776.031, Fla. Stat. (2023); *see also Bouie v. State,* 292 So. 3d 471, 481 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D415a]; *State v. Quevedo,* 357 So. 3d 1249, 1250-53 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D539a]. The State presented no evidence that Ms. Urquhart's belief was unreasonable, as it only attempted to establish that ***one*** of many keys on the lanyard belonged to Ms. Powell's employer.

o. In sum, the State failed to establish by clear and convincing evidence that the lanyard and most (if not all) of the keys on the lanyard were the personal property of anyone other than Danielle White and Ms. Urquhart as the legal guardian of Danielle. The State further failed to establish that Ms. Urquhart's belief was unreasonable that the lanyard and keys were her and Danielle's personal property.

p. Thus, the moment that Ms. Urquhart demanded the return of the lanyard and associated keys and Ms. Powell refused, Ms. Powell committed a tortuous interference with Ms. Urquhart's personal property, i.e. conversion of the lanyard and at least three separate keys. *World Cellphones Distribs. Corp. v. De Surinaamsche Bank, N.V.,* 357 So. 3d 225, 229 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D332b] ("Where a person having a right to possession of property makes demand for its return and the property is not relinquished, a conver-

sion has occurred.") (internal quotations omitted).

q. To terminate Ms. Powell's tortuous interference of her property, Ms. Urquhart was entitled to use non-deadly force. *See* § 776.031, Fla. Stat. (2023); *see also Burns v. State,* 361 So. 3d 372, 377-78 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1067a].

r. This Court finds that Ms. Urquhart's minimal use of force was justified under section § 776.031 and therefore she is immune from prosecution.

ORDERED AND ADJUDGED:

The Defendant's Motion for Declaration of Immunity and Dismissal is GRANTED, with prejudice.

* * *

Torts—Punitive damages—Motion for leave to amend complaint to add claim for punitive damages in action against realty management company brought by plaintiff who was struck by bed frame that was dropped from second floor balcony by independent contractor hired by management company to clean out rented condominium unit—Motion denied—There is no reasonable showing that management company engaged in requisite level of intentional misconduct or gross negligence to be exposed to punitive damages claim where company had no knowledge that contractor would choose to drop bed frame from balcony, company did not direct contractor to drop bed frame or control its work, and company had retained contractor over 100 times to perform similar work with no complaints or reports of injury—Motion also fails because allegation that management company knowingly allowed unlicensed contractors to perform construction work all over county is not supported by record, and there is no evidence that furniture removal work that caused injury required contractor's license—Further, motion fails where there is no allegation that a managing agent of management company, a limited liability company, was grossly negligent or knowingly participated in or condoned behavior that would warrant punitive damages

MAYRE MARICHAL, Plaintiff, v. MALU ONE, LLC, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-014346-CA-01. Section CA31. June 4, 2025. Migna Sanchez-Llorens, Judge. Counsel: Bram J. Gechtman, GCFLA Law, P.A., for Plaintiff. Scott Boyer, Salehi, Boyer, Lavigne Lombana, P.A., for Defendant Midtown Realty Group, LLC.

ORDER ON MOTION TO LEAVE TO AMEND

THIS CAUSE came before the Court for hearing on May 19, 2025, on Plaintiff's Motion for Leave to Amend Complaint to Add Punitive Damages at Count #12 Against Defendant, Midtown Realty Group, LLC. After reviewing the Plaintiff's Motion, Midtown Realty Group, LLC's written response in opposition, the Court file, and hearing argument, for the reasons discussed below, Plaintiff's Motion for Leave to Amend Complaint to Add Claims for Punitive Damages at Count #12 Against Defendant, Midtown Realty Group, LLC and finds:

BACKGROUND

1. In this personal injury case, the record facts are as follows: Midtown Realty Group, LLC managed a residential property on the second floor of a condominium building. The property was owned by Co-Defendant, Malu One, LLC. Because the previous tenant left the property in poor condition, Midtown Realty hired independent contractor, Remodelaciones IDR, Inc., to remove abandoned furniture and perform various repairs to the walls and floors so that the property could be returned to a rentable condition. Remodelaciones IDR, Inc. began the job by removing abandoned furniture, and in the process, dropped a bed frame off the second-floor balcony, which allegedly struck the Plaintiff who was walking below.

2. Plaintiff moved for leave to amend the complaint to add a punitive damage count against Midtown Realty Group, LLC only.

3. Florida Statute, §768.72 states the elements necessary to bring an action for punitive damages against an entity such as Midtown Realty Group, LLC:

768.72 Pleading in civil actions; claim for punitive damages.-

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

4. Florida appellate courts have interpreted Florida Statute, §768.72 to require the most egregious of behavior by the alleged wrongdoer for a punitive damage count to be maintained.

5. "Punitive damages are reserved for truly 'culpable conduct,' where the conduct is so outrageous in character, and so extreme in degree. . .[that] the facts [of the case] to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous!" *Federal Ins. Co. v. Perlmutter*, 376 So. 2d 24 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D2320b] *quoting Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 705 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D203a].

6. "Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others." *Id. quoting W.R. Grace & Co.-Conn v. Waters*, 638 So. 2d 502, 503 (Fla. 1994).

7. "The character of negligence necessary to sustain an award of punitive damages must be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them." *Valladares v. Bank of Am. Corp.*, 197 So. 3d 1, 11 (Fla. 2016) [41 Fla. L. Weekly S252a] *quoting Owens-Corning Fiberglass Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999) [24 Fla. L. Weekly S401a].

8. "Allegations of misfeasance or malfeasance, or breaches of a professional standard of care, cannot without more be converted into a claim for punitive damages simply by labeling them as 'grossly' negligent." *Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v.*

Oriolo, 357 So. 3d 703, 705 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D203a] *citing Weller v. Reitz*, 419 So. 2d 739, 741 (Fla. 5th DCA 1982) (distinguishing simple negligence, in which a reasonable person would know conduct might result in injury, with gross negligence, which is a "conscious and voluntary act or omission [and] is likely to result in grave injury."

9. The Florida Supreme Court has gone so far as to state that the required level of negligence for punitive damages is equivalent to nothing short of the conduct involved in criminal manslaughter. [Emphasis added]. *Valladares v. Bank of America Corp.*, 197 So. 3d 1 (Fla. 2016) [41 Fla. L. Weekly S252a].

10. For instance, in *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1028 (Fla. 1984), the Florida Supreme Court held that operating a forty-ton CAT 988 "loader" with knowledge that its brakes had not been working for some time was not enough to support a claim for punitive damages.

11. First, in the present case, guided by the law referenced above, there is no reasonable showing by evidence in the record or proffered by the Plaintiff that Midtown Realty Group, LLC engaged in the requisite level of intentional misconduct or gross negligence to be exposed to a punitive damage claim. Instead, the undisputed record evidence is as follows (paragraphs 12-15):

12. It was Defendant, Remodelaciones IDR, Inc., and not Midtown Realty Group, LLC, that dropped the bed frame off the second-floor balcony.

13. Midtown Realty Group, LLC had no knowledge that Remodelaciones IDR, Inc., would choose to drop the bed frame off the balcony; Midtown Realty Group, LLC did not direct Remodelaciones IDR, Inc. to drop the bed frame off the balcony; and Midtown Realty Group, LLC did not have any control over the manner with which Remodelaciones IDR, Inc. carried out its work.

14. During the five (5) to six (6) years preceding the subject accident, Midtown Realty Group, LLC had retained Remodelaciones IDR, Inc., over one hundred (100) times to perform similar work, and there had never been a single complaint reported about the quality or safety of their work, much less a report of danger or injury associated with it.

15. Accordingly, Plaintiff has not made the requisite showing of intentional misconduct or gross negligence on the part of Midtown Realty Group, LLC.

16. Second, in their Motion, Plaintiff alleged that Midtown Realty Group, LLC knowingly allowed unlicensed contractors to repeatedly perform construction at condominiums all over Dade County, which Midtown Realty Group knew would result in injury to a member of the public at some point.

17. However, this Court cannot simply accept the allegations in a complaint or motion to amend as true. *Manheimer v. Florida Power & Light Company*, Case No. 3D22-1534 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1495a] *citing Napleton's N. Palm Auto Park, Inc. v. Agosto*, 2023 WL 4095777 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1250b].

18. "A trial court must weigh both parties' showings when considering whether the evidence or proffer is sufficient to establish a reasonable evidentiary basis for recovery of punitive damages." *Id.*

19. "A trial court's inquiry under section 768.72 is more intensive than at summary judgment because the statute 'necessarily requires the court to weigh the evidence and act as a factfinder.' " *Id. quoting Napleton*.

20. Here, this Court has found that Plaintiff's evidence and/or proffer is insufficient to support their allegation or a recovery of punitive damages for the following additional reasons (paragraphs 22-26)

21. Whether the subject job that Remodelaciones IDR, Inc. was retained to perform required a "Contractor's License" remains a disputed question of fact due to competing affidavits from the parties' retained general contractors.

22. There is no record evidence or proffer from the Plaintiff that the work being done, which caused the alleged injury (removal of abandoned furniture) required a "Contractor's License."

23. There is no record evidence or proffer from the Plaintiff supporting their allegation that Midtown Realty Group, LLC *knew* that any portion of the subject job required a "Contractor's License." In fact, the record evidence is the opposite: Midtown Realty Group, LLC did not think that the subject job required a license to be performed.

24. There is no record evidence or proffer from the Plaintiff supporting their allegation that Midtown Realty Group, LLC *repeatedly* allowed unlicensed contractors to perform construction work all over Dade County. To this point, there is no record evidence or proffer from the Plaintiff providing any basis or explanation as to why any other said jobs required a "Contractor's License," and/or what portion(s) of said jobs required a "Contractor's License."

25. And there is no record evidence or proffer from Plaintiff which establishes any nexus between work being done that would otherwise require a "Contractor's License," and said work actually endangering the safety of the Miami-Dade community because it was being done without a license.

26. Third, Plaintiff's Motion fails because it does not meet the necessary elements required to bring a punitive damage claim against Midtown Realty Group, LLC as a limited liability company, especially when the alleged injury-causing bad actor was a different company altogether.

27. "Because a corporation cannot act on its own, 'there must be a showing of willful and malicious action on the part of the **managing agent** of the corporation.' " [Emphasis added]. *Pinnacle Property Management Services, LLC v. Forde,* No. 4D2023-0606 (Fla. 4th DCA 2023) [49 Fla. L. Weekly D98d] *quoting Fla. Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205-06 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2619a] *quoting Partington v. Metallic Eng'g Co.*, 792 So. 2d 498, 501 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D854b].

28. "A managing agent 'must be an individual of such seniority and stature within the corporation or business to have ultimate decision-making authority for the company. *Id. quoting Halum v. ZF Passive Safety Sys. US, Inc*., 360 So. 3d 391 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D647a].

29. "A managing agent is an individual like a president [or] primary owner who holds a position with the corporation which might result in his acts being deemed the acts of the corporation.' " *Id. quoting Taylore v. Gunter Trucking Co., Inc.*, 520 So. 2d 624 (Fla. 1st DCA 1988).

30. In *Pinnacle Property Management Services, LLC v. Forde*, 372 So. 3d 2926 (Fla. 4th DCA 2023) [49 Fla. L. Weekly D98d], Plaintiff proffered an email that had been sent to an executive vice president of the defendant company informing them of a broken security gate in order to show that the company was grossly negligent by not fixing the gate.

31. However, in *Forde*, Plaintiff proffered no evidence that said executive vice president was a "managing agent" possessing ultimate decision-making authority for the company." *Id.*

32. Accordingly, the 4th DCA ruled that *Forde* failed to proffer sufficient evidence to recover punitive damages against *Pinnacle* as an employer and business entity. *Id.*

33. In the instant case, Plaintiff made no allegation in their Motion that a "managing agent" of Midtown Realty Group, LLC was grossly negligent or knowingly participated in or condoned the type of behavior that would warrant a claim for punitive damages.

34. "[A]mending a complaint to add a claim for punitive damages requires culpable corporate conduct shown through the actions of that corporation's managing agent(s)." *Napleton's North Palm Auto Park, Inc. v. Agosto,* 364 So. 3d 1103 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1250b].

35. "[T]he trial court, in its gatekeeping function, must consider the pleading and evidentiary components of the motion to amend to determine if the plaintiff may plead a claim for punitive damages." *Palm Bay Towers Condo Assn., Inc. v. Marrazza*, No. 3D23-1952 (Fla. 3d DCA 2025) [50 Fla. L. Weekly D104c].

36. "Absent sufficient allegations, there would be neither a reason nor a framework for analyzing the proffered evidentiary basis for a punitive damages claim." *Crump v. American Multi-Cinema, Inc.*, 383 So. 3d 880, 885 (Fla. 5th DCA 2024) [49 Fla. L. Weekly D692a].

37. Plaintiff's Motion lacks the necessary allegation that a "managing agent" of Midtown Realty Group, LLC was grossly negligent or knowingly participated in or condoned punitive-level behavior.

38. Moreover, even if the proper allegation was stated, the only record evidence upon which Plaintiff could rely on this issue is the testimony of Carlos Lozano of Midtown Realty Group, LLC.

39. Mr. Lozano testified that he began as an intern at the company and moved his way up to Vice President of Investor Relations.

40. However, according to Mr. Lozano's testimony, he is not an owner or president of Midtown Realty Group, LLC, and there is no evidence that he has any ultimate decision-making authority for the company, or that he would qualify as a "managing agent."

Accordingly, it is hereby,

ORDERED and **ADJUDGED** as follows:

Plaintiff's Motion for Leave to Amend Complaint to Add Claims for Punitive Damages at Count #12 Against Defendant, Midtown Realty Group, LLC is **DENIED**.

* * *

Torts—Negligence—Gross negligence— Contracts— Condominiums—Failure to maintain common areas—Punitive damages—Action by unit owner alleging breach of contract, negligence, and gross negligence by condominium association and negligence by property management company based on failure of defendants to maintain and repair roof of complex—Motion for leave to amend to add claim for punitive damages is denied—While there may be evidence of breach of contract or negligence, there is no evidence that defendants acted intentionally—Further, evidence and proffer is insufficient to establish reasonable evidentiary basis for recovery of punitive damages based on claim of gross negligence

LEIGH ALLISON POLLACK, Plaintiff, v. VILLAS MARGARITA CONDOMINIUM ASSOCIATION, INC., et al., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-002631-CA-01. Section CA24. April 17, 2025. Antonio Arzola, Judge. Counsel: Robert J. McKee, Robert J. McKee Law Group, for Plaintiff. Oscar Lombana, Salehi, Boyer, Lavigne Lombana, P.A., Coral Gables, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND TO ADD A CLAIM FOR PUNITIVE DAMAGES

THIS CAUSE having come to be heard on Plaintiff LEIGH ALLISON POLLACK's Amended Motion for Leave to Amend Complaint to add a Claim for Punitive Damages [D.E. 324] (the "Motion"), and such motion having been heard on April 4, 2025, and the Court having heard argument of counsel, reviewed the pleadings thereto, and the Court being fully advised in the premises, it is hereby:

1. *Plaintiff is a condominium unit owner who has sued the defendant homeowner association, Villas Margarita Condominium Association, Inc., and its property management company, South Florida Condominium Management, Inc. Plaintiff is no longer pursuing claims against the roofing contractor.*

2. *Plaintiff claims that the defendant, by and through its agents, failed to maintain and repair the common areas and roof of the condominium complex, leading to water intrusion and mold growth within the plaintiff's unit. Plaintiff alleges that these conditions caused damages to her unit, personal property, and to her health.*

3. *Specifically, Plaintiff has filed a First Amended Complaint which sets forth the following counts:*

(1) Breach of Contract against the Association;
(2) Negligence against the Association;
(3) Gross Negligence against the Association; and
(4) Negligence against the Management Company.

These are the only four counts currently alleged in the operative complaint.

4. *Section 768.72(1), Florida Statutes, provides: "In civil actions, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages."*

5. *"A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." See § 768.72(2), Fla. Stat.*

6. *As used in this section, "intentional misconduct" means that "the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result, and despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." See § 768.72(2)(a), Fla. Stat.*

7. *Additionally, as used in this section, "gross negligence" means that "the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." See § 768.72(2)(b), Fla. Stat.*

8. *Pursuant to Florida law, punitive damages are meant to be reserved for the most egregious cases. Therefore, Florida Statute § 768.72 requires this Court to act as a gatekeeper and precludes claims for punitive damages where no reasonable evidentiary basis exists for recovery of such damages. See Manheimer v. Florida Power & Light Co., 673 So. 3d 684 (Fla. 3d DCA 2023)* [48 Fla. L. Weekly D1495a]. *In affirming an order denying a motion for punitive damages entered by the undersigned in an unrelated case, the Third District recently noted that the trial court "must weigh both parties' showings when considering whether the evidence or proffer is sufficient to establish a reasonable evidentiary basis for recovery of punitive damages."*

9. *See also Federal Ins. Co. v. Perlmutter, 376 So. 3d 24, 33 (Fla. 4th DCA 2023)* [48 Fla. L. Weekly D2320b] *(en banc) ("Applying Section 768.72's plain language, we hold that a trial court must consider the evidentiary showing by all parties at the hearing on the motion to amend—that is, evidence 'in the record' and evidence 'proffered by the claimant' "); Napleton's VW, LLC v. Agosto, 364 So. 3d 1103 (Fla. 4th DCA 2023)* [48 Fla. L. Weekly D1250b] *("A trial court's inquiry under Section 768.72 is more intensive than at summary judgment because the statute necessarily requires the Court to weigh the evidence and act as a factfinder.").*

10. *The Plaintiff appears to be proceeding in this motion on both claims of intentional misconduct and gross negligence.*

11. *Plaintiff proffers that the roof was a common element and that the defendant had a duty to maintain and repair the common areas. Plaintiff asserts that the defendant had knowledge and notice of the*

water leak through the management company. According to the Plaintiff, she was not allowed to fix the roof herself and the defendant delayed repairs, even though Plaintiff's experts and Defendant's own expert identified serious issues with the roof. Plaintiff argues that the defendant's conduct constituted a reckless disregard and indifference to her life, safety, and rights.

12. *In support of her proffer, Plaintiff relies on:*

A. The affidavit of the Plaintiff;

B. E-mails and text messages between the Plaintiff and the management company;

C. Expert reports of both the Plaintiff's and Defendant's experts;

D. The deposition and affidavit of Brian Penalo; and

E. The deposition of Linda Maldonado.

13. *In opposition, Defendant argues that its conduct does not amount to intentional misconduct or gross negligence as required by § 768.72. Specifically, Defendant contends that the communications with Plaintiff show it was in constant contact about the issue, actively seeking estimates, and coordinating with contractors to address the roof leak. Defendant also notes scheduling difficulties due to Plaintiff's availability and contends Plaintiff's own HVAC contractor may have contributed to the leak. Defendant argues that logistical issues do not rise to the level of a conscious disregard for Plaintiff's rights.*

14. *In support of its position, Defendant relies on:*

A. E-mails and text messages exchanged with the Plaintiff;

B. The February 25, 2021, report of Greg Weatherman of Aerobiological Solutions, Inc.;

C. Recent punitive damage decisions including Manheimer v. FP&L, 673 So. 3d 684 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1495a], *and Napleton's v. Agosto, 364 So. 3d 1103 (Fla. 4th DCA 2023)* [48 Fla. L. Weekly D1250b].

15. *The Court has taken all of the materials submitted by the parties and proffers and/or testimonies presented at the hearing into consideration in reaching its decision. The Court held a hearing that took over an hour.*

16. *The Court finds that the evidence in the record and/or proffered by the Plaintiff is legally insufficient under § 768.72. Plaintiff's presentation does not demonstrate a reasonable showing by evidence in the record or proffer that she "will be able to produce competent substantial evidence at trial upon which a rational trier of fact could find that the defendant specifically intended to engage in intentional or grossly negligent misconduct that was outrageous and reprehensible enough to merit punishment." See Federal Ins. Co. v. Perlmutter, 376 So. 3d 24, 33-34 (Fla. 4DCA 2023)* [48 Fla. L. Weekly D2320b].

17. *First, while there may be some evidence of negligence or a breach of contract, the Court finds that there is no evidence that the Defendant acted intentionally. This is consistent with the First Amended Complaint, which does not assert any intentional tort claims against the Defendant.*

18. *Secondly, as to gross negligence, this Court has weighed the showings by both parties and finds that the evidence and/or proffer is insufficient to establish a reasonable evidentiary basis for the recovery of punitive damages.*

19. *The Court finds no evidence and/or proffer that, taken in the light most favorable to the Plaintiff, would shock the conscience or demonstrate an outrageous disregard of the rights and safety of the Plaintiff. See Barcelo v. Little Paket Corp., 399 So. 3d 1189, 119 (Fla. 3d DCA Dec. 4, 2024)* [49 Fla. L. Weekly D2436a]*; River Front v. North Investment Group, 399 So. 3d 1106, 1108 (Fla. 3d DCA 2024)* [49 Fla. L. Weekly D2163b].

20. *In conclusion, having weighed the showings by both parties, the Court finds that neither the evidence in the record nor the Plaintiff's proffer rises to the level necessary for the imposition of punitive damages. For these reasons, the motion is* ***DENIED****.*

21. *Based on the allegations and the proffer and/or evidence presented, the Court finds that normal legal remedies, including monetary damages, constitute an adequate remedy for the conduct alleged to have occurred here. See River Front, 399 So. 3d at 1108.*

22. *The Court's findings herein are solely for the purpose of this motion and the consideration of the factors required by § 768.72.*

* * *

Insurance—Pretrial orders—Failure to comply—Sanctions—Dismissal with prejudice is justified based on incarcerated plaintiff's refusal to appear at case management conference despite clear judicial directives to do so and assistance from jail personnel and plaintiff's chronic neglect of litigation duties—Conduct severely impeded efficient administration of justice and unduly burdened insurer

JERRY UPSHAW, Plaintiff, v. SAFE HARBOR INSURANCE COMPANY, Defendant. Circuit Court, 14th Judicial Circuit in and for Jackson County. Case No. 20-000356-CA. March 7, 2025. Christopher N. Patterson, Judge. Counsel: Jerry Upshaw, Pro se, Plaintiff. Oscar Lombana, Salehi, Boyer, Lavigne Lombana, P.A., Coral Gables, for Defendant.

ORDER ON DEFENDANTS MOTION TO DISMISS

THIS CAUSE having come before the Court on March 7, 2025, on Defendant's Motion to Dismiss and it is therefore,

ORDERED AND ADJUDGED as follows:

1. **GRANTED**. This action is dismissed with prejudice.

2. The Plaintiff initiated this action on October 28, 2020, and has since exhibited a pattern of neglect and disregard for court orders and the judicial process, culminating in willful and contumacious behavior that warrants dismissal of this action with prejudice.

3. Despite being granted numerous opportunities to prosecute his case, including accommodations for telephonic or video appearances from incarceration at the Jackson County Jail, Plaintiff has failed to take any substantive action for more than a year, and failed to comply with multiple court orders.

4. The Court specifically finds that Plaintiff's refusal to appear at the court-ordered Case Management Conference (CMC) on March 7, 2025, despite the accommodation provided by the Jackson County Jail and multiple attempts by deputies to secure his appearance, constitutes willful and contumacious disregard for the Court's authority.

5. Jackson County Deputies advised that Plaintiff refused to leave his cell despite instruction that he had a Case Management Conference in his civil case on March 7, 2025.

6. Deputies made multiple attempts to obtain compliance from Plaintiff who contumaciously refused to comply.

7. This Court has continued trial three prior times. The last continuance was to provide Plaintiff with ample time to secure counsel. As directed in the Court's order dated November 8, 2024, the Plaintiff was directed to secure counsel within 30 days. He has failed to do so, and proceeds pro se. The Plaintiff has made no effort to secure additional counsel, even though he secured counsel for a newer case in Case Number 24 CA 145, Jackson County Division, 14th Judicial Circuit, wherein he is Plaintiff.

8. The plaintiff has not complied with the terms of the Court's Uniform Order Setting Cause for Jury Trial as dated August 28, 2024. Additionally, Plaintiff has refused to comply with the Standing Civil Case Management Order dated February 7, 2025.

9. Such behavior demonstrates a deliberate and bad-faith disregard for the Court's orders and the diligent administration of justice, significantly prejudicing the Defendant who has incurred considerable costs continuing to defend a case the Plaintiff shows no interest in pursuing.

10. According to Fla. R. Civ. P. 1.200(c), upon the failure of any party to attend a case management conference, a court may, after notice and a hearing, impose all sanctions authorized by Rule 1.420(b), including dismissal of the action. Plaintiff's failure to appear at the court-ordered case management conference, despite clear judicial directives and assistance by the Jackson County Jail, combined with the Plaintiff's chronic neglect of litigation duties and underscores the necessity for dismissal of this action with prejudice. Plaintiff's actions have severely impeded the efficient administration of justice and unduly burdened the Defendant.

11. Plaintiff's actions have demonstrated deliberate and contumacious disregard of the court's authority, which justify application of the severest of sanctions, dismissal with prejudice. See *Mercer v. Raine,* 443 So. 2d 944, 946 (Fla. 1983).

* * *

Mortgage foreclosure—Conditions precedent to foreclosure were not met where bank failed to comply with HUD regulations requiring that it send "Save Your Home" brochure to mortgagor, send letter soliciting face-to-face interview with mortgagor before 62nd day of delinquency, and make at least one trip to mortgaged property in effort to arrange face-to-face meeting—Noncompliance prejudiced mortgagor by denying her help to which she was entitled to remedy delinquency and avoid foreclosure—No merit to argument that mortgagor cannot raise noncompliance with HUD regulations as defense because regulations deal with relations between mortgagee and government and do not give mortgagor private right of action—Mortgagor is not attempting to assert private right of action, but to raise bank's noncompliance with its legal obligations as equitable defense to foreclosure action—Foreclosure is denied

CITIZENS BANK, N.A., Plaintiff/Petitioner, v. ROBIN FAIR, UNKNOWN SPOUSE OF ROBIN FAIR, UNITED STATES OF AMERICA, et al., Defendant/Respondents. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Circuit Civil Division AN. Case No. 50-2024-CA-007238-XXXA-MB. July 28, 2025. Richard L. Oftedal, Senior Judge. Counsel: Christopher Evans, West Palm Beach, for Plaintiff. Malcolm E. Harrison, Wellington, for Defendant.

FINAL JUDGMENT DENYING FORECLOSURE

THIS CAUSE came before the Court for a bench trial on June 25, 2025. Present before the Court were Chrissy Dove-Czarnecki for the Plaintiff, represented by Christopher Evans, Esq., and the Defendant, Robin L. Fair, represented by Malcolm E. Harrison, Esq. After considering the Court file, hearing testimony, receiving documentary evidence, hearing argument of counsel and being otherwise duly advised in the premises and the law, the Court hereby makes the following findings of fact and conclusions of law:

The Defendant's Mortgage is insured by the Federal Housing Administration and is, therefore, subject to those specific loss mitigation measures developed by the Department of Housing and Urban Development ("HUD") that lenders, including Plaintiff, Citizens Bank, N.A., must offer before the loan goes into default. Compliance with the HUD's regulations is not optional. *Harris v. US Bank*, 223 So. 3d 1030, 1032 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D588b] (HUD regulations for FHA-insured loans "have been codified, making them mandatory.")

Defendant Robin Fair did not sign the Note, but she did sign the Mortgage and is identified therein as a mortgagor.

Defendant argues that Plaintiff has failed to comply with two HUD regulations.

The first of those regulations, 24 C.F.R. § 203.602, provides that:

> [T]he mortgagee shall give notice to each mortgagor in default on a form supplied by the Secretary or, if the mortgagee wishes to use its own form, on a form approved by the Secretary, no later than the end of the second month of any delinquency in payments under the mortgage. If an account is reinstated and again becomes delinquent, the delinquency notice shall be sent to the mortgagor again, except that the mortgagee is not required to send a second delinquency notice to the same mortgagor more often than once each six months. The mortgagee may issue additional or more frequent notices of delinquency at its option.

As set forth in the Mortgagee Letter 2014-1, the Plaintiff was required to send each mortgagor a Delinquency Notice Cover Letter accompanied by the "*Save Your Home: Tips to Avoid Foreclosure*" HUD-2008-5-FHA brochure, which contains updated information on FHA-specific loss mitigation options.

Section 7-7g of the HUD Handbook states that "HUD believes that the information in this pamphlet and cover letter is important and should be sent during the initial stages of delinquency (the 32nd day of delinquency) as an early effort to save mortgages from being foreclosed upon." In fact, HUD deems the information in the brochure to be so "important" that it wrote in the HUD Handbook that while mortgagees may reproduce the pamphlet at the mortgagee's expense, "the contents may not be changed in any way." *Id.*

The Plaintiff did not enter into evidence any proof that it sent the Defendant the "Save Your Home" brochure or that it had authorization from the Secretary of Housing and Urban Development to use its own form. Nor did the Plaintiff introduce any evidence showing that it sent the Defendant a copy of the brochure within the previous six months in connection with a previous default.

Therefore, the Court hereby finds that the Plaintiff did not comply with 24 C.F.R. § 203.602.

The second regulation, 24 C.F.R. § 203.604 states that lenders "must have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting before three full monthly installments due on the mortgage are unpaid."

It is uncontroverted that the parties did not engage in a face-to-face meeting. However, a meeting is unnecessary when "[a] reasonable effort to arrange a meeting is unsuccessful." 24 C.F.R. § 203.604(c)(5). "A reasonable effort to arrange a face-to-face meeting with the mortgagor" includes "at a minimum . . . one letter sent to the mortgagor certified by the Postal Service as having been dispatched" and "at least one trip to see the mortgagor at the mortgaged property." 24 C.F.R. § 203.604(d).

Pursuant to Section 7-7c of the HUD Handbook, the Plaintiff was required to make a reasonable effort to arrange the meeting before the 62nd day of delinquency. As the Default Date set forth in the Plaintiff's complaint was April 1, 2023, the mandatory regulatory deadline to arrange the meeting was June 2, 2023.

The Plaintiff sent a face-to-face solicitation letter to the Defendant on November 3, 2023. Hence, based on the Plaintiff's own evidence, it missed the mandatory regulatory deadline to send the letter by 154 days. The Court finds that this delay in sending the face-to-face solicitation letter does not constitute substantial compliance with the regulation. *See Legacy Place Apartment Homes LLC. v. Gateway*, 65 So. 3d 644 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1605a] ("[t]he doctrine of substantial performance is generally unavailable where a party has materially breached the terms of the agreement").

There is no competent, substantial evidence that the Plaintiff ever made the required trip to the property.

Therefore, based on the evidence before the Court, the Court finds that the Plaintiff did not comply with 24 C.F.R. § 203.604.

Further, it can hardly be argued that Defendant was not prejudiced as a result of Plaintiff's non-compliance with the HUD regulations. Mr. Fair, the Defendant's husband, was approved for an FHA Partial Claim Modification just before his death. The Partial Claim Modification would have brought the subject loan current as of June 1, 2023, at which time normal payments would resume.

Ms. Fair received the Partial Claim Modification just days after the death of her husband. On March 15, 2023, Ms. Fair informed the Plaintiff of her husband's passing and asked to be able to take over the

loan so that she could sign the Partial Claim Modification. She sent the Plaintiff her husband's death certificate on April 17, 2023 so that the Plaintiff could confirm her as a successor in interest, and the Partial Claim Modification could be reissued in her name.

In anticipation of being allowed to assume the loan, Ms. Fair made the required loan payments for June, July, and August 2023. Inexplicably, however, the Plaintiff did not confirm her as a successor in interest, and as of September 2023, the Plaintiff refused to accept any more payments because the Partial Claim Modification had not been signed. The Plaintiff also returned part of the payments Ms. Fair had made.

Ms. Fair called the Plaintiff repeatedly seeking help to assume the loan but received none. No one aided her or provided any meaningful assistance in her efforts to be confirmed as a successor in interest. Instead, she was simply told to "Google it."

Efforts by Ms. Fair to speak to Sherlita Fox, the relationship manager who had helped her husband before his death and had approved the Partial Claim Modification were equally in vain. The Plaintiff's own records show that the Plaintiff's representative refused to allow Ms. Fair to speak to Ms. Fox.

Ms. Fair further testified that no one explained her home retention options to her. In addition, she faced language barriers with some of the Plaintiff's call center employees who were based overseas.

Had a face-to-face meeting timely occurred, Ms. Fair could have been informed as to any available options to save her home together with whatever steps were required to be confirmed as a successor in interest. Moreover, she would have been afforded the opportunity to bring any necessary documents and complete any required forms while meeting with Plaintiff's representative. Ms. Fair was at all times willing and able to travel from her home in Royal Palm Beach to Plaintiff's office in Palm Beach but was uninformed as to her right to do so. Given her limited education and lack of business acumen she would have clearly benefited from a personal meeting with a representative of the Plaintiff instead of trying to navigate these issues over the telephone.

Plaintiff's failure to send Ms. Fair the "Save Your Home" brochure required by 24 C.F.R. § 203.602 and to conduct or make a reasonable effort to arrange a face-to-face pre-foreclosure counseling session with her as required by 24 C.F.R. § 203.604 prejudiced Ms. Fair, because it denied her the help that she was entitled to as an FHA-insured mortgagor to remedy her delinquency and avoid foreclosure.

In this case, the Plaintiff's failure to comply was particularly prejudicial because Ms. Fair was ready, willing, and able to make her payments as demonstrated by the fact that she made the payments for June, July, and August 2023 and only stopped making payments in September after the Plaintiff refused to accept any further payments. She also testified that the payments were affordable for her and that she had no problem making them.

The Plaintiff argued in its Reply that the Defendant cannot raise noncompliance with the HUD regulations as a defense because those regulations deal only with relations between the mortgagee and the government and do not give mortgagors a private right of action. However, the Plaintiff's argument fails to acknowledge the difference between using violations of the HUD regulations defensively, as Ms. Fair is doing here, versus offensively.

As explained by an Indiana Court of Appeals in *Lacy-McKinney v. Taylor Bean & Whitaker Mortgage Corp.*, 937 N.E.2d 853 (Ind. Ct. App. 2010), the HUD regulations do not create a private right of action for non-compliance. However, they may nonetheless be raised as an affirmative defense in FHA foreclosure actions. *See also Neal*, 922 A.2d at 547, (a mortgagor may not wield HUD regulations as a sword but may assert regulatory noncompliance as a shield to foreclosure on a HUD mortgage) and *Washington Mutual Bank FA v. Lewis-Dunham*, 14 Fla. L. Weekly Supp 450b (Fla. Cir. Ct. Duval County 2007) ("HUD default servicing regulations . . . are intended to minimize the risk of foreclosure and the loss of home ownership and . . . such regulations are intended to be applied defensively, as a matter of equity, to stave off foreclosure and do not create a federal cause of action for noncompliance").

The Court reads the provision in Paragraph 20 of the Mortgage which states that "Borrower is not a third party beneficiary to the contract of insurance between the Secretary and Lender, nor is Borrower entitled to enforce any agreement between Lender and the Secretary" as affirming that the Defendant does not have the right to bring an affirmative action at law against the Plaintiff for its noncompliance under the insurance contract. Here, though, the Defendant is not attempting to raise at law any affirmative third-party claims or enforce the insurance contract between the Plaintiff and the Secretary. The Defendant is raising the Plaintiff's non-compliance with its legal obligations under the HUD regulations as an equitable defense to the Plaintiff's foreclosure action, and her right to do so has been specifically authorized by the Fourth District in *Cross v. Federal Nat. Mortg. Ass'n, 359 So. 2d 464 (Fla. 4th DCA 1978),*

Finally, the cases cited by the Plaintiff in its Reply are easily distinguished because the borrowers in those cases were the plaintiffs who were trying to assert a private right of action under the HUD regulations. Here, in contrast, the Defendant is using noncompliance defensively, which is permissible. *Cross, supra*.

Finding no merit to any of Plaintiff's remaining affirmative defenses, it is hereby

ORDERED AND ADJUDGED as follows:

The Plaintiff, CITIZENS BANK, N.A., shall take nothing by this action and the Defendant, ROBIN FAIR, shall go hence without day.

The Defendant is entitled to recover her reasonable attorney's fees. The mortgage contract contains a provision which entitles the Plaintiff to an award of attorney's fees if the Plaintiff is required to take action to enforce the mortgage. Thus, the Court may allow reasonable attorney's fees to the Defendant for prevailing in this action pursuant to § 57.105(7), Fla. Stat.

The Court retains jurisdiction for the purpose of determining the amount of attorney's fees and costs to be awarded to the Defendant.

* * *

Dissolution of marriage—Motion to dismiss petition for dissolution of marriage on ground that parties were not actually married because they did not obtain marriage license is denied—Parties were married in bona fide religious ceremony properly solemnized by rabbi in New York—Validity of marriage is determined by New York law, which presumes the validity of marriage even without license so long as parties participate in solemn ceremony officiated by clergyman or magistrate wherein they exchange vows

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

ORDER DENYING MOTION TO DISMISS

This Court has considered, with the benefit of an evidentiary hearing held on May 14, 2025, Respondent's Renewed Motion to Dismiss for Failure to State a Claim, filed March 24, 2025.

I. INTRODUCTION

Is a couple who were married in a religious ceremony that never obtained a marriage license legally married? Surprisingly, the answer under New York law is "often yes."

Husband moves to dismiss this petition for dissolution of marriage[1] on the grounds that he and Wife were never actually married because they never obtained a marriage license. But they were married by a Rabbi in a traditional Jewish wedding, in a ceremony in New York where they resided at the time. And the upshot of New York law's fact-intensive analysis is that, regardless of whether the couple obtains

a marriage license, if the wedding if it looks like a wedding, it's a wedding, and the marriage is valid.

And here, this looked an awful lot like a wedding:

Wedding Picture 1

Wedding Picture 2

Wedding Invitation

For the reasons stated herein, the parties were legally married in New York, and the motion to dismiss is accordingly denied.[2]

II. FACTUAL BACKGROUND

The parties stipulated, or the evidence showed,[3] as follows: the parties were married in a formal Jewish religious ceremony in New York in August 2022. In preparation, the parties sent out invitations for the ceremony. The ceremony was conducted by an authorized Rabbi who led the couple in saying religious vows and exchanging wedding bands/rings. The ceremony included all customary halachic elements, such as the execution of a Ketubah which was signed and witnessed, blessings, and ritual declarations. The ceremony was witnessed by family and friends. Photos and videos of the ceremony were also taken. Subsequently, the parties lived together for around two years. In doing so, the parties raised two children as a traditional family, with the Respondent financially supporting the family and the Petitioner staying at home and caring for the children. The document showing a legal marriage in Israel was obtained unilaterally by the wife after the filling of the instant action and motion to dismiss. No marriage license was sought, obtained, or issued from any US State. The parties did not file taxes jointly nor did they share any bank accounts. The parties stipulate that the Ketubah is a contract.

Husband admitted that in the years following the ceremony, he held Wife out to be his wife. He testified that he would introduce her as "my wife" to people he would meet during that time.

This Court found Husband's self-serving testimony that he did not understand the marriage to be a legal marriage was not credible in light of the weight of the evidence, including the wedding invitations and pictures of the ceremony, as well as his post wedding conduct of holding out Wife to be his Wife.

This Court found credible Wife's testimony that although she was not obtaining a New York wedding license, she understood from their joint discussions with the Rabbi effecting the ceremony that the marriage would be valid under Jewish religious law and Israeli law. She testified that before the wedding, husband promised to marry her and promised that he would get her a green card when they did marry. She also held him out to be her husband.

III. ANALYSIS

A. Florida courts look to the law of the jurisdiction of the location of the marriage in order to determine the validity of the marriage.

The parties were married in New York, where they resided at the time of the marriage. They continued to reside together in New York for more than a year before moving to Florida (and thereafter filing these dissolution proceedings).

"Florida has traditionally approved of the sanctity of marriage, and the act of marriage, regardless of where it is contracted." *Claflin v. Claflin*, 288 So. 3d 774, 777 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D147a] (quotation omitted). Accordingly, "[t]he issue of whether the parties' religious wedding ceremony amounted to a valid marriage is determined in accordance with the law of the place where the putative marriage occurred." *Betemariam v. Said*, 48 So. 3d 121, 124 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2542a] (holding that because a wedding ceremony occurred in Virginia, the court looks to Virginia law to determine whether the parties were validly married) (citing *Preure v. Benhadj-Djillali*, 15 So. 3d 877, 877 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D1530b] and *Goldman v. Dithrich*, 131 Fla. 408, 410 (1938)).[4] Thus, in the instant case, this Court looks to New York law to determine if the parties were validly married.

B. Under New York law, a marriage may be valid even without a license so long as it is properly solemnized.

New York's Domestic Relations Law states that "no marriage shall

be valid unless solemnized." N.Y. Dom. Rel. § 11. A clergyman or minister may solemnize marriages; this includes a duly authorized rabbi. *Id.* Marriages are solemnized where the would-be spouses "solemnly declare in the presence of a clergyman, magistrate, or such one-day marriage officiant and the attending witness or witnesses that they take each other as spouses" and "at least one witness beside the clergyman, magistrate, or such one-day marriage officiant [is] present at the ceremony." *Id.* at § 12. Persons intending to be married in New York must also obtain a marriage license from a town or city clerk in New York state and deliver it to said clergy or minister within sixty days before the marriage ceremony may be performed. *Id.* at § 13. However, § 25 states that "nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age." *Id.* at § 25. "Thus, "a marriage is not void for the failure to obtain a marriage license if the marriage is solemnized." *In re Farraj*, 900 N.Y.S.2d 340, 341 (N.Y. App. Div. 2010); *see also id.* at 341 ("Under New York law, the marriage between the petitioner and the decedent was valid, even without a marriage license, since it was solemnized.").

In New York, there is a "strong presumption favoring the validaity of . . . marriage." *Spalter v. Spalter*, 225 N.Y.S.3d 86, 87 (N.Y. App. Div. 2025). Indeed, "[t]hat the parties may not have intended to have their marriage legally recognized under New York law is not dispositive." *Id.* at 88; *see also Farraj*, 900 N.Y.S.2d at 341 (finding that the parties had a "justified expectation" that they were married after participating in a formal religious ceremony).

New York's Domestic Relation Law thus establishes that "where parties participate in a solemn marriage ceremony officiated by a clergyman or magistrate wherein they exchange vows, they are married in the eyes of the law." *Persad v. Balram*, 724 N.Y.S.2d 560, 563 (N.Y. Sup. Ct. 2001).

C. The Parties' marriage was valid under New York law because they were properly solemnized in New York.

Here, the evidence shows the marriage was properly solemnized in New York and thus valid under New York law. This Court turns to New York's Domestic Relation Law § 25 and supporting case law in making this finding.

Based on the evidence and testimony of the parties, this was a traditional Jewish ceremony that was solemnized by a Rabbi that adhered to traditional halachic elements. Such elements included the execution of a Ketunah which was signed and witnessed, blessings, and ritual declarations. Many guests attended. Wedding invitations announced the "wedding" to those guests, along with a picture of interconnecting wedding bands. In the ceremony the parties exchanged vows and wedding bands/rings. In the case at hand, following this wedding ceremony, the parties lived together for two years, had two children, and Husband publicly introduced Wife as his wife.

In short, this was a wedding, and it was "solemnized" by a Rabbi. Under New York Law, that's good enough.

Several New York cases are on point.

In *Persad*, the parties were married in a Hindu "prayer" ceremony before a Hindu priest at a family home that was attended by over 100 guests. 724 N.Y.S.2d at 562. Traditional garments were worn. *Id.* Vows and rings were exchanged. *Id.* No marriage license was obtained. *Id.* The court held that the parties were married under New York law. *Id.* The court noted that "[t]he parties' failure to obtain a marriage license does not render their marriage void"; rather, "where parties participate in a solemn marriage ceremony officiated by a clergyman or magistrate wherein they exchange vows, they are married in the eyes of the law." *Id.* at 563. As was the case here, "[n]umerous guests witnessed the nuptials wherein the parties, before a Hindu pandit, exchanged vows and declared their desire to be husband and wife." *Id.* at 564. And where such ritual is performed, courts have "held marriages valid [even] despite the parties' agreements to the contrary." *Id.* at 716.

In *Farraj*, the parties "participated in a formal marriage ceremony in accordance with Islamic law," and "An Imam (Islamic clergyman) came from New York to New Jersey to solemnize the marriage." 900 N.Y.S. 2d at 340. Although a marriage license was never obtained, the court applied New York law and found the parties "had a justified expectation that they were married, since they participated in a formal marriage ceremony in accordance with Islamic law." *Id.* at 341. "Under New York law, the marriage between the petitioner and the decedent was valid, even without a marriage license, since it was solemnized." *Id.*

Perhaps most squarely on point is the Appellate Division, First Department's recent decision in *Spalter*. There, in facts nearly on all fours with this case,

> The parties took part in a religious wedding ceremony officiated by a rabbi under a chuppah, with 29 guests and featuring traditional Jewish rites and blessings. They obtained a ketubah [Jewish wedding contract] which was signed by two witnesses, signed a separate document that stated they were entering into a "marriage that is binding under Jewish law" but not "legally recognized" under New York law and signed an arbitration agreement referring to them as "husband-to-be" and "wife-to-be," in which they authorized the Beth Din to preside over marital disputes.

225 N.Y.S. 3d at 87. But *unlike* here, there was testimony that the parties "held themselves out as single, lived separate lives and only entered into the religious marriage to facilitate their children's acceptance into day schools and the family into synagogues." *Id.* The court still held that held that "the parties' marriage is valid," and that "[a]s the parties' marriage was solemnized by a rabbi with witnesses in a traditional Jewish ceremony, their failure to obtain a marriage license does not invalidate the marriage." *Id.* at 88.

Respondent-Husband relies heavily on *Devorah H. v. Steven S.*, 12 N.Y.S.3d 858, 870 (N.Y. Sup. Ct. 2015). However, in comparing the panoply of facts and circumstances found in *Devorah H.* and here, there are clear differences. The ceremony in *Devorah H.* was described as "bare-boned" and "very, very unusual"; it lasted for a few minutes in the office of the rabbi. *Id.* at 861-62. No guests were present. *Id.* The same cannot be said for the instant case where the ceremony was planned out, numerous guests were in attendance, photos and videos were taken, and a Ketubah was signed and witnessed. *Compare id.* at 865 ("there being no photographs, videos, audio recordings, ketubah, wedding announcements, or the like"). In addition, the parties in *Devorah H.* originally did not even go to their Rabbi with the intent to get married, instead they had wanted to discuss moving to a new apartment. *Id.* at 866 ("The evidence shows that the parties went to the rabbi's office at his request to discuss moving to a new apartment; they did not go with the intent of having him marry them."). In short, the facts here are nothing like the bizarre facts of *Devorah H.*, and are much more similar to *Spalter*.

In conclusion, this Court finds that a bona fide ceremony properly solemnized by a Rabbi points to the finding of a valid marriage under New York law.

IV. CONCLUSION

The parties are, in fact, married. Now they can get divorced.

Husband's Motion to Dismiss for Failure to State a Claim is DENIED.

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[1]"An attack on the validity of an alleged marriage has nothing to do with subject matter jurisdiction but is simply an issue to be determined in the dissolution action." *Dressler v. Dressler,* 967 So. 2d 1009, 1010 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2590b]. Although Husband styled his motion as one to dismiss for failure to state a

claim under Fla. Fam. L. R. P. 12.140(b)(6), the parties stipulated that the hearing would be evidentiary in nature. Of course, 12.140(b)(6) motions are limited to the four corners of the complaint and the Court cannot consider evidence in adjudicating them. *E.g., Alevizos v. John D. & Catherine T. MacArthur Found.,* 764 So. 2d 8, 9 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D535a]. And since evidence was actually heard and witness credibility weighed, this was not a motion for summary judgment, either. So the best way to characterize these proceedings is that the motion was construed to be a motion for bifurcation of the question of validity of the marriage and for expedited final judgment on that issue, and the evidentiary hearing as a final hearing on that issue. This Order thus constitutes a partial final judgment on that issue.

[2]Because the parties were legally married under New York law, this Court need not address Petitioner's alternative argument that they were legally married under Israeli law, even though they were purportedly married not in Israel but in New York. *Compare Montano v. Montano*, 520 So. 2d 52, 52-53 (Fla. 3d DCA 1988) ("Under principles of comity a marriage by citizens of a foreign country, if valid under foreign law, may be treated as valid in Florida for the purposes of a dissolution action.") *with Betemariam v. Said*, 48 So. 3d 121, 124 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2542a] ("The issue of whether the parties' religious wedding ceremony amounted to a valid marriage is determined in accordance with the law of the place where the putative marriage occurred.").

[3]The parties declined to order and provide a copy of the transcript to this Court following the hearing, leaving the Court to issue this Order based only on its notes. This Order may be modified if, upon any eventual review of the transcript, any discrepancies become apparent.

[4]Husband cites authority that religious marriages are not recognized under Florida law without a valid marriage license. *Hall v. Maal,* 32 So. 3d 682, 684 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D709a]. He may well be right, but given that the parties were married in New York, the Florida court must look to New York law, rather than Florida law, to determine if the marriage was valid under New York law and thus entitled to recognition under principles of comity. *Betemariam*, 48 So. 3d at 124.

* * *

Child custody—Termination of parental rights—Petition to terminate parental rights of biological father of 14-year-old child pending adoption by stepfather is granted—Father has abandoned child and unreasonably withheld consent for adoption—Fact that injunction for protection against domestic violence, protecting child and his mother, was entered against father 14 years ago does not excuse father's failure to have any contact with child for 14 years where father failed to pursue supervised timesharing that was explicitly permitted under terms of injunction or make any attempt to modify injunction—Further, consent for adoption was unreasonably withheld where father admits that he has not emotionally supported child, child needs father figure but he cannot be there for child, and stepfather has lovingly fulfilled father figure role for child—Father's challenge to validity of child's consent to adoption fails—Children aged 12 years and older must consent to adoption, and father has presented no evidence to raise concerns about this child's competence to consent

IN THE MATTER OF THE TERMINATION OF PARENTAL RIGHTS FOR THE PROPOSED ADOPTION OF A MINOR CHILD RE: P.J.P. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. FMCE24011804 (33). May 6, 2025. Johnathan D. Lott, Judge. Counsel: Katie Jay, for Petitioners. Christopher A. Narducci, for Respondent.

AMENDED[1] ORDER GRANTING SUMMARY JUDGMENT AND TERMINATING FATHER'S PARENTAL RIGHTS PENDING ADOPTION

This Court has considered, with the benefit of oral argument held on March 27, 2025, Petitioners' February 7, 2025 Motion for Summary Judgment.

Petitioners (Mother and Stepfather) seek to terminate Respondent's (Biological Father's) parental rights to P.J.P., a fourteen-year old boy, so that Stepfather can adopt him. Respondent has not had any relationship or contact with the child since July 2011, when the child was a baby. Respondent says, however, that the reason he wasn't able to have any contact for all those years was that there was a domestic violence restraining order issued against him.

Respectfully, that is not convincing. Respondent was not the victim of the restraining order; the child was the victim of whatever violence that caused the restraining order to come about.[2] Respondent could have pursued supervised timesharing that was explicitly permitted under the terms of the injunction, could have sought to modify the injunction, and could have pursued timesharing in a paternity action. He did not, and still had not at the time of argument on this motion. There is no genuine dispute of material fact that he has abandoned his child.

For this and other reasons described herein, the motion is GRANTED.

I. FACTUAL BACKGROUND

"In determining whether a genuine dispute of material fact exists, the court must view the evidence and draw all factual inferences therefrom in a light most favorable to the non-moving party and must resolve any reasonable doubts in that party's favor." *Brevard Cnty. v. Waters Mark Dev. Enterprises, LC*, 350 So. 3d 395, 398 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1863c].

The material undisputed facts are as follows.

1. Respondent is the legal, biological father of P.J.P. *Verified Petition to Terminate Parental Rights Pending Stepparent Adoption* ("TPR Petition") at ¶4 and Exhibit B to TPR Petition; *Father's Response to the Petition to Terminate Parental Rights* at ¶4.

2. Respondent was properly served the TPR Petition, in accordance with the requirements of the Florida Adoption Act. Motion For Summary Judgment at ¶9; Response to Motion For Summary Judgment at ¶9.

3. In 2011, Broward County's domestic violence civil court entered agreed final judgments of injunction for protection against domestic violence, protecting P.J.P. and his mother from Respondent. Petitioners' Exhibit C.

4. The judge told Respondent at the 2011 hearing that visitation in the domestic violence case was temporary and that he would need to file a paternity action if he wanted to establish a timesharing schedule. Petitioners' Exhibit D at p.5-6. Respondent remembers the judge telling him this at the hearing. Petitioner's Exhibit E at 53.

5. Respondent has had no contact with P.J.P. since temporary visitation ended in July, 2011. Petitioner's Exhibit E at 81.

6. Respondent was able to file *a pro se* paternity petition to seek timesharing. *See e.g.,* Florida Supreme Court Approved Family Law Form 12.983(a), *Petition to Determine Paternity and for Related Relief.*

7. Respondent never filed a paternity petition. MSJ Transcript at 36; Petitioners' Exhibit E at 83-89; Petitioners' Exhibit B at ¶6.

8. Respondent never tried to modify the domestic violence injunctions. MSJ Transcripts at 33-34.

9. P.J.P. consents to adoption by his stepfather. Petitioners' Exhibit F.

10. Respondent has withheld his consent to P.J.P.'s adoption. *See Response to Motion For Summary Judgment.*

II. LEGAL STANDARD

A. Summary Judgment

The Fifth District recently restated Florida's summary judgment standard, which as of 2021 is the same as the federal Rule 56 standard:

> Summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Looking to the federal summary judgment standard, an issue of fact is 'genuine' only if "a reasonable jury could return a verdict for the nonmoving party." A fact is 'material' if the fact could affect the outcome of the lawsuit under the governing law.
>
> The moving party bears the initial burden of identifying those portions of the record demonstrating the lack of a genuinely disputed issue of material fact. If the movant does so, then the burden shifts to

the non-moving party to demonstrate that there are genuine factual disputes that preclude judgment as a matter of law. To satisfy its burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." To do so, the non-moving party must go beyond the pleadings and "identify affirmative evidence" that creates a genuine dispute of material fact.

> In determining whether a genuine dispute of material fact exists, the court must view the evidence and draw all factual inferences therefrom in a light most favorable to the non-moving party and must resolve any reasonable doubts in that party's favor. Summary judgment should only be granted where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.

Waters Mark, 350 So. 3d at 398-99 (cleaned up.

As here, where the movant bears the burden of proof on the underlying claim at trial, "that party must show affirmatively the absence of a genuine issue of material fact: it must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (cleaned up). "If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the non-moving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Id.* (cleaned up). "Only if after introduction of the non-movant's evidence, the combined body of evidence presented by the two parties relevant to the material fact is still such that the movant would be entitled to a directed verdict at trial—that is, such that no reasonable jury could find for the non-movant—should the movant be permitted to prevail without a full trial on the issues." *Id.* at 1116. *Cf. Gracia v. Sec. First Ins. Co.*, 347 So. 3d 479, 484 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1866a] (discussing standard where defendant bears burden to prove affirmative defense); *see also* Wright & Miller, *Federal Practice & Procedure* § 2727.1 (4th ed. 2025) ("[I]f the movant bears the burden of proof on a claim at trial, then its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing.").

B. Statutory Interpretation

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

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

III. ANALYSIS

Here, there are no genuine disputes of material fact and the record is replete with undisputed clear and convincing evidence that Respondent abandoned his child and unreasonably withheld his consent to adoption. Accordingly, summary judgment is proper and the petition to terminate his parental rights should be granted for these two independent and alternative reasons, either of which would alone justify termination.

A. Respondent abandoned his child.

Section 63.089(3), Florida Statutes, sets forth the grounds for terminating parental rights pending adoption. Subsection 3(e) provides that rights should be terminated where the parent "has been determined under subsection (4) to have abandoned the minor ."[3]

Section 63.089(4) describes grounds to terminate a parent's rights for abandonment and provides, in relevant part:

> (4) FINDING OF ABANDONMENT.—A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence that a parent or person having legal custody has abandoned the child in accordance with the definition contained in s. 63.032. A finding of abandonment may also be based upon emotional abuse or a refusal to provide reasonable financial support, when able, to a birth mother during her pregnancy or on whether the person alleged to have abandoned the child, while being able failed to establish contact with the child or accept responsibility for the child's welfare.
>
> (a) In making a determination of abandonment at a hearing for termination of parental rights under this chapter, the court shall consider, among other relevant factors not inconsistent with this section:
>
> 1. Whether the actions alleged to constitute abandonment demonstrate a willful disregard for the safety or welfare of the child or the unborn child;
>
> 2. Whether the person alleged to have abandoned the child, while being able, failed to provide financial support;
>
> 3. Whether the person alleged to have abandoned the child, while being able, failed to pay for medical treatment; and
>
> 4. Whether the amount of support provided or medical expenses paid was appropriate, taking into consideration the needs of the child and relative means and resources available to the person alleged to have abandoned the child.

Fla. Stat. § 63.089(4). The incorporated definition of abandonment is:

> a situation in which the parent or person having legal custody of a child, while being able, makes little or no provision for the child's support ***or*** makes little or no effort to communicate with the child, which situation is sufficient to evince an intent to reject parental responsibilities**.** If, in the opinion of the court, the efforts of such parent or person having legal custody of the child to support and communicate with the child are only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. In making this decision, the court may consider the conduct of a father towards the child's mother during her pregnancy.

Fla. Stat. § 63.032(1) (emphasis added). Abandonment thus is a disjunctive legal test: failing to either immediately and continuously offer financial *or* emotional support to their children results in abandonment. *E.g., Fettig's Constr., Inc. v. Paradise Properties & Interiors LLC*, 305 So. 3d 555, 560 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2471a] ("[T]he word 'or' is generally construed in the disjunctive when used in a statute or rule.") (quotation omitted).

In other words, if a parent "makes little or no effort to communicate with the child, which situation is sufficient to evince an intent to reject parent responsibilities," then the child is abandoned, regardless of what other support the parent has provided. Section 63.089(4)(a) counsels that in considering whether this definition of abandonment is met, the Court should consider enumerated additional factors, as well as a catchall of any other not inconsistent factors, but these factors are not meant to alter the straightforward definition of abandonment in Section 63.032. Thus in *V.C.B. v. Shakir*, 145 So. 3d 967, 970-71 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1808a], the Fourth District Court of Appeal held that the four enumerated factors in 63.089(4) do *not* limit the definition of abandonment by superimposing the first factor's requirement of willfulness onto the definition of abandonment. The first sentence of section 63.089(4)(a) incorporates the section 63.032(1) definition of abandonment as a standalone ground for abandonment.

Here, it is undisputed that Respondent had no communication, at all, with the child from July 2011, when the child was a baby, up through and including the day of the hearing on this motion, March 27, 2025. That is, standing alone and in any vacuum, "sufficient to evidence an intent to reject parental responsibilities." The § 63.089(4)(a) factors counsel such a finding. These actions "demonstrate a willful disregard for the safety or welfare of the child or the unborn child," § 63.089(4)(a)1., as no parent could make any provision for the safety or welfare of the child without communicating with them. The other factors do not bear on the at-issue portion of the definition of abandonment (failing to communicate), and in any event, do not counsel a different result in light of the undisputed evidence. Moreover, the statute makes clear that "marginal efforts" to communicate are insufficient; here, there were, without dispute, ***no*** efforts.

Respondent argues that he was not able to pursue timesharing because he could not afford a lawyer and did not have the educational capacity to pursue any pro se action. That argument is unconvincing.[4] "Every person is presumed to know the law and ignorance of the law is no excuse." *E.g., Davis v. State,* 928 So. 2d 442, 448 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1192a] (cleaned up). That maxim is as true in a termination of parental rights case as it is in criminal law. Respondent could have, acting pro se as is his right under the Florida Constitution, sought to modify the injunction or to seek timesharing through a paternity action. Not only did he not do this, he made no meaningful *efforts* to do this, for nearly fourteen years. *Cf. J.S. v. S.A.*, 912 So. 2d 650, 661-62 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2229a] ("Allowing a father to 'sit on his rights' or remain on the fence indefinitely would undermine the state's 'compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children.' ").

The child is either abandoned, or he is not abandoned. No parent hoping to be described as "not abandoning" their children would sit idly by for fourteen years even if the legal hurdles in front of them were daunting. Lack of awareness of the paternity itself, as well as poor advice of counsel, will not negate a finding of abandonment. *G.T. v. Adoption of A.E.T*, 725 So. 2d 404, 411 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D118b]. Neither will failing to navigate, or even attempt to navigate, the legal system to pursue a relationship with one's child.

To the extent Respondent argues that the injunction prevented him from communicating with the child, that argument is also unconvincing. Incarceration, which wholly prevents a parent from having a relationship with the child, may be grounds for abandonment. § 63.089(4)(b), Fla. Stat. The parent, after all, was responsible for the acts that resulted in incarceration. But the injunction, unlike incarceration, did not necessarily prevent Respondent from having, or certainly seeking, a relationship with the child.[5]

Accordingly, because the undisputed facts show as a matter of law that the child was abandoned, summary judgment is proper.

B. Alternatively and additionally, Respondent unreasonably withheld his consent to the child's adoption.

Abandonment, discussed above, is only one of several reasons why parental rights should be terminated pending adoption. Another is where a respondent, "after examination of his or her written reasons for withholding consent, is found by the court to be withholding his or her consent unreasonably." § 63.089(3)(g), Fla. Stat.

Such is undisputedly the case here.

This Court has examined Respondent's written reasons for withholding his consent:

1. Constitutional right to retain his parental rights.
2. He doesn't believe his rights may be terminated unless he agrees.

Response to the TPR Petition at Affirmative Defenses.

In his Response to the Motion For Summary Judgment, Respondent explained that he did not seek timesharing because he lacked the means or capacity. Response to Motion For Summary Judgment at ¶ 19, 21.

Respondent testified at his deposition:

> A child definitely needs a father figure and unfortunately due to circumstances, I can't be there for him right now. And, you know, he's got a loving father figure in the picture, which is great, but that's not his dad. Like, that's not his biological father. And I'm not going to sign a piece of paper that allows that.

Exhibit E at 97. Respondent thus recognizes that:

(1) He hasn't emotionally supported the child,
(2) Children need a father figure; and
(3) Stepfather has "lovingly" fulfilled that role for the child.

Nevertheless, Respondent won't consent to this adoption.

Courts agree that the passage of time can be harmful to the well-being of a child and that a stable home environment for the child deserves consideration along with the interest of biological parents. *J.S.*, 912 So. 2d at 662. The child has a full, balanced, and happy life with Mother and Stepfather, who are devoted to him and reliable. *See* Exhibits A, B, and F. Respondent presented no evidence to the contrary, and indeed, admitted as much.

Petitioners have thus satisfied their burden that the material, undisputed facts show that Respondent has unreasonably withheld his consent to the child's adoption, pursuant to section 63.089(3)(h), and they are entitled to judgment as a matter of law on this alternative ground.

C. The Child's consent to adoption is valid.

Respondent challenges, without citing any legal authority, the child's competence to consent to the adoption. But Respondent's challenge was based solely on the child's age and not any individualized concern. By offering P.J.P.'s consent via affidavit, Petitioners are simply fulfilling the statutory requirements: Children 12 years and older *must* consent to their adoption, unless the court finds it is in the child's best interest to waive their consent. Fla. Stat. § 63.062(1)(c). Their consent may be offered either by notarized statement in the presence of two witnesses, or in the presence of the court. Fla. Stat. § 63.082(1)(a)1.

No evidence was presented that would raise concerns over this particular child's competence to consent to his adoption. No relevant legal authority was provided to contradict the consent requirements for minors under the Florida Adoption Act.

At common law, 12 year-old minor children could take oaths of allegiance and 14 year-old minor children could choose their own

guardians. 1 William Blackstone, *Commentaries on the Laws of England* *463 (3d ed. 1768-69) ("A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate") (emphasis in original).

The child is 14 years old and the common law would not have barred him from choosing a new guardian or making an oath. But even if he were only 12 years old, he would still be able to do so under Florida law. A statute may change the common law if it does so with clarity. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012). The Florida Adoption Act's expressly requires minors 12 years of age and older consent to adoption and it sets forth waivers and procedures for doing so. A fair reading of the Florida Adoption Act and its express provisions regarding sworn consent from minors should be read to alter any contradictory common law rule.

IV. CONCLUSION

For the reasons, it is ORDERED:

(1) Petitioners' Motion for Summary Judgment is GRANTED. Respondent's consent to the adoption of the child, P.J.P., is hereby waived.

(2) The parental rights of the legal father, Respondent, to the minor child, P.J.P., who is the subject of these proceedings are hereby terminated.

(3) A petition for adoption may be filed on behalf of the minor child, P.J.P.

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

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[1]The May 1, 2025 Order is VACATED and this Order is substituted in its place *nunc pro tunc.* This Order corrects minor drafting errors.

[2]The restraining order was entered on an agreed judgment. It was not clear from the record what the underlying allegations were and the extent to which they were or were not admitted by the agreed judgment. Regardless, he did not dispute that an injunction was proper.

[3]Relatedly, Section 63.041(1), Florida Statutes, provides that the Court may waive the consent of a parent who has abandoned a child.

[4]Respondent's counsel is, of course, thanked for skilled advocacy on behalf of his client's interests in light of the facts of this case.

[5]To the extent that a finding of harm to the child is required to prove abandonment, Respondent admitted harm when he testified that it's harmful for the child to not have emotional support from his biological father. Exhibit E at 98. Mother and Stepfather believe the child would be harmed by the reintroduction of Respondent to the 14-year-old boy after 13 years of absence. See Exhibits A and B. The child is "embarrassed" that he does not share a name with the rest of his family. Exhibit F at ¶2. Therefore, everyone agrees that the child has been harmed by Respondent's absence. In *V.C.B.,* the Fourth District inferred harm from 4-5 years of abandonment. *V.C.B.,* 145 So. 3d 967.

In their Motion, Petitioners argued the *V.C.B.* court erred in imposing a "harm" requirement by overreading the Supreme Court's decision in *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996) [21 Fla. L. Weekly S340a], to apply to Chapter 63 proceedings, and in improperly drawing on authority from Chapter 39 proceedings. *C.f. A.M. v. D.S.,* 314 So. 3d 747, 750 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D682a] (explaining error in conflating Chapter 39 and Chapter 63 proceedings). These arguments are compelling. Perhaps a court with authority to do so will revisit the issue.

* * *

Dissolution of marriage—Equitable distribution—Dog—There is no authority for granting custody or visitation as to animals—Animals are personal property to be awarded pursuant to dictates of equitable distribution statute—Dog that was purchased jointly by husband and wife when they were dating and living together prior to marriage was joint pre-marital property owned as tenants in common—Because wife has greater emotional relationship with dog, equities favor distributing dog to wife while she in turn pays husband half of the value of dog

SARAH ANN PROMISE PEIX, Petitioner, v. JOSHUA JEREMIAH JACOBS, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. FMCE24011772 (33). July 9, 2025. Johnathan D. Lott, Judge. Counsel: Francisco J. Vargas, for Petitioner. Diana Salomon, for Respondent.

ORDER ON INTERIM PARTIAL EQUITABLE DISTRIBUTION OF CERTAIN CHATTEL, NAMELY, THE FAMILY DOG, TITAN

This Court has considered, with the benefit of an evidentiary hearing conducted on April 17, 2025, Wife's Motion to Modify/Vacate Agreed Order Regarding the Family Dog, Titan, as well as the parties' joint request made at the hearing that the Dog be equitably distributed. For the reasons stated herein, the motion is granted in part, the Dog is equitably distributed to Wife, and Wife should pay Husband an equalizing payment of $250.

I. INTRODUCTION

Husband and Wife, in the course of their divorce proceedings, reached a time-sharing agreement regarding their Dog, Titan, a ten-year-old Pitbull. The substance of the agreement was month-on, month-off timesharing, with the exchange facilitated by a dog walker. The agreement fell apart when Wife had the dog neutered without Husband's consent during her time sharing, and Husband then refused to return the dog to her.

Wife then sought to have the agreement set aside on the grounds that the dog was in fact her sole pre-marital property. The evidence, however, showed that the dog was joint pre-marital property—the parties owned the Dog as tenants in common, with each having a 50% interest in the Dog. The parties accordingly agreed that the Dog needed to be equitably distributed in accordance with Florida's dog law precedents. *E.g,* Tr. at 37:12-38:7.[1] Because the evidence at the hearing showed that Wife had a greater emotional relationship with the Dog, the equities favor distributing the Dog to her while she in turn pays Husband an equalizing payment.

II. ANALYSIS

A. Dog Law

"While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property." *Bennett v. Bennett*, 655 So. 2d 109, 110 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D225a]. "There is no authority which provides for a trial court to grant custody or visitation pertaining to personal property." *Id.* (citing § 61.075, Fla. Stat.). Florida courts have thus (wisely and in accordance with statute) taken the view that because "our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children, we cannot undertake the same responsibility as to animals." *Id.* at 110-11 (cleaned up).[2] Rather, animals, like other chattel, should be "awarded pursuant to the dictates of the equitable distribution statute." *Id.* at 111 (cleaned up).

"A trial court has broad discretion to fashion an equitable distribution scheme, as long as it supports its distribution with specific factual findings that are supported by competent, substantial evidence." *Harby v. Harby*, 331 So. 3d 814, 821 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2453a] (cleaned up). Because "Section 61.075 does not explicitly address the distribution of pets in dissolution proceedings; Florida courts must consider the factors enumerated in section 61.075(1), as is, along with any special needs or special circumstances to distribute pets." *Id.* Thus "[t]he trial court may consider a party's sentimental interest in property, such as the ordinary attachment to pets, alongside the other factors of section 61.075." *Id.* at 823.

B. The Dog was joint pre-marital property owned by the Parties as tenants in common.

The Parties purchased the Dog in 2015 from their friend Carlos Idiaquez. Tr. at 8:2-9:4. At the time, they were dating and living together but not married. *Id. &* 16:1-3. Mr. Idiaquez testified at the hearing that he sold the dog to both of them, jointly, and they jointly came and picked up the Dog. Tr. at 8:11-23; 15:4-11. He testified that

they jointly agreed that he would be paid $500 each—$250 from Husband and $250 from Wife. Tr. at 9:6-17; 12:21-14:1; 15:18-25. Wife paid her $250, but Husband never did. *Id.* Mr. Idiaquez never followed up on the non-payment. *Id.*

Accordingly, Husband and Wife purchased the Dog together. There was offer, acceptance, and consideration—a promise to pay $250 each from Husband and Wife in exchange for the sale of the Dog to both of them. Mr. Idiaquez tendered the dog on payment by Wife and promise to pay by Husband. That Husband never made good on his promise is a remedy available to the seller under the contract, not a defense to the existence of the contract. *E.g,* Tracy Bateman et al., *Want or Failure of Consideration,* 11 Fla. Jur. 2d Contracts § 81 ("When consideration for a contract fails, i.e., when one of the exchanged promises is not kept . . . The party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely, but that is not the same thing as saying the contract was never validly concluded.").[3]

C. The equities favor distribution of the Dog to the Wife.

The evidence presented at the hearing showed that Wife has a stronger connection to and relationship the Dog, and hence the equities favor distribution of the Dog to her.

Wife made the final decision on the purchase of the Dog. Tr. at 8:17-23. Once the Dog had been purchased, Wife purchased a separate "special" dog food for the Dog to consume while still under the care of Mr. Idiaquez. Tr. at 9:18-10:5. Wife would check in on the dog under Mr. Idiaquez's care. Tr. at 10:9-14. Wife also bought toys for the Dog. Tr. at 18:13-17. Wife testified that she visited the Dog multiple times before her "heart was won over," and she purposefully chose a male dog to bond with her. Tr. at 17:9-17. Once the Dog had been taken home, Wife registered the Dog with Broward County and obtained a rabies certificate. Tr. at 19:3-25.

By contrast, the only evidence presented regarding Husband's relationship with the Dog was that he registered the Dog as a service animal using an otherwise-undescribed online registration service. Tr. at 30:18-21. There was evidence that Husband took the Dog to the vet at some points, but the evidence was not specific and is overweighed by the evidence regarding Wife's emotional connection to the dog. By contrast, no evidence was presented regarding any emotional connection to the Dog or otherwise regarding his relationship with the Dog. *Cf.* Tr. at 39:14-22. Nor was there any evidence to suggest that the Dog actually provided services in accordance with any law or regulation (beyond the normal enjoyment any pet may provide). *Cf. Harby,* 331 So. 3d at 823 ("Former Wife only proved that Liberty provided emotional comfort, as would any ordinary pet.").

As noted, the Dog, like other chattel, must be "awarded pursuant to the dictates of the equitable distribution statute." *Bennett*, 655 So. 2d at 111 (cleaned up). For these reasons, the balance of the equities favors distribution to Wife. The "sentimental value" of the Dog favors distribution to Wife. *Harby*, 331 So. 3d at 823. The "contribution" Wife made to the acquisition and maintenance of the Dog, especially during its adolescence, including the $250 payment for the dog (the only payment actually made at the time) in addition to other items discussed above, further favors distribution to Wife. Fla. Stat. § 61.075(1)(g). By contrast, no statutory factor or other factor favors distribution to Husband.

Because the Dog is being distributed to Wife, Wife should make an equalizing payment in order to effect equitable distribution of the entire estate.[4] The only evidence presented regarding the value of the Dog was the purchase value of the Dog, that is, $500. Accordingly, the Dog will be valued at $500.[5] Wife therefore will need to make an equalizing payment of $250 to Husband.[6]

III. CONCLUSION

For these reasons, Wife's Motion to Modify/Vacate Agreed Order Regarding the Family Dog, Titan is GRANTED IN PART. The Dog is to be equitably distributed as follows:

To Wife: the Dog.

To Husband: $250.

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[1]The issue of what becomes of chattel that is jointly owned by the parties as tenants in common prior to the marriage was not thoroughly addressed by the parties. Both parties agreed that the Dog would need to be equitably distributed. This Court will assume that the Dog, being chattel, became commingled with marital funds that were converted into dog food and medicine and consumed by the Dog, thus recharacterizing the Dog as marital property. That's a lot of words to say "the married couple owned the dog together," but property law is tedious in that regard.

[2]This is not the law in every state. *Cf. Bennett*, 655 So. 2d at 110 (citing Texas law); *Harby v. Harby*, 331 So. 3d 814, 821 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2453a] ("In several states, pets have a special property status that the trial court must consider for fair and equal distribution of the marital assets. ... Florida is not one of those states.").

[3]Accordingly, this Court need not resolve the conflicting testimony on whether Husband satisfied this obligation by offering Mr. Idiaquez a boat trip some years later; it is not relevant to the existence of a contract.

[4]As noted above, each party had a 50% pre-marital interest in the dog, and this Court is assuming that the dog has been commingled with marital funds and therefore taken the status of marital property. *See* Note 1. But regardless of whether Wife is made to buy out Husband's pre-marital interest in this property or made to make an equalizing payment to effect equitable (that is, 50/50) distribution of marital property, the result is the same.

[5]This Court suspects that the fair market value of a ten-year-old Pitbull is substantially less than $500, but no other evidence regarding valuation was presented.

[6]The parties have fully settled all remaining issues; all that remains in dispute is the distribution of the Dog.

* * *

Torts—Landlord-tenant—Premises liability—Failure to repair dangerous defective condition—Action against landlord for injuries sustained when already partially cracked and shattered shower glass door shattered further and allegedly injured subtenant—Because subtenant had never provided landlord with notice of cracked and shattered shower door, no reasonable juror could find that landlord breached duty to exercise reasonable care to repair dangerous defective condition—Subtenant's claim that prior to accident she informed primary tenant of damaged shower door is unavailing where there is no evidence or legal support in record to establish that primary tenant is agent of landlord so as to impute knowledge of damaged door to landlord—Summary judgment entered in favor of landlord

CASSANDRA DAVIS, Plaintiff, v. BDH INVESTMENT CORP., Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2023-CA-021790-XXXX-XX. August 25, 2025. Kristen Smith-Rodriguez, Judge. Counsel: Robert A. Samartin, The Berman Law Group, for Plaintiff. Scott Boyer, Salehi, Boyer, Lavigne Lombana, P.A., Coral Gables, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court for hearing on August 12, 2025, on Defendant's Amended Motion for Summary Judgment (Doc# 54 and date filed 1/14/25). After reviewing the Defendant's Amended Motion for Summary Judgment, and the opposition, Defendant's reply, and the Court file, and hearing oral argument by Robert Samartin, Esq. and Scott Boyer, Esq., Defendant's Amended Motion for Summary Judgment is hereby **GRANTED.** In support of its ruling, the Court states as follows:

UNDISPUTED FACTS

1. At all times relevant, Defendant, BDH INVESTMENT CORP. ("the Defendant"), was the owner/landlord of a residential property located at 128 Surf Drive, Cocoa Beach, FL 32931 ("the residence").

2. At all times relevant, Plaintiff, CASSANDRA DAVIS ("the Plaintiff"), was a sub-tenant of the residence.

3. The shower glass door inside the Plaintiff's designated bathroom at the residence cracked and partially shattered in April of 2022 while Plaintiff was using said shower.

4. Four (4) months later, in August of 2022, Plaintiff had an accident involving the subject cracked and partially shattered shower glass door wherein the glass shattered further and allegedly caused her injury.

COURT FINDINGS

5. There is no genuine issue of material fact that prior to the Plaintiff's accident in August of 2022, the Defendant was never given any notice that the subject shower glass door was cracked and partially shattered or damaged in any way whatsoever.

6. The pertinent law is as follows: "After the tenant takes possession, the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless waived by the tenant." *Mansur v. Eubanks,* 401 So. 2d 1329-30 (Fla. 1981).

7. Because it is undisputed that, prior to the Plaintiff's accident in August of 2022, the Defendant was never given notice of the subject cracked and shattered shower glass door, there is no way a reasonable juror could find that the Defendant breached its duty to exercise reasonable care to repair a dangerous defective condition.

8. Moreover, although the Plaintiff claims that, prior to her accident in August of 2022, she informed the primary tenant of the residence, Jesse Torrans, of the cracked and partially shattered shower glass door, there is no admissible evidence or legal support in the Court record to establish that Jesse Torrans was an agent for the Defendant, or that his alleged knowledge of the damaged shower glass door should have been imputed upon the Defendant, or that he informed the Defendant of the damaged shower glass door.

9. Accordingly, for the reasons stated above, it is hereby **ORDERED and ADJUDGED**:

(i) The Defendant's Amended Motion for Summary Judgment is hereby **GRANTED**.

(ii) Final Judgment is entered in favor of the Defendant.

(iii) The Plaintiff shall take nothing from this action and the Defendant shall go hence without day.

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

* * *

Mobile home parks—Class actions—Consumer law—Florida Consumer Collection Practices Act—Settlement agreement and service award to named plaintiff are approved—Portion of residual funds is awarded to plaintiff's counsel for post-mediation work, and remainder is to be distributed to participating class members pro-rata

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

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, SERVICE AWARD, AND ALLOCATION OF RESIDUAL FUNDS

[Editor's note: Final judgment published at 33 Fla. L. Weekly Supp. 75a.]

THIS CAUSE came before the Court for hearing on July 29, 2025, on two pending motions: (1) Plaintiff's Motion for Final Approval of Class Action Settlement, Service Award, and Allocation of Residual Funds, and (2) Plaintiff's Motion for Deposit of Unclaimed Funds into the Court Registry. The Court, having reviewed both motions, the settlement agreement, supporting documentation, and the entire record, having heard argument of counsel, and being otherwise fully advised in the premises, hereby enters this Order granting both motions and making the following findings:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This class action was brought pursuant to the Florida Mobile Home Act and the Florida Consumer Collection Practices Act on behalf of tenants at Missile View Mobile Home Park.

2. The proposed settlement totals $80,000. The settlement includes:

- $50,000 in payments to class members representing 100% of documented overcharges;
- A rent cap through February 1, 2026;
- A mutual non-retaliation provision;
- A $6,960.35 service award to named Plaintiff Lourdes McIntosh;
- $30,000 in attorney's fees and costs (232.05 hours at $129.28/hour);
- Provision for allocation of unclaimed or residual funds.

3. Class notice was served by U.S. Mail and physical posting in the park between June 12-19, 2025, as detailed in Plaintiff's filing. No objections were received. The Court finds that notice was reasonable, appropriate, and satisfied due process and the requirements of Rule 1.220(e), Florida Rules of Civil Procedure.

4. The settlement is fair, adequate, and reasonable, and meets the requirements of Rule 1.220(e), Florida Rules of Civil Procedure.

5. The Court finds that Plaintiff Lourdes McIntosh undertook significant personal risk in initiating this action, including defending a retaliatory eviction suit, and that her efforts materially advanced the interests of the class. Her contribution of a $2,500 retainer—over seven times her own $351.70 damages and over two months of her monthly $1,100 income—supports the full award.

6. The Court finds that 17 tenants opted out of the settlement and that unclaimed funds remain in the amount of $2,446.00. Of this, 40% ($978.40) shall be awarded to Plaintiff's counsel as a supplemental fee for 23 hours of post-mediation implementation work (approximately $42.54/hour), and 60% ($1,467.60) shall be redistributed pro rata to participating class members.

7. Defendant shall remit payment in the amount of $80,000.00, payable to: George M. Gingo, P.A. IOTA Trust Account P.O. Box 838, Mims, Florida 32754 within fourteen (14) days of service of this Order.

IT IS HEREBY ORDERED AND ADJUDGED:

A. The settlement is APPROVED and shall be given full force and effect;

B. The service award to named Plaintiff Lourdes McIntosh in the amount of $6,960.35 is APPROVED;

C. The allocation of residual funds as set forth above is APPROVED;

D. Plaintiff's separate Motion to Deposit Unclaimed Funds into the Court Registry is GRANTED. Funds allocated to deceased or unlocatable class members shall be deposited with the Clerk of Court in accordance with Plaintiff's motion and instructions therein;

E. Defendant SHALL remit full settlement funds within 14 days as directed above.

* * *

Insurance—Homeowners—Property insurance—Claimant/non-assignee's action against insurer—Conditions precedent—Ten-day notice—Plaintiff's presuit notice of intent to initiate litigation did not comply with statute where notice did not state with specificity alleged acts or omissions of insurer—No merit to argument that, because section 627.70152(6) provides that presuit notice is admissible as evidence only in proceeding regarding attorney's fees, court cannot determine whether plaintiff complied with presuit notice requirement on motion to dismiss—Further, dismissal without prejudice is warranted for failure to join indispensable party who cannot later be joined in action where no presuit notice was submitted on behalf of estate of now-deceased person who was named insured under policy and sole owner of property on date of loss

AMY MOORE, Plaintiff, v. PEOPLE'S TRUST INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 25-CA-002711. July 11, 2025. Alane Laboda, Judge. Counsel: Jason D. Spiller, Kevin Weisser, and Sapir Elazar, Fort Lauderdale, for Plaintiff. Michael B. Greenberg, Deerfield Beach, for Defendant.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE AND ENTITLING DEFENDANT TO REASONABLE ATTORNEY FEES AND COSTS

THIS CAUSE, having come before the Court for hearing upon Defendant's Motion to Dismiss for Failure to Comply with § 627.70152(3)(a), fla. stat. (the "Motion to Dismiss) and the Court having reviewed the pleadings, heard the argument of counsel and being otherwise duly advised in the premises, it is hereby

ORDERED and ADJUDGED

1. Defendant's Motion to Dismiss is **GRANTED**;

2. The Defendant's argue dismissal without prejudice is appropriate for failure of Plaintiff's to comply with section 627.70152, Florida Statutes (2022), on two distinct bases, 1) the notice of intent to initiate litigation submitted on Plaintiff's behalf did not "state with specificity" the "alleged acts or omissions of the insurer, which may include a denial of coverage" as required by section 627.70152(3)(a)2; and 2) the estate of the sole owner of the subject property as of the alleged date of loss, James D. Moore, is an indispensable party to the action but has failed altogether to submit a notice of intent to initiate litigation.

3. The Court finds that the grounds upon which relief is requested are with merit and that the Complaint should be dismissed without prejudice for Plaintiff's failure to comply with section 627.70152(5). Further, the Court finds the Defendants are entitled to reasonable attorney fees and costs pursuant to section 627.70152(8)(b) of the applicable version of the statute.

4. In addition, the subject homeowner's insurance policy came into effect on June 1, 2022, so the second version of section 627.70152 (in effect from May 26, 2022 through December 15, 2022) is applicable. *See generally Hughes v. Universal Prop. & Cas. Ins. Co.,* 374 So. 3d 900, 900 (Fla. 6th DCA 2023) [49 Fla. L. Weekly D153a].

5. Based on the plain language of the statute and binding case law, the Court rejects Plaintiff's argument that since section 627.70152(6) provides that the notice is "admissible as ***evidence*** only in a proceeding regarding attorney fees," the Court cannot determine whether Plaintiff complied with section 627.70152. (Emphasis added). Section 627.70152(5) provides, in pertinent part, that "[a] court ***must dismiss*** without prejudice any claimant's suit relating to a claim for which a notice of intent to initiate litigation was not given as required by this section . . . ." (Emphasis added). That the statute requires courts to "dismiss without prejudice" for failure to submit a compliant notice of intent to initiate litigation establishes that compliance with the statute can be considered on a motion to dismiss. Further, in *Citizens Prop. Ins. Corp. v. Walden*, 395 So. 3d 216, 218 (Fla. 3d DCA 2024) [49 Fla. L. Weekly D1815a], a recent decision of first impression, the Third District Court of Appeal granted certiorari and quashed a trial court's order denying an insurer's motion to dismiss based on the plaintiff's failure to submit a section 627.70152 notice prior to suit. In so holding, the *Walden* Court relied on a "bevy of medical malpractice cases finding that a litigant's failure to satisfy the mandatory presuit procedures . . . satisfies the threshold jurisdictional inquiry" to satisfy certiorari jurisdiction, and held that "[s]ection 627.70152 cannot be meaningfully enforced on post-judgment appeal because the purpose of providing the presuit notice is to prevent the premature filing of a lawsuit." *Id.* Accordingly, the Court held that "[t]he issue of an insured's compliance with section 627.70152's presuit notice requirements presents ***an issue of law.***" *Id.* (emphasis added); *see Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts.").

6. Plaintiff's reading of section 627.70152(6) would lead to the absurd result that no court, at any stage of the litigation or upon any motion brought by an insurer, could dismiss a case where a presuit notice fails to include the information required by section 627.70152(3)(a), which provides that all of the information required thereunder must be "state[d] with specificity."

7. The statute demands strict compliance given section 627.70152(3)(a)'s language providing that the presuit notice "must state with specificity" certain information required thereunder and the absence of any statutory language allowing substantial compliance or exception for lack of prejudice. *See Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1283 (Fla. 2000) [25 Fla. L. Weekly S172a]; *see, e.g., Burton v. Oates*, 362 So. 3d 311, 315 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D1178c] (rejecting argument that recall petition's substantial compliance with section 100.361, Florida Statutes, sufficed because the statute's use of the word "shall" made the requirement mandatory and because the statute "contains no language that permits substantial compliance with the statute" and does not "provide that the failure to comply with the filing requirements of the statute can be excused if there is an alleged lack of prejudice to the elected official targeted for election recall"); *Doral Collision Ctr., Inc. v. Daimler Tr.,* 341 So. 3d 424, 428 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1217a] (holding strict compliance required by mechanics' lien law because section 713.585, Florida Statutes, requires that notice "must contain" specific information and does not include specific statutory exceptions allowing for consideration of substantial compliance or lack of prejudice); *accord Demase v. State Farm Florida Ins. Co.,* 351 So. 3d 136, 139 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2318c] (Sasso, J., concurring specially).

8. The Court finds Plaintiff's presuit notice failed to strictly comply with section 627.70152(3)(a)2 because it did not "state with specificity" the "alleged acts or omissions of the insurer giving rise to the suit," but instead merely stated, in pertinent part, "[f]ailing to acknowledge and act promptly upon communications with respect to claims. Denying claims without conducting reasonable investigations based upon available information." As this vague allusion to plural "claims" and alleged general claims handling practices falls well short of the specificity required by the statute, dismissal without prejudice is warranted pursuant to section 627.70152(5).

9. Section 627.70152(3)(a) provides, in pertinent part, that "[a]s a condition precedent to filing a suit under a property insurance policy, ***a claimant*** must provide the department with written notice of intent to initiate litigation . . . ." (Emphasis added). Section 627.70152(5) provides, in pertinent part, that "[a] court must dismiss without prejudice ***any claimant's*** suit relating to a claim for which ***a*** notice of intent to initiate litigation was not given as required by this section . . . ." (Emphases added). Statutes are "presumed to be grammatical in

their composition. They are not presumed to be unlettered. Judges rightly presume, for example, ***that legislators understand subject-verb agreement***, noun-pronoun concord, the difference between the nominative and accusative cases, and the principles of correct English word-choice." *Dean Wish, LLC v. Lee Cnty.*, 326 So. 3d 840, 846 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2173a] (emphasis in original) (quoting Antonin Scalia & Bryan A. Gamer, *Reading Law: The Interpretation of Legal Texts* 140 (1st ed. 2012)). Thus, under the statute at issue, the failure of "***a*** claimant" to submit "***a*** notice of intent to initiate litigation" requires dismissal of "***any*** claimant's suit" even if some of the proper claimants submitted a compliant presuit notice.

10. It is undisputed that prior to suit, Plaintiff's counsel submitted a written notice of intent to initiate litigation on Plaintiff's behalf. However, no such notice was provided on behalf of James D. Moore or his estate. James D. Moore (deceased), was a named insured under the subject policy along with Plaintiff, and was the sole owner of the subject insured property as of the alleged date of loss. Public records establish that current owner of record of the subject property are the unknown heirs of Mr. Moore.

11. The Court finds and it is undisputed that as Mr. Moore was a named insured under the insurance policy and was the sole owner of the subject property as of the alleged date of loss, his estate is an indispensable party to this action. *See* § 627.405, Fla. Stat. (defining "insurable interest" as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment"); *Florida Dept. of Revenue v. Cummings*, 930 So. 2d 604, 607 (Fla. 2006) [31 Fla. L. Weekly S275c] (defining an indispensable party as "one whose interest in the controversy is of 'such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience' " (quoting *Phillips v. Choate*, 456 So. 2d 556, 557 (Fla. 4th DCA 1984))).

12. In Florida, an estate is a distinct entity from the individual person who represents the estate. *See Beseau v. Bhalani*, 904 So. 2d 641, 642 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1590b] ("Although Appellant, 'individually' was named in the complaint's caption, the body of the complaint makes clear that her claims were made solely as personal representative of the estate. Thus, Appellant was never a party to the action in her individual capacity."); *see also Hett v. Barron-Lunde,* 290 So. 3d 565, 572 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D177a] (explaining that "[t]he general rule under Florida law is that a trustee is an indispensable party to proceedings affecting trust property," and "a trustee is a separate party distinct from the individual person serving as a trustee"); *Grasso v. Grasso,* 143 So. 3d 1050, 1050 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1514d] ("Olga Grasso asserted no claims against Margaret or Michelle in their individual capacities but only as purported cotrustees. As such, Margaret and Michelle were not parties to the action in their individual capacities and the trial court erred in taxing costs against them individually."); *Beekhuis v. Morris*, 89 So. 3d 1114, 1116 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1386c] (holding it was error for court to assert jurisdiction over trust property and individual in her capacity as trustee where original pleadings in guardianship proceeding were brought by individual solely in her individual capacity and not as trustee). The Court finds even if Plaintiff were the personal representative of Mr. Moore's estate (which was not alleged in the Complaint), Plaintiff would have had to submit a presuit notice of intent to initiate litigation in her specific capacity as the estate's personal representative and not just in her individual capacity. That did not happen here.

13. Accordingly, the Court finds dismissal without prejudice is also warranted pursuant to section 627.70152(5) due to the failure of the estate of James D. Moore to submit a presuit notice. This is so based on both the plain language of the relevant subsections of section 627.70152 and the established axiom that the failure to join an indispensable party *who cannot later be joined* in the action is grounds for dismissal. *See Marson v. Comisky*, 341 So. 2d 1040, 1040-41 (Fla. 4th DCA 1977); *accord New Port Largo, Inc. v. U.S. Excavating & Eng'g, Inc.,* 490 So. 2d 1045, 1046 (Fla. 3d DCA 1986). The estate of James D. Moore cannot later be joined in this action since the lawsuit was filed prior to the estate's submission of a section 627.70152 presuit notice, and section 627.70152(5) clearly instructs that the court "must dismiss without prejudice any claimant's suit relating to a claim for which a notice of intent to initiate litigation was not given as required by this section."

14. For each of the aforementioned reasons, the action is **DISMISSED WITHOUT PREJUDICE** and without leave to amend. *See Hughes*, 374 So. 3d at 913 (White, J., concurring in result).

15. Defendant's Motion to Dismiss sought entitlement to attorney fees and costs pursuant to section 627.70152(8)(b), Florida Statutes (2022).

16. Again, as subject homeowner's insurance policy came into effect on June 1, 2022, the second version of section 627.70152 (in effect from May 26, 2022 through December 15, 2022) applies. *See generally Hughes*, 374 So. 3d at 900.

17. Section 627.70152(8)(b) of the applicable version of the statute provides:

> In a suit arising under a residential or commercial property insurance policy not brought by an assignee, if a court dismisses a claimant's suit pursuant to subsection (5), the court may not award to the claimant any incurred attorney fees for services rendered before the dismissal of the suit. When a claimant's suit is dismissed pursuant to subsection (5), the court may award to the insurer reasonable attorney fees and costs associated with securing the dismissal.

§ 627.70152(8)(b), Fla. Stat (2022).

18. As Plaintiff's suit is hereby **DISMISSED** pursuant to section 627.70152(5), the Court finds Defendant insurer is entitled to an award of reasonable attorney fees and costs associated with securing the dismissal pursuant to subsection (8)(b), with the amount of the award to be determined at a later evidentiary hearing if necessary. The Court reserves jurisdiction to determine the amounts due and owing at a subsequent evidentiary hearing, should the parties not be able to come to a resolution of same. If an evidentiary hearing is required, the Court directs the movant to self- refer the same to the Circuit Civil Magistrate.

* * *

Civil rights—Public employees—Discrimination—Disability—Accommodations—Drug use—Medical marijuana—County EMT, who has a valid license to use prescription medical marijuana, placed on administrative leave after testing positive for marijuana in random urine screening—Plaintiff's motion for summary judgment granted—Plaintiff is a disabled individual under Florida Civil Rights Act where it is undisputed that he suffers from anxiety and insomnia which significantly impact his day-to-day life when unmedicated—Plaintiff is a qualified medical marijuana patient under section 381.986(2)(k)—Article X, section 29 of constitution requires that "qualified patients" be allowed to use medical marijuana off-site, and employers are required to make accommodations—By not making an accommodation for plaintiff to use medical marijuana off-site, county violated FCRA—Wrongful termination—County violated its own drug-free workplace policy, which requires it to treat a positive drug screen as a negative one when an employee provides a prescription for that positive result, where plaintiff provided county with his medical marijuana certification within contractually enumerated period—Medical marijuana certification is considered a prescription, or akin to a prescription, and county was required to accept it as justification for test result under verbiage of policy where it was undisputed that plaintiff did not utilize marijuana while in course and scope of his employment—Collective bargaining agreement also required county to accept medical marijuana card as sufficient justification for positive result because medical marijuana falls within CBA's definition of prescription or non-prescription drug

ANGELO GIAMBRONE, Plaintiff, v. HILLSBOROUGH COUNTY, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CA-4719. Division C. December 10, 2024. Melissa M. Polo, Judge.

[Appeal Pending. 2DCA Case No. 2D2025-0115.]

ORDER GRANTING PLAINTIFF, ANGELO GIAMBRONE'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court for hearing on November 25, 2025, on Plaintiff, ANGELO GIAMBRONE'S (hereinafter "Plaintiff") Motion for Final Summary Judgment filed 09/04/2024 [Doc. #49], Amended Motion for Final Summary Judgment filed 10/02/2024 [Doc. #52] and Defendant's, HILLSBOROUGH COUNTY'S Motion for Summary Judgment filed by HILLSBOROUGH COUNTY on 09/20/2024 [Doc. #50]. The Court having reviewed the parties' respective Motions, Defendant's Response to Plaintiff's Motion for Summary Judgment filed 09/20/2024 [Doc. #51], Plaintiff, ANGELO GIAMBRONE'S Response to Defendant's Motion for Summary Judgment filed 10/28/2024 [Doc. #63], all pleadings, documents, and exhibits thereto provided in support of or in opposition to the subject Motions, the record, the applicable law, argument of counsel for the parties, and being otherwise fully advised in the premises, the Court finds as follows:

EXHIBITS PROVIDED

Attached to the parties dueling Motions for Summary Judgment were a multitude of exhibits. In addition to the pleadings filed, the Court reviewed the following exhibits:

Plaintiff's:

- Exhibit A- Hillsborough County Employment Records for Plaintiff
- Composite Exhibit B- Hillsborough County Administrative Policy Manual; Hillsborough County Administrator Department Procedures Drug Free Workplace Procedure Number 1.4; Collective Bargaining Agreement between Hillsborough County BCCC and International Association of Fire Fighter (IAFF) Local 2294 (October 1, 2018 through September 20, 2021)
- Exhibit C- 08/31/24 Affidavit and 3/16/23 Deposition of Plaintiff, Angelo Giambrone
- Exhibit D- Plaintiff's Medical Marijuana Card, expiration date of 6/7/2019
- Exhibit E- letter and records from "Marijuana Doctor," Clearwater Medical Marijuana clinic. Plaintiff has been patient there since May 30, 2018, includes Plaintiff's intake questionnaire.
- Exhibit F- 08/31/24 Affidavit of Mrs. Jennifer Giambrone, Plaintiff's wife
- Exhibit G- Hillsborough County's Response to Plaintiff's Requests For Admissions
- Exhibit H- Redacted suspension letter from Defendant to Plaintiff
- Exhibit I- Drug screening results from March 1, 2019- Positive for Marijuana, in remarks stated "Donor claims medical marijuana card in Florida."
- Exhibit J- Department of Health letter informing plaintiff that investigation was closed on 4/28/2020 as it was found that there was not probable cause after an investigation by the Probable Cause Panel for Bureau of Emergency Medical Oversight.
- Exhibit K- Office of Medical Marijuana Use, Florida's Official Source for Medical Use treatment center information.

Defendant's:

- Exhibit 1- County Drug Free Workplace Policy (effective 10/-1/2015)
- Exhibit 2- County Collective Bargaining Agreement (CBA)
- Exhibit 3- Plaintiff's Deposition taken March 16, 2023
- Exhibit 4- March 21, 2023, Deposition of Luz Ruiz, Human Resource Partner with Hillsborough County

STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL HISTORY

Plaintiff was employed by Defendant, HILLSBOROUGH COUNTY (hereinafter "Defendant") as an Emergency Medical Technician (EMT) in the role of Fire Medic I with Defendant's Fire Rescue Department, i.e. firefighter paramedic, and had been in the employ of the County for several years.[1] Plaintiff was and is licensed by the State of Florida, Department of Health, as an Emergency Medical Technician. On February 26, 2019, Plaintiff was selected for a random urine drug test and tested positive for marijuana with results obtained on March 1, 2019. (PL's Ex. I) (Def Ex. 4-Deposition of Luz Ruiz). There was no workplace incident or concerns with the Plaintiff's work performance that prompted the random urinalysis screening—the testing was strictly random. In accordance with Defendant's Collective Bargaining Agreement (CBA) and Drug Free Workplace Policy, Plaintiff presented Defendant and the testing medical doctor with a Medical Marijuana Card duly and lawfully issued by the Florida Department of Health evidencing that Plaintiff held a valid prescription for medical marijuana to treat his medical conditions.[2] Instead of treating Plaintiff's positive drug test as a negative test pursuant to Defendant's own Drug Free Workplace Policy concerning prescriptions for controlled substances and other medications, Defendant placed Plaintiff on administrative leave without pay. Plaintiff has not undergone a follow up drug test, as it would provide the same result as the first one since he is still being prescribed the medication for use in treating his diagnosed ailments. (PL's Depo. pp 42-43). Plaintiff was placed on unpaid administrative leave due to the 03/01/19 positive drug test on the basis that Defendant would not accommodate Plaintiff's use of medical marijuana with a prescription during his employment as an EMT. (PL's Depo. pp 41). Defendant admits that:

1. There is no evidence that Plaintiff used marijuana on work premises, or during work hours;
2. There is no evidence that Plaintiff possessed marijuana on work

premises or during work hours;

3. There are no work performance evaluations which allege Plaintiff was impaired while working;

4. That Plaintiff never had a complaint or a suspicion of impairment on his employment record;

5. The sole reason for Plaintiff's employment suspension was due to a positive random drug urinalysis.

(PL's Exhibit G- Hillsborough County's Response to Plaintiff's Requests For Admissions filed 8/11/22- DOC. #25).

Defendant has never alleged that Plaintiff ever used marijuana on Defendant's property, ever used marijuana during the course and scope of his employment as an EMT, and that Plaintiffs job functions and performance were never impacted by his use of medicinal cannabis outside of work after he first obtained his medical marijuana card sometime in 2016. In fact, Plaintiff received a promotion in 2018 to Fire Medic I. (PL Depo. pp 13).

As a result of the positive drug screening, the Defendant reported Plaintiff to the State of Florida, Department of Health, licensing board who governs Plaintiff's EMT license. An investigation was conducted by the State of Florida into Plaintiff's positive drug screening, but after being provided with a copy of Plaintiff's medical marijuana card, the investigation was dropped for want of probable cause. More specifically, the Department of Health stated that the Probable Cause Panel for Bureau of Emergency Medical Oversight carefully reviewed all of the information and evidence obtained in the case and determined that probable cause of a violation did not exist and directed the case be closed. (PL's Ex. I). The parties are in agreement that there is no dispute of material fact remaining.

As a result of Defendant's actions, Plaintiff filed the instant cause against Defendant. Plaintiff's Complaint filed 06/05/2020 [Doc. #4], alleges (a) Count I - violation of the Florida Civil Rights Act because Defendant was required to accommodate Plaintiff as a disabled individual; (b) Count II - wrongful termination because Defendant refused to accept Plaintiff's state issued medical marijuana card as justification for the positive test results as required by Defendant's own Drug Free Workplace Policy and Collective Bargaining Agreement; (c) Count III—failure to update its Drug Free Workplace Policy pursuant to the Florida Civil Rights Act; and (d) Count IV - breach of contract for Defendant's violation of it Drug Free Workplace Policy and Collective Bargaining Agreement by not accepting Plaintiff's state issued medical marijuana card as a prescription or non-prescription drug as defined and required in the Collective Bargaining Agreement and Drug Free Workplace Policy.

Defendant, in opposition, argues that Plaintiff questions, as a matter of law, the authority of Defendant—Hillsborough County Fire Rescue Department—to discipline its firefighter medics for a positive drug screen, by contending that a Medical Marijuana Card immunizes firefighter medics from both federal law and employee discipline pursuant to Section 381.986, Fla. Stat. and Fla. Const. Art. X, Section 29.

FINDINGS OF FACT

A. Defendant's Collective Bargaining Agreement and Drug Free Workplace Procedure Number 1.4.

1. On December 7, 2008, Plaintiff was hired to work as an Emergency Medical Technician (EMT) with Defendant's Fire Rescue Department.

2. Plaintiff's employment with Defendant was governed by the Hillsborough County Administrator Policy Manual, Hillsborough County Administrator Department Procedures (hereinafter "County Policy") Drug Free Workplace Procedure Number 1.4, and the Collective Bargaining Agreement (hereinafter "CBA") between Hillsborough County BCCC and International Association of Fire Fighters.

3. Section 40.1 of the CBA prohibits certain actions and behaviors for its employees and provides that "[e]xcept as approved in the line of duty for EMT or paramedic-certified personnel, all employees are prohibited from using, possessing, soliciting, purchasing, selling, distributing, dispensing or manufacturing a Drug; (1) while at work, when within Hillsborough County whether on or off County property; (2) at any time on County property, whether or not at work; (3) at any time in a County vehicle, whether or not at work; and (4) at any time wearing, or otherwise, displaying a Hillsborough County logo, whether or not at work. (5) Or at any time while employed by Hillsborough County Fire Rescue, other than alcohol or prescribed medications."

4. The CBA and County Policy provide that the County can subject an employee to submit to a random urinalysis for the presence of illegal substances.

5. Section 40.2(L) of the CBA defines Prescription or Nonprescription medication as "a drug or medication obtained pursuant to a prescription as defined by s. 893.02 or a medication that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries." This broad definition encompasses medications authorized under federal *or* Florida law.

6. Section 40.2(K) of the CBA defines a "Medical Review Officer" or "MRO" as "a licensed physician, employed with or contracted with an employer, who has knowledge of substance abuse disorders, laboratory testing procedures, and chain of custody collection procedures; who verifies positive, confirmed test results; and who has the necessary medical training to interpret and evaluate an employee's positive test result in relation to the employee's medical history or any other relevant biomedical information."

7. County Policy 1.4 section titled "Over the Counter or Prescription Drugs" states that "[e]mployees and job applicants should confidentially report the use of prescription or nonprescription medications to the County's medical Review Officer (MRO) when contacted by the MRO. Employees or job applicants will have the opportunity to contest or explain the result to the MRO within five working days after written notification of the positive result. If the employee or job applicant's explanation or challenge is unsatisfactory to the MRO, the MRO shall report a positive test back to the employer. If an employee or job applicant has provided an adequate explanation regarding prescription or non-prescription drug use that may affect the test results, the MRO will verify the test as negative and report back to the employer."

8. The County Policy section 1.4 requires Defendant to permit an employee to provide justification for a positive test result within 5 days of written notification of the positive test.

9. Plaintiff was requested to take a random drug test that resulted in a positive test for marijuana.

10. The Duty of an Employee to Disclose their use of a prescription or non-prescription drug is dictated by section 40.7(A) of the CBA and provides that "[a]n Employee is responsible for disclosing to the Battalion Chief or Deputy Fire Marshall, any medication or prescription drug that could impair or adversely affect an Employee's ability to perform his/her job functions."

B. Medical Marijuana in Florida.

11. Per the will of the voters of the State of Florida, Medical Marijuana became enshrined in Article X. s. 29 of the Florida Constitution and codified in Florida Statute § 381.986. This provision maintains that medical use of marijuana by a qualified patient or caregiver in compliance with the provision is not subject to criminal or civil liability or sanctions under Florida law.

12. The Florida Constitution and section 381.986, Florida Statutes,

provides for a framework where patients in Florida can obtain a medical marijuana certification from a licensed Florida doctor and to then be eligible to legally obtain marijuana from a Florida licensed dispensary.

13. There are currently over 880 thousand medical marijuana patients in the State of Florida with over 650 retail stores dispensaries for distribution of regulated medical marijuana to patients. In oral arguments, counsel for Defendant argued that doctors prescribing medical marijuana under Florida law are not "real" doctors because marijuana is "never prescribed, [but is] provided by a person representing themselves to be a physician giving them a license to purchase it." The Court notes that under Florida law, only licensed and state certified medical physicians who have obtained additional licensing to prescribe marijuana are eligible to write prescriptions for medical marijuana.

14. It is factually undisputed that prior to and during Plaintiff's employment with the Defendant, he suffers from anxiety, PTSD, and insomnia which substantially limits one or more of his major life activities on a daily basis when he is not properly medicated. (PL's Depo pp 16-29).

15. The definition of disability under the Florida Civil Rights Act includes both physical and mental impairments.

16. Plaintiff is a disabled individual under the Florida Civil Rights Act, as indicated by the testimony in the affidavits provided by Plaintiff and his wife, but otherwise able to complete all his job duties and functions.

17. Plaintiff's wife's affidavit corroborates Plaintiff's testimony that his anxiety and sleep disorder substantially limited one or more of his major life activities.

18. Plaintiff had tried multiple different prescription medications for many years prior to his primary care physician recommending him to a medical marijuana doctor because of the side-effects of the prescription medications.

19. Plaintiff became a qualified patient pursuant to Article X. s. 29 of the Florida Constitution, by consulting with a licensed medical doctor authorized to certify patients to use medical marijuana, he paid the required fee to the Florida Department of Health and was issued a medical marijuana card from the Florida Department of Health. In oral arguments, counsel for Defendant argued that this Plaintiff is "not a qualified patient" under the applicable Florida Law despite a qualified treating physician determining that the Plaintiff was qualified.

20. Plaintiff began using medical marijuana to treat his anxiety and sleep disorder which Plaintiff found provides him with significantly more relief with little to no side effects. In contrast, Plaintiff previously treated his conditions with traditional prescription medications and experienced significant side effects. Plaintiff in his deposition testified that he only utilizes marijuana on gaps of time where he has off from work, and that he does not use medical marijuana when he is on duty at work. While on shift, Plaintiff normally did not get consistent sleep due to the on-call nature of his job as an EMT. Plaintiff did not request an accommodation because he did not need an accommodation for medicine usage while on shift.

21. Plaintiff provided his state issued medical marijuana card to the Medical Review Officer within 5 days after the positive drug test as justification of his use of medical marijuana as a prescription or non-prescription drug in accordance with the CBA and County Policy. It is noted in Plaintiff's drug test that he provided his medical marijuana card to the testing provider.[3]

22. During his deposition, Plaintiff was not asked about the impact of his medical conditions on his life when unmedicated.

C. Defendant admits that Plaintiff's use of medical marijuana had no impact on his job duties.

23. Defendant admits there was no evidence that Plaintiff possessed medical marijuana on work premises, in work vehicles, during work hours, and in the course and scope of his employment.

24. Defendant admits there were no allegations that Plaintiff was ever impaired, under the influence of cannabis at work or used cannabis at work, before work, or during work hours.

25. Defendant admits there were no complaints or suspicions that Plaintiff was ever impaired at work and Plaintiff regularly had above average or exemplary performance reports.

26. Defendant admits that the sole reason for Plaintiff's suspension was a random positive urinalysis.

27. Defendant suspended Plaintiff for the positive test and denied considering Plaintiff's medical marijuana card as justification for the positive test, unlike any other controlled substances under Florida law.

28. After suspension, Plaintiff, through the union representatives, requested the County make an accommodation after his positive screening that the Defendant consider the positive test a negative test for his use of marijuana outside of work hours pursuant the policy and in light of his lawful Florida prescription for medical marijuana and his rights to obtain that prescription as a lawful prescription under Article X. s. 29 of the Florida Constitution establishing medical marijuana.

29. Defendant denied Plaintiff's accommodation request and Plaintiff subsequently sued Defendant seeking in part reinstatement of employment, lost wages and compensatory damages. In oral arguments, counsel for the Defendant argued that Plaintiff was under an implied, affirmative duty to self-report his medical marijuana usage in advance of any potential screening and request an accommodation to utilize medical marijuana while not at work. Counsel for Defendant argues that Plaintiff is not a disabled person, because he never requested an accommodation or self-reported his confidential medical information to his employer. Further, even if the Plaintiff had revealed his medical information requesting an accommodation, Defendant argues the accommodation of using medical marijuana while off shift or during gaps of time off from work would be unreasonable.

30. Perplexingly, in oral arguments, counsel for Defendant argued that the County "singled out" medical marijuana use and only tested Plaintiff for marijuana—despite the Plaintiff's drug test demonstrating that a battery of controlled substances were listed as being tested for. When asked about examples of accommodations for other controlled substances testified as being used by Plaintiff in the past to treat his current medical conditions such as amphetamines and benzodiazepines, counsel stated that they were unsure if those individuals would go through the same process as someone with a prescription for medical marijuana because the Defendant was specifically looking for medical marijuana as there is "'no valid prescription for marijuana' under federal law." The Court notes that two medications prescribed and taken by Plaintiff during the course of his employment, Xanax (benzodiazepine) and Adderall (amphetamine) are controlled substances under Florida Law requiring a prescription for legal possession and consumption and were the types of controlled substances Plaintiff was tested for on 02/26/19, which, according to the lab results yielded negative results.

CONCLUSIONS OF LAW

A. SUMMARY JUDGMENT STANDARD OF REVIEW.

Florida's summary judgment standard recently changed, pursuant to the Florida Supreme Court's December 31, 2020 and April 29, 2021 orders titled "In Re: Amendments to Florida Rule of Civil Procedure 1.510." *In re Amends. to Fla. Rule of Civ. Pro. 1.510,* 309 So. 3d 192, 192 (Fla. 2020) [46 Fla. L. Weekly S6a] and *In re Amends. to Fla. Rule of Civ. Pro. 1.510,* 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a]. Florida Rule of Civil Procedure 1.510 is now largely

consistent with Federal Rule of Civil Procedure 56. The new version of Fla. R. Civ. P. 1.510, which took effect May 1, 2021, aligns Florida's summary judgment standard with federal courts and a supermajority of states. *Id.*

Under Florida's new standard, summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fla. R. Civ. P. 1.510; *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact to be decided at trial. *Celotex,* 477 U.S. at 330. A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. *Id.* at 325; *see also Bedford v. Doe,* 880 F.3d 993, 996 (8th Cir. 2018) ("In other words, if the nonmoving party must prove X to prevail, the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X") (emphasis in original). When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing there is a genuine issue for trial. *Celotex,* 477 U.S. at 324.

B. COUNT I - VIOLATION OF THE FLORIDA CIVIL RIGHTS ACT.

The undisputed facts establish that Plaintiff is a qualified individual who suffers from anxiety and insomnia. The medical records of Dr. Auerbach, the State of Florida certified doctor, state that Plaintiff suffers from moderate anxiety and severe insomnia, affidavits provided by Plaintiff and his wife, along with Plaintiff's deposition testimony, demonstrate that Plaintiff suffers from anxiety and a sleep disorder, which significantly impacts his day-to-day life when unmedicated. (PL's Ex. E). Section 381.986(2), Florida Statutes, defines what a "Qualified Patient" is as described in Article X, section 29, of the Florida Constitution. Although section 381.986(2) provides an enumerative list of qualifying conditions for a medical marijuana prescription, there is also a catch all provision in subsection (k) that encompasses "[m]edical conditions of the same kind or class as or comparable to those enumerated in paragraphs (a)-(j)." Defendant's contention that Plaintiff is not a qualified patient on the basis that he does not have one of the enumerated conditions in subsections (a)-(j) does not amount to a conclusion that the Plaintiff was incorrectly determined to qualify under subsection (k) through a determination by the Plaintiff's treating medical physician.

The definition of disability under the Florida Civil Rights Act includes both physical and mental impairments. *Avery v. City of Coral Gables,* 100 So. 3d 749 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2588a].

Medical marijuana is strictly regulated under the applicable statutory provision, section 381.986. Plaintiff is and was at all times pertinent hereto, a "Qualified Patient" for the use of medical marijuana. A "Qualified Patient" as defined in Art. X. s. 29 and Florida Statute § 381.986 as:

> a resident of [Florida] who has been added to the medical marijuana registry by a qualified physician to receive marijuana or marijuana delivery device of a medical use and who has a qualified patient identification card." Contained in the Public Policy section of Article X., section 29(a)(1) of the Florida Constitution, states "[t]he medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida Law.

Article X, Section 29 of the Florida Constitution states that it *does not require* for any on-site use of medical marijuana. The plain language of the Amendment provides that "[n]othing in this section shall require any accommodation of any on-site medical use of marijuana in any place of education or employment, or of smoking medical marijuana in any public place" it therefore requires people be able to use medical marijuana in private and the legislatures ban on it was unconstitutional. The pertinent section requires that "Qualified Patients" be allowed to use medical marijuana off site and employers are required to make accommodations, *expressio unius est exclusion alterius.* This maxim and rule of statutory construction means if one or more things of a class are expressly mentioned others of the same class are excluded.

Therefore, the Court finds that Plaintiff is entitled to protection under the Florida Civil Rights Act and the County violated the by not making an accommodation for Plaintiff to use his medical marijuana off-site.

The Court is unpersuaded by Defendant's argument concerning the illegality of marijuana as a schedule I substance under Federal Law and the Americans with Disabilities Act (ADA) and its reliance on *Ortiz v. Department of Corrections,* 368 So. 3d 33 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1238a] in support of its position. The Court finds that *Ortiz* is distinguishable and that under Florida law, there exists a valid prescription for medicinal marijuana and that use and possession of marijuana pursuant to a lawful prescription is not illegal under Florida law.

Ortiz is based on a violation of the Florida Civil Rights Act and does not implicate the Federal ADA. Counsel for Defendant in oral argument argued that *Ortiz* is not distinguishable as it "simply says" that there is a federal law deeming marijuana illegal and therefore an employer can take action firing an employee if they "fail" a drug screening as the Plaintiff did. The Court in *Ortiz* made clear that it did "not decide the extent of a qualified patient's right to use medical marijuana." The Court's ruling was based specifically on the fact that "[f]ederal law makes it a felony for certain 'prohibited persons' to possess a firearm," and that a correctional officer who *sometimes* was required to carry a firearm as a part of their employment would be committing a felony every time they possessed a firearm by the nature of their marijuana possession and usage. *Ortiz,* 368 So. 3d at 34. Further, the Court in *Ortiz* pointed to the ethical requirements for correctional officers under Section 943.13(4) and (7), Florida Statues, and that their behavior is held to a higher standard both on and off shift. Pursuant to Florida law, the *Ortiz* Court found that correctional officers while possessing marijuana are committing a felony under federal law every time they possess it, thereby violating their character requirement because criminal prosecution is not a necessary element for violation. Verbatim, the Corut in *Ortiz* ruled:

> Because Mr. Velez Ortiz uses medicinal marijuana to treat his posttraumatic stress disorder, he is a regular user of marijuana. Although he can legally possess and use medicinal marijuana under state law, his use of it is illegal under federal law. Accordingly, he cannot lawfully possess a firearm. Each time he does, he is committing a felony. And each year, he is required to possess a firearm to qualify. As a result, he is violating his requirement to maintain good moral character, which is required to keep his correctional officer certification. Because Mr. Velez Ortiz could not perform an important requirement of the job of corrections officer, training with and using firearms, without being in violation of federal law and causing other agency personnel to be in violation of federal law, his termination was lawful.

368 So. 3d 33 (Fla. 1st DCA 2023).

Under Florida law, EMTs and their licensing are supervised by the State of Florida, Department of Health, not under federal law. Medical marijuana licenses and prescriptions are also supervised by the Florida

Department of Health. Unlike *Ortiz,* after the Plaintiff's drug test result was reported to the Department of Health, the investigation into Plaintiff's EMT license was dropped for want of probable cause to determine Plaintiff an illicit drug user due to Plaintiff's state issued medical marijuana card. There is no analogous provision of law holding EMTs and correctional officers to the same duty of moral character, and the State Health Department, responsible for Plaintiff's licensing, found he had not violated the conditions of his EMT license.

The Court's ruling in *Ortiz* was specifically based upon the employee's possession of a firearm and being a medical marijuana patient, which has recently been held unconstitutional under numerous federal court rulings. *Cf. United States v. Connelly,* 117 F.4th 269 (5th Cir. 28, 2024) (holding that 18 U.S.C. § 922(g)(3) possession of a firearm as an unlawful user of a controlled substance was unconstitutional as applied to her right under the 2nd Amendment because the history of the 2nd Amendment does not support disarming sober people based on past substance use and only some limits on presently intoxicated individuals); *United States v. Daniels,* 77 F.4th 337 (5th Cir. 2023) (same); *United States v. Harrison,* 654 F. Supp. 3d 1191 (W.D. Okla. 2023) (same). None the less, the crux of this dispute is rooted in Florida state law, not federal law. Plaintiff does not and is not required to possess a firearm in his employment duties with Defendant and is readily distinguishable from the employee in *Ortiz.*

To further distinguish the *Ortiz* decision, the *Ortiz* Court also relied heavily upon a strict Florida Department of Corrections enumerated contractual employment policy against **any** and **all** marijuana usage. 368 So. 3d 33 (Fla. 1st DCA 2023). Although Defendant's argument in their Motion for Summary Judgment mirrors and largely adopts the *Ortiz* Court's reasoning, their contractual agreement on prescription medications and substances does *not* distinguish marijuana from all other substances *and* adopts a more liberal definition of prescription and over the counter substances that encompasses both substances prescribed or made legal over the counter under federal *and Florida law.* This impliedly provides that medical marijuana prescribed under Florida law will be treated the same as all other prescriptions and lawful over the counter substances. Despite their written agreement being worded differently, Defendant relies *solely* upon federal law to argue that there is no valid prescription for medical marijuana. *See* 21 U.S.C. Sect. 812(c)(10); *Gonzales v. Raich,* 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) [18 Fla. L. Weekly Fed. S327a]. Defendant does not explain how this is reconcilable in light of the Florida Constitutional grant on medical marijuana or the widespread practice of providing medical marijuana at dispensaries across the state. The citizens of Florida in adopting Article X, Section 29 of the Florida Constitution decided to make medicinal marijuana legal in this state.

Further, the Defendant argues that the Plaintiff is not protected by the Americans with Disability Act and thereby the Florida Civil Rights Act because the ADA provides ". . . a qualifies individual with a disability **shall not** include any employee. . . who is **currently engaging in the illegal use of drugs**, when the covered entity acts on the basis of such use." *Emphasis supplied by Defendant,* 42 U.S.C. Section 12114. Defendant arrives at this legal conclusion because Florida Courts have held that the Florida Civil Rights Act is interpreted in conformity with the Federal ADA. *St. Johns County v. O'Brien,* 973 So.2d 535, 540 (Fla. 5th DCA 2007) [33 Fla. L. Weekly D71a]. However, this overlooks the fact that medical marijuana usage is not illegal under Florida law. At the time of his drug test, Plaintiff was not engaged in the illegal use of drugs due to his lawful medical marijuana license.

Counsel for Defendant further elaborated their above argument in stating that Plaintiff is not a disabled person in light of his failure to request an ADA accommodation for his medical conditions prior to his random drug screening. Defendant through counsel argued that Plaintiff was under an affirmative implied duty to reveal his private medical information to his employer to seek accommodations for activities occurring outside of the course and scope of his employment. Defendant concedes that there is no requirement that an employee seek an accommodation if the employee does not need one. In this instance, Plaintiff had zero performance issues for several years in the employment of the Defendant, despite using medical marijuana while not in the course and scope of his employment for several of those years. Plaintiff is not seeking any accommodation for his medical marijuana use "in the workplace," but rather the ability to use his lawfully prescribed medical marijuana while not in the course and scope of his employment. The Plaintiff is not seeking to consume, smoke, utilize, possess, or be under the influence of marijuana while at work.

C. COUNT II - WRONGFUL PLACEMENT ON ADMINISTRATIVE LEAVE.

Defendant's County Policy requires it to permit an employee to provide justification for a resulting positive drug test. Defendant's Drug Free Workplace Policy defines a prescription or non-prescription drug as any substance allowed under Florida law that is widely distributed for medicinal use. In summation, the policy holds that if an employee tests positive on an employer ordered drug screening and provides a prescription—valid under Florida or Federal law—for that positive result, then the positive result will be treated as a negative one if the justification is provided within the contractually enumerated period.

Defendant's Drug Free Workplace Policy number 1.4 defines Over the Counter or Prescription Drugs and paragraph 2 of the Policy:

> [e]mployees and job applicants should confidentially report the use of prescription or non-prescription medications to the County's Medical Review Officer (MRO) when contacted by the MRO. Employees or job applicants will have the opportunity to contest or explain the result to the MRO within 5 working days after written notification of the positive test result. If the employee or job applicant's explanation or if an employee or job applicant has provide an adequate explanation regarding prescription or non prescription drug use that may affect the test results, the MRO will verify the test as negative and report back to the employer.

Plaintiff provided the MRO with his medical marijuana card immediately upon receiving notice of the positive drug test result, within the 5 days required by the policy. It is also noted on the Plaintiff's drug screening report that he provided his medical marijuana card to the screening provider at the time of testing. Section 40.2(L) of the CBA defines Prescription or Nonprescription medication as "a drug or medication obtained pursuant to a prescription as defined by s. 893.02 or a medication that is authorized pursuant to federal *or state law* for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries." *Emphasis added.*

A prescription under Florida Statute, section 893.02, requires the "[n]ame of the person the medicine is prescribed to, the date on which it was ordered, the quantify and directions for use and the mode of administration:" Similarly, dispensaries are required to have the full name and information for the doctor, labeling requirements on the product, including the dispensing pharmacy, the date it was filled, the number ordered, the directions for use and information that it is a crime to transfer it to another individual. A special Pharmacy under section 465.003(11)(a)4, Florida Statutes, which "includes every location where medicinal drugs are compounded, dispensed, stored, or sold if such locations are not otherwise defined in this subsection." A Medical Marijuana Treatment Center in Florida fits the definition of Special Pharmacy.

Under Florida law, a medical marijuana certification is considered

a prescription or akin to a prescription, as it is an order for drugs written by a licensed doctor and permitted pursuant to the state constitution. Nowhere in Defendant's contract is medical marijuana enumerated as distinct from all other prescribed medications.

Defendant was required to accept Plaintiff's state-issued medical marijuana card as justification under the verbiage of their policy and report the test as negative due to the undisputed fact that Plaintiff was not under the influence of and did not utilize marijuana while in the course and scope of his employment and Defendant's failure to do so constitutes a violation of its own Defendant's Drug Free Workplace Policy number 1.4. Plaintiff was not under any notice under the written Collective Bargaining Agreement, Drug Free Workplace Policy, or otherwise that the Defendant would treat medical marijuana distinctly from all other prescribed substances and medications.

D. COUNT III—FAILURE OF DEFENDANT TO UPDATE ITS POLICY PURSUANT TO THE FLORIDA CIVIL RIGHTS ACT.

The CBA states that the Employer and Union will not discriminate against an employee for their legal or political activity is permitted by law and not prohibited by the agreement. Article 8—Non-Discrimination states that "the Employer and Union will not discriminate against any employee. . . provided the activity is permitted by law and/or not prohibited by the Agreement."

The use of medical marijuana is not prohibited in Florida and is constitutionally permitted. Defendant's policy as written does not discriminate against patients who use medical marijuana pursuant to Florida law. The County's silent agenda as argued at oral argument to "single out" marijuana among all other potential medications and treating substances, against its own policies constitutes a breach of the CBA and poses an Equal Protection problem. Defendant argued in oral argument that they—Hillsborough County—have an interest in ensuring that the EMTs employed by the County do not enter people's homes when the have been using marijuana and that the County's actions are to benefit public health and safety. Further, Defendant argues that there are evidentiary issues with allowing employees to utilize marijuana when not in the course and scope of their employment, as the test for marijuana has no way of distinguishing if the employee used marijuana minutes, hours or days ago as it remains in the employee's system for 30+ days. These stated justifications are not convincing reasons as to why the Defendants written policy should be abrogated in favor of their implementation of applying the policy to target employees who utilize marijuana medicinally when their medical use is legal under Florida law.

Defendant cites section 381.986 (14)(f) and (15)(a), Florida Statutes, as justification for their actions. Section 381.986 (14)(f) states that the provision authorizing medical marijuana usage does not "limit the ability of an employer to establish, continue, or enforce a drug free workplace program or policy." Section 381.986 (15)(a) states that the provision authorizing medical marijuana usage does not "exempt a person from prosecution for a criminal offense related to impairment or intoxication resulting from the medical use of marijuana or relieve a person from any requirement under law to submit to a breath, blood, urine or other test to detect the presence of a controlled substance." Defendant argues that its actions are authorized under section 381.986 (14)(f) as a means to "establish, continue or enforce" its Drug Free Workplace Policy and that under section 381.986 (15)(a), the Plaintiff does not enjoy immunity for his marijuana usage on the basis of his medical marijuana card. The Court declines to grant summary judgment in favor of the Defendant on this ground and grants summary judgment in Favor of the Plaintiff because as written, the Defendant's drug free workplace does not explicitly prohibit medical marijuana usage by employees and impliedly permits it via subsection Section 40.2(L) of the CBA definition of prescription and non-prescription substances because medical marijuana is a substance legal for treatment under Florida Law.

E. COUNT IV - BREACH OF ARTICLE 8 OF THE COLLECTIVE BARGAINING AGREEMENT (CBA) AND DRUG FREE WORKPLACE POLICY NUMBER 1.4.

Plaintiff signed a contract for employment with Defendant as a Fire Medic Trainee (Firefighter) on or about December 7, 2008. At the same time Plaintiff signed an Acknowledgment and Consent form for receipt of the Employee Handbook and copy of the Defendant's Administrator's Drug Free Workplace Policy. In addition to the Handbook and County Policy, Plaintiff was also provided the Collective Bargaining Agreement (CBA) between Hillsborough County BOCC and the International Association of Firefighters (IAFF), dated October 1, 2018, to September 30, 2021. The CBA and County Policy are contracts that both parties must adhere to.

The portions of the contracts relevant to this case include the Drug Free Workplace provisions found in section 40 of the CBA and section 1.4. of the County Policy. The CBA and County Policy provide for random testing of employees for the purpose of detecting the presence of *illegal* substances. The plain language in section 40.1(A) only prevents employees from using substances or illegal drugs while at work, on county property, in county vehicles, or reporting to work under the influence. Defendant admits that Plaintiff did not possess or use medical marijuana on work premises or while at work, and that he was never under the influence of marijuana while at work.

Defendant points to Section 40.8 of the CBA and argues that for employees that test positive for "controlled substances," they must participate in "EAP" Employee Assistance Training or a private provider counseling and rehabilitation process and undergo further testing to ensure that employee has a "negative test" prior to returning to work. The Defendant's stated purpose behind the EAP program is to assist employees in having a "clean" drug screen. When asked how this policy is impacted by controlled substances like prescribed medications for depression and amphetamines for persons with ADD, Defendant did not have a clear answer as to how those persons would be treated but speculated that it is likely those employees would be same as those testing positive for marijuana. The Court notes that for a person with ADD, they are utilizing the controlled substance while at work due to the nature of the medication. In light of the Defendant's policy on positive drug screenings being deemed negative for prescription substances, this is illogical. The Defendant alleges that under internal company policies, all persons taking "controlled substances," regardless of prescription status, will be subject to the mandatory counseling and retesting requirement. However, the Substance Abuse Policy demonstrates differently.

Section 40 of the CBA contains the provisions of the Substance Abuse Policy, including section 40.1, prohibited actions and behaviors, section 40.2, definitions, and section 40.7, duty to disclose. Section 40.1(A) states that:

> [e]xcept as approved in the line of duty for EMT or paramedic-certified personnel, all employees are prohibited from using, possessing, soliciting, purchasing, selling, distributing, dispensing or manufacturing a Drug; (1) while at work, when within Hillsborough County whether on or off County property; (2) at any time on County property, whether or not at work; (3) at any time in a County vehicle, whether or not at work. (5) Or at any time while employed by Hillsborough County Fire Rescue, other than alcohol or prescribed medications.

Furthermore, County policy 1.4 provides a mechanism for an employee to provide documentation for legal justification for the presence of the substance on the drug test:

> [e]mployees and job applicants should confidentially report the use of prescription or non-prescription medications to the County's Medical

Review Officer (MRO) when contacted by the MRO. Employees or job applicants will have the opportunity to contest or explain the result to the MRO within 5 working days after written notification of the positive test result. If the employee or job applicant's explanation or if an employee or job applicant has provide an adequate explanation regarding prescription or non-prescription drug use that may affect the test results, the MRO will verify the test as negative and report back to the employer.

Plaintiff timely provided the MRO with his state issued medical marijuana card as justification of the positive test result. Section 40.2(L) of the CBA provides the definition of Prescription or nonprescription as:

> a drug or medication *obtained pursuant to a prescription* as defined by s. 893.02 or a *medication that is authorized* pursuant to federal or *state law* for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

Medical marijuana is enshrined in Article X. s. 29 of the Florida Constitution which sets up a system of cultivation and distribution throughout the state for medical marijuana to patients. This system is codified in Florida Statute § 381.986 which provides for the licensing of business to open retail stores and deliver to patients. According to the Florida Department of Health Office of Medical Marijuana updates there are currently over 880 thousand patients in the state and over 650 retail stores to distribute medical marijuana. Medical marijuana, therefore, falls within the definition of prescription or non-prescription drug under section 40.2(L) of the CBA and required the County to accept Plaintiff's medical marijuana card as sufficient justification for the presence of marijuana in his random test. Therefore, Defendant's actions in suspending Plaintiff for a positive test result, despite his justified use of medical marijuana, constitutes a breach of contract.

CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

1. Plaintiff, ANGELO GIAMBRONE'S Amended Motion for Summary Judgment is **GRANTED** on Counts I, II, III, and IV of Plaintiff's Complaint.

2. Defendant, HILLSBOROUGH COUNTY'S Motion for Summary Judgment is **DENIED**.

3. Pursuant to the Florida Civil Rights Act, Florida Statute § 760.07 and 760.11(5). Plaintiff is entitled to recovery of back pay, compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, reputational damages, and any other intangible injuries from Defendant and the Court reserves ruling as to the amount of damages. Additionally, Plaintiff is entitled to recover reasonable attorneys' fees and costs incurred pursuant to Florida Statute § 760.11(5) from Defendant and the Court reserves ruling as to the amount of attorneys' fees and costs.

4. Pursuant to the Florida Civil Rights Act, Florida Statute § 760.11(5), and the Defendant's contractual agreements in place, the Defendant is hereby prohibited from discriminating against and must provide an accommodation to employees who present a valid State of Florida Medical Marijuana Card after testing positive for marijuana so long as there is no evidence that the employee was using substances or illegal drugs while at work, on county property, in county vehicles, or reporting to work under the influence in violation of said written agreements.

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[1]Plaintiff's documentation shows a hiring date effective December 7, 2009. *See* Plaintiff's Amended Motion for Summary Judgment, Exhibit A. Plaintiff testified he was a volunteer firefighter with Hillsborough County Station 18 for 2 years prior to being hired. *See* Plaintiff Deposition pp. 12-13. Defendant alleges Plaintiff began employment for the County in 2015. This is not a dispute of material fact, and instead undisputedly demonstrates that Plaintiff was employed by the County without issue for many years before the incident prompting his suspension.

[2]It is undisputed that Plaintiff was issued and held a valid license to use prescription medical marijuana. Despite this fact, Defendant attempts to argue that Plaintiff does not have a qualifying medical condition under the Public Health statute F.S.381.986(2).

[3]Plaintiff testified at his deposition that the (doctor) at the testing facility contacted him and asked if he had a prescription for marijuana. (PL Depo pp 35).

* * *

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COUNTY COURTS

Criminal law—Boating under influence with person under age 18 in vessel—Operating vessel—Defendant was operating vessel within meaning of BUI statute where defendant stated twice during encounter with officer that he was captain of vessel and in command of vessel being driven by his 14-year-old son, and defendant indicated that he was responsible for vessel safety by describing location of safety equipment to officer—No merit to argument that defendant is relieved of criminal liability because he allowed non-intoxicated son to be in actual physical control of vessel—Fact that son could have been cited for operating vessel without valid boater safety identification card does not absolve defendant of his own criminal liability for BUI pursuant to broad statutory definition of "operate"—Motion to dismiss is denied

STATE OF FLORIDA, v. EUGENE BURKE, Defendant. County Court, 2nd Judicial Circuit in and for Wakulla County. Case No. 25-MM-105. August 22, 2025. Brian D. Miller, Judge. Counsel: Harrison G. Broer, Assistant State Attorney, Second Judicial Circuit, Crawfordville, for State. David Kemp, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE comes before the Court on the Defendant's Motion to Dismiss (hereafter "Motion"). After reviewing the Motion, the State's Demurrer and Traverse, considering the testimony of witnesses and the arguments of counsel for the State and the Defendant at a hearing held on August 5, 2025, and being fully advised in the premises, the Court DENIES the Defendant's Motion for the reasons stated below:

Factual Background

1. The State and Defendant essentially stipulated to the facts of this case. The State presented evidence at the hearing on the Motion from Ofc. Charles Mallow of the Florida Fish and Wildlife Conservation Commission and Brandy Burke, the Defendant's wife, as well as a recording of the encounter between Ofc. Mallow and the Defendant as recorded by Ofc. Mallow's body-worn camera.

2. The testimony at the hearing on the Motion showed that on April 12, 2025, the Defendant, his wife, and their 14-year-old son, L.B., were in a vessel on the St. Marks River in Wakulla County, Florida. Ofc. Mallow observed the vessel "ploughing," or being operated with the bow high in the water, indicating a higher speed. The vessel was in a no-wake zone at the time Ofc. Mallow made this observation. Ofc. Mallow initiated a stop on the vessel, which was registered to Mrs. Burke's uncle. The video evidence clearly showed the vessel was underway in the St. Marks River and that L.B. was at the helm, with the Defendant sitting behind him. L.B. did not possess a valid boater safety identification card that would allow him to operate the vessel. L.B. was not cited for this infraction.

3. The Defendant clearly showed indications of alcohol impairment, such as slurred speech, the presence of a 24-pack of beer in the boat, and the Defendant's own admissions regarding his level of alcohol impairment. Specifically, the Defendant told Ofc. Mallow that he would "blow over the legal limit," that he had "more than a couple beers," and that "I'm under the influence." Ofc. Mallow arrested the Defendant for one (1) count of boating under the influence (hereafter "BUI") with a person under 18 in the vessel, pursuant to *Fla. Stat.* § 327.35.

4. The issue raised by the Defendant concerns where the State presented sufficient evidence that the Defendant operated the vessel as defined in Florida law. Ofc. Mallow did not observe the Defendant steering or otherwise directly controlling the navigation or operation of the vessel. Rather, the State argues the Defendant was the operator of the vessel because he (1) stated that he was the captain and in command of the vessel when asked by Ofc. Mallow, and (2) that he showed Ofc. Mallow the locations of safety equipment on the vessel, thereby indicating being responsible for the safety of the vessel, both of which established criminal liability for BUI pursuant to Florida's definition of vessel operation.

Legal Standard for Motion to Dismiss

5. In response to a defendant's motion to dismiss pursuant to Rule 3.190(c)(4), *Fla. R. Crim. P.*, the State may file a traverse or demurrer in response. Rule 3.190(d), *Fla. R. Crim. P.* By filing a demurrer, the State admits the basic facts in a motion to dismiss, but despite such an admission, the trial court must still consider the facts alleged in the motion to determine whether the State has set forth a prima facie case. *State v. Jaramillo*, 951 So.2d 97 (Fla. 2nd DCA 2007) [32 Fla. L. Weekly D696a]. To establish a prima facie case necessary to survive a motion to dismiss, the State may rely on circumstantial evidence, and all inferences to be drawn therefrom are resolved in the light most favorable to the State. *Id.*

Operation of a Vessel

6. Florida law provides that a person is guilty of the offense of boating under the influence if they operate a vessel while under the influence of alcohol to the extent that their normal faculties are impaired or have a blood alcohol level of 0.08g or more per milliliter of blood or 0.08g or more per 210 liters of breath. *Fla. Stat.* § 327.35(1).

7. Florida law defines a "vessel" as synonymous with a "boat" and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water, without regard to the size of the vessel. *Fla. Stat.* § 327.02(46).

8. Florida law has a broad definition of "operate" regarding a vessel. "Operate" includes five (5) separate definitions: (1) the person in charge of the vessel, or the person responsible at any given time for the operation of the vessel; (2) the person in command of the vessel, or the master, captain, or person with ultimate authority over the vessel; (3) the person in actual physical control of the vessel, or actually steering the vessel; (4) the person with control or responsibility for navigation and safety while underway, such as a navigator or pilot; and (5) a person controlling or steering a vessel while it is being towed by another vessel. *Fla. Stat.* § 327.02(34).[1]

9. The Court also considered the analogous statute for driving under the influence (hereafter "DUI")[2] and prior BUI statutes that defined "operate." Previously, Florida defined "operate" to mean "navigate or otherwise use a vessel." *Fla. Stat.* § 327.02(18) (1987). The term "use" was held to be unconstitutionally vague, and the legislature amended the definition in 1988 to a person in the actual physical control of the vessel. *State v. Corley*, 558 So.2d 187 (Fla. 4th DCA 1990); *State v. Kolacia*, 558 So.2d 190 (Fla. 4th DCA 1990). Clearly, this limited definition of "operate" did not encompass situations where the navigator or pilot of a vessel could be impaired by alcohol or controlled substances and escape criminal liability because they did not physical steer the vessel. Similarly, the legislature could have continued the limitation of "operate" to be analogous to the DUI statute. They did not. The current definition of "operate" as cited above shows the legislature's intent to broaden the definition of "operating" a vessel to distinct areas of responsibility outside of actual physical control.

10. The Defendant cited *Cardenas v. State*, 993 So.2d 546 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D2388a] to support his argument, correctly, that being a *passenger* on a vessel does not automatically make one an *operator* of the vessel and can be a valid defense to BUI.

However, *Cardenas* concerned an ineffective assistance of counsel claim for failing to call a witness that would have testified the defendant in that case was not operating the vessel. *Cardenas* did not otherwise address the variations of how a person can operate a vessel or the boundaries of those variations.

11. In response, the State cited a circuit court order denying a motion to suppress in *State v. Windham*, 26 Fla. L. Weekly Supp. 53a (Fla. 10th Cir. 2017). *Windham* involved similar facts to this case, including Windham's 13-year-old son was in actual physical control of the personal watercraft the two occupied, with the defendant sitting directly behind his son directing his steering and navigation. The State also argued the *Windham* court considered the defendant's handling of the safety check and improperly identifying safety equipment in its analysis of whether Windham "operated" the vessel as defined in *Fla. Stat.* § 327.02(34).

12. The Court finds, based on viewing the evidence in the light most favorable to the State, that two (2) of the variations encompassed in the definition of "operate" apply in this case. First, the Defendant affirmatively stated twice during his encounter with Ofc. Mallow that he was the captain of the vessel and in command of the vessel. Second, the Defendant's actions in locating and describing items for vessel safety in response to Ofc. Mallow's questions regarding those items indicated he was responsible for the safe operation of the vessel. The plain language of *Fla. Stat.* § 327.02(34) clearly includes a person in command of a vessel or responsible for the safety of a vessel while it is underway in the definition of "operating" a vessel. While this conduct might not have been unlawful in other states or in the previous versions of Florida law, the current broad definition of "operate" includes the circumstances presented in this case.

13. Lastly, the Defendant argued that the legislature encourages designated operators of vessels and vehicles, and that an intoxicated person could be relieved of criminal liability if they allow a non-intoxicated person to be in actual physical control of the vessel, whether that person was authorized to operate the vessel or not. However, the Court rejects this argument, as the fact that another person could have received a citation for operating a vessel without a valid boater safety identification card does not absolve the Defendant of his own criminal liability pursuant to the broad definition of "operate" in *Fla. Stat.* § 327.02(34).

Conclusion

14. The Court finds that the State presented sufficient evidence to establish that the Defendant operated the vessel in this case by admittedly being its commander and by his actions showing that he was the person responsible for the vessel's safety while it was underway, as both are defined in *Fla. Stat.* § 327.02(34).

15. Accordingly, it is hereby:

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

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[1]There is a dearth of case law in Florida regarding the issue presented in this case. The Court examined how other states defined operation of a vessel in the context of boating under the influence and found that (1) Florida has the broadest definition of "operate," as most other states restrict operation to a person in actual physical control of a vessel, and (2) that even less case law regarding this issue exists in those states.

[2]Criminal liability for driving under the influence limits "operation" of a vehicle to those who are (1) driving the vehicle or (2) in actual physical control of the vehicle. *Fla. Stat.* § 316.193(1).

* * *

Insurance—Personal injury protection—Coverage—Action for remainder of reduced charges—Affirmative defenses—Accord and satisfaction—Insurer failed to satisfy burden to prove accord and satisfaction defense under controlling statutory standard where insurer has not provided copy of alleged payment or any evidence of conspicuous statement on alleged settlement draft—No merit to argument that medical provider has failed to show that charges were reasonable, related and necessary—Fact that services were reasonable, related and necessary is the only conclusion that can be drawn from fact that insurer paid for billed services, albeit at reduced rate—Insurer erred in applying Budget Neutrality Adjustment that is only applicable to payments by Medicare to Medicare providers and in compensating for code covered by Medicare using lower workers' compensation fee schedule

HARMONY CLINIC, P.A., a/a/o Ronald Joseph, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2023 38691 COCI. June 5, 2025. Rehearing Denied June 25, 2025. Robert A. Sanders, Jr., Judge. Counsel: Keith Petrochko, Keystone Insurance Law, Daytona Beach, for Plaintiff. Wallace L. Richardson, Jr., Kubicki Draper, Orlando, for Defendant.

ORDER ON PLAINTIFF'S AND DEFENDANT'S COMPETING MOTIONS FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on May 23, 2025, upon the Parties' competing Motions for Final Summary Judgment and the Court having considered said Motions, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

SUMMARY JUDGMENT STANDARD

Pursuant to 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."

The moving party bears the initial responsibility of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Starr Indem. & Liab. Co. v. Rodrigues*, 495 F. Supp. 3d at 1279 (S.D. Fla. 2020). The court must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the non-moving party and must resolve all reasonable doubts about the facts in favor of the non-moving party. *Id*.

Moreover, Rule 1.510(f), in line with its federal counterpart, allows for the granting of summary judgment for a non-movant; the granting of the motion on grounds not raised by a party; or for the Court to consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

FACTUAL BACKGOUND

The Defendant issued an insurance policy that provided Personal Injury Protection ("PIP") benefits to its insured, Ronald Joseph, the Assignor, for a motor vehicle accident. Following the accident, Mr. Joseph received services from the Plaintiff. The Plaintiff submitted charges for those services to the Defendant for reimbursement under the PIP policy.

The motions, pleadings, and oral argument indicate that payment for the charges were made under the 2007 Limiting Charge rate of the Medicare Physicians Fee Schedule as well as the Florida Worker's Compensation Fee Schedule. Prior to filing suit, the Plaintiff, through counsel, sent three demand letters pursuant to section 627.736(10), Florida Statutes. The Defendant's motion addresses only the first such letters.

The docket reflects three affidavits: two filed by the Plaintiff and one by the Defendant. The Plaintiff's first affidavit, submitted by Danae Quintero, states that $26.88 in benefits remains unpaid. The Plaintiff's second affidavit, submitted by Suzanne Schlernitzauer, states that the Medicare Limiting Charge is a Medicare payment methodology. The Defendant's affidavit, submitted by Sandra

Stephan, states that the Plaintiff's first demand letter was satisfied. The affidavit does not include a copy of the payment nor does it address the other two demand letters. The affidavit does include a copy of the policy at issue.

PROCEDURAL BACKGROUND

1. The Defendant moved for summary judgment advancing the position that it is entitled to Final Summary Judgment because it had issued payment in response to the first Fla. Stat. § 627.736(10) letter. Neither Defendant's motion nor oral argument discuss the subsequent subsection (10) "demand" letters.

2. The Plaintiff moved for summary judgment alleging that the Defendant underpaid the subject charges based upon the Medicare RVU formula.

3. Defendant's response to Plaintiff's Motion for Summary Judgment was not filed timely pursuant to Fla. R. Civ. P. 1.510(c)(5).

DEFENDANT'S ARGUMEMT

Defendant raises two arguments: (1) Accord and Satisfaction; and (2) Reasonableness, Relatedness, and Necessity. The same are addressed below.

I. ACCORD AND SATISFACTION

Defendant argues, in relation to the first of three Fla. Stat. § 627.736(10) demand letters, that it has met its burden to establish the elements of the affirmative defense of common law accord and satisfaction. The elements are set forth in *Republic Funding Corp. v. Juarez*, 563 So. 2d 145, (Fla. 5th DCA 1990): (1) a preexisting dispute as to the amount due from one party to another, (2) a mutual intent to effect settlement of that dispute by a superseding agreement, and (3) the subsequent tender and acceptance of performance of the new agreement in full satisfaction of the prior disputed obligation.

However, even if those elements do exist in the instant case, which was not established, those elements differ from those required for statutory accord and satisfaction under § 673.3111, Fla. Stat. If a conflict exists between a common law defense and a statutory defense, the statutory defense controls. See §2.01, Fla. Stat.; *Berman v. U.S. Financial Acceptance Corp*., 669 So. 2d 1116 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D719b], therefore, the statutory requirements control in this instance.

The Uniform Commercial Code ("UCC"), codified in § 673.3111(2), Florida Statutes dictates that without a conspicuous statement, there can be no accord and satisfaction.

Additionally, Fla. Stat. § 671.201(10) defines conspicuous as follows:

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:
>
> (a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Lastly, Fla. Stat. § 90.952 provides that, "except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." Defendant has not provided any copy of the alleged payment, endorsed or unendorsed, or any evidence of a conspicuous statement on the purported settlement draft. As such, Defendant has failed to meet its burden of proving its affirmative defense of accord and satisfaction.

II. REASONABLENESS, RELATEDNESS, AND NECESSITY

Defendant has argued that Plaintiff has failed to meet its burden by failing to establish that the subject billing was Reasonable, Related, and Necessary. It is well settled that Defendant may not defeat a motion for summary judgment by raising purely paper issues where the pleadings and evidentiary matters before the trial court show that defenses are without substance in fact or law. *See e.g., Hialeah Medical Assoc. Inc., a/a/o Ana Lexcano v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 487b (11th Jud. Cir. Ct. App., 2014). It is not sufficient for the opposing party to merely assert that a triable issue exists.

Florida courts have found that a plaintiff's prima facie showing of the reasonableness of its charges can be established by merely presenting the medical bill produced for the service at issue. *See A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1677e]; *Iowa Mutual Nat'l Ins. Co. v. Worthy*, 447 So.2d 998 (Fla. 5th DCA 1984); *Polaco v. Smith*, 376 So.2d 409, 409-10 (Fla. 1st DCA 1979); *State Farm Mutual Auto. Ins. Co v. Multicare Medical Group, Inc.*, 12 Fla. L. Weekly Supp. 33a (11th Cir. Ct. 2004). As noted by the Fourth DCA, "[A] medical bill constitutes the provider's opinion of a reasonable charge for the services." *A.J*., 677 So.2d at 937. Moreover, the reasonableness of charges is not at issue where an insurance policy adopts the fee schedule method of benefit reimbursement, as finding that treatment is related and necessary is the only reasonable inference that can be drawn from the fact that the insurer claims to have reimbursed bills in accordance with a policy that only permits payment when treatment is Related and Necessary. See *Witherell Chiropractic Center, a/a/o Tacarra Stubbs, v. United Automobile Insurance Company*, 30 Fla. L. Weekly Supp. 48b (17th Jud. Cir., Judge Allison Gilman, February 2022); *Health Diagnostics of Fort Lauderdale, LLC, d/b/a Stand-Up MRI of Fort Lauderdale a/a/o Gertrudis Connell v. State Farm Mutual Automobile Insurance Company*, 24 Fla. L. Weekly Supp. 754a (17th Jud. Cir. Judge John D. Fry, August 2016); *Pan Am Diagnostic Services, Inc., d/b/a Pan Am Diagnostic of Orlando a/a/o Junior Valceus v. State Farm Fire and Casualty Insurance Company*, 23 Fla. L. Weekly Supp. 374b (17th Jud. Cir., Judge Peter B. Skolnik, June 2015).

Here, it is indisputable that the policy of insurance provides that it will only pay for services determined to be reasonable, related and necessary. Plaintiff submitted medical bills to Defendant, which Defendant paid from the Assignor's Personal Injury Protection benefits. The only conclusion to be drawn is that the subject billing is reasonable.

Additionally, Defendant allowed the services billed by the Plaintiff in this case, but reduced the amount allowed when making payment based on their calculation of the Medicare Part B fee schedule. Pursuant to both the Defendant's policy of insurance and the Florida No-Fault statute, only charges for medically necessary and related treatment are covered medical expenses. It is therefore self-evident that Defendant's payment, which was made pursuant to the terms of its policy of insurance, represents a determination by Defendant that Plaintiff's services were "covered services" (i.e., that the services were medically necessary and related). *See e.g., Pan Am Diagnostic Services, Inc., d/b/a Pan Am Diagnostic of Orlando a/a/o Junior Valceus v. State Farm Fire and Casualty Ins. Co.*, 23 Fla. L. Weekly Supp. 374b (17th Jud. Cir., Judge Peter B. Skolnik, June 2015).

Plaintiff is not required to prove the medical necessity and relatedness of services that Defendant has conceded and already paid. *Derius v. Allstate Indemnity*, 723 So. 2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. An insurer cannot challenge medical necessity and relatedness of services where they made partial payment for services. See *Open MRI Of Boca, LLC, a/a/o Lola Irvine, Plaintiff,*

v. State Farm Mutual Automobile Insurance Company, 24 Fla. L. Weekly Supp. 463b (17th Jud. Cir., Judge John D. Fry, February 2016). See also, *Total Health Care of Florida, Inc. a/a/o Araceli Sanchez v. State Farm Mutual Automobile Insurance Company*, 24 Fla. L. Weekly Supp. 758b (17th Jud. Cir., Judge Jane D. Fishman, August 2016). *Health Diagnostics of Fort Lauderdale, LLC, d/b/a Stand-Up MRI of Fort Lauderdale, a/a/o Gertrudis Connell v. State Farm Mutual Automobile Insurance Company*, 24 Fla. L. Weekly Supp. 754a (17th Jud. Cir., Judge John D. Fry, August 2016); *Florida Emergency Physicians Kang & Associates M.D., P.A., a/a/o Kerry Tastinger v. Progressive Select Ins. Co.*, 21 Fla. L. Weekly Supp. 798a (9th Jud. Cir., Judge Andrew L. Cameron, 2014)(A payment of policy benefits reduces the amount available for other covered services. Once the payment is applied to reduce the balance of benefits available for other covered services it represents a determination by Defendant that the services are related and necessary); *Pam Am Diagnostic Services, Inc., d/b/a Wide Open MRI a/a/o Giji Kurian v. State Farm Mutual Auto Ins. Co.*, Case No 12-21929 COCE (53) (17th Jud. Cir., Judge Robert W. Lee, 2014). Therefore, based upon the above Plaintiff has met its burden that the subject billing is Reasonable, Related, and Necessary.

The burden of proving each element of an affirmative defense rests on the party that asserts the defense." *Custer Medical Center v. United Auto. Inc. Co.,* 62 So. 3d 1086 1097 (Fla. 2010) [35 Fla. L. Weekly S640a]; see also *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) [39 Fla. L. Weekly S122a].

For the above reasons, Defendant's Motion is ***DENIED***.

PLAINTIFF'S ARGUMENT

Plaintiff raises an issue that this Court has already addressed in *Professional Radiology Associates, P.A., D/B/A Advanced Imaging Partners, a/a/o Angeliz Torres v. Geico General Insurance Company*, 32 Fla. L. Weekly Supp. 132a (Fla. 7th Jud. Cir. March 2024). As in that case, Plaintiff contends that Defendant's policy exceeds the requirements of the Florida No-Fault Statute by incorporating Medicare coding policies and the payment methodologies of the Federal Centers for Medicare and Medicaid Services when determining appropriate reimbursement amounts. This interpretation is supported by *Kingsway Amigo Insurance Company v. Ocean Health,* 63 So. 3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a], which confirms that "an insurance company is not precluded from offering greater coverage than that required by statute. . . policy provisions requiring payment in accordance with the PIP statute should not be construed to limit coverage to the minimum amount authorized by the PIP statute . . . when the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control."

Here the expanded policy language includes the Medicare Limiting Charge, which, according to the unchallenged affidavit of Plaintiff's witness, Suzanne Schlernitzauer, is a payment methodology established by the federal Centers for Medicare and Medicaid Services which does not constitute a utilization limit. The evidence shows that the Defendant elected to apply the 2007 Limiting Charge rate under its policy and used that rate to reimburse the charges at issue.

The 2007 Medicare Limiting Charge Rate included a reduction to the payment files known as the Budget Neutrality Adjustment ("BNA"). The BNA applies only to payment by Medicare-to-Medicare providers who treat Medicare beneficiaries. It does not apply to other payors in different contexts, such as Florida PIP insurers, who are required to pay claims in accordance with the Florida PIP statute. The 5th District Court of Appeal clarified this distinction in *SOCC, P.L. v. State Farm Mut. Auto. Ins. Co.*, 95 So. 3d 903 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1663a], stating that PIP Claims are not to be adjusted as if they were Medicare Claims.

In *Sunrise Chiropractic and Rehabilitation Center a/a/o Bichenet Louis v. Security National Insurance Company*, 321 So.3d 786 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a], the Fourth District Court held that reimbursement under the Physicians Fee Schedule must be calculated by "multiplying (1) the relative value of a service; (2) the conversion factor for the particular year; and (3) the geographic adjustment factor applicable to the locality in which the service was provided." There is no conflict among the district courts regarding this formula. As explained in *Geico Gen. Ins. Co. v. Tarpon Total Health Care*, a decision of one district court of appeal is binding throughout Florida in the absence of inter-district conflict or contrary Florida Supreme Court precedent. Accordingly, *Sunrise Chiropractic* is binding on this Court, and its reimbursement formula does not include a BNA.

In that case, the Fourth District rejected an insurer's argument that it could apply a BNA reflected in the CMS payment files. The insurer asserted it followed the schedule of maximum charges but also imposed an additional two percent reduction on reimbursement for chiropractic manipulation based on a BNA. The Fourth District adopted the reasoning of Federal Judge William P. Dimitrouleas in *Coastal Wellness Centers, Inc. v. Progressive Am. Ins. Co.,* 309 F. Supp. 3d 1216, 1221 (S.D. Fla. 2018), concluding that application of the BNA was improper in the PIP context.

Quoting *Coastal Wellness*, the Fourth District emphasized that the reimbursement value for services under Physicians Fee Schedule are calculated by multiplying (1) the relative value of a service; (2) the conversion factor for the particular year; and (3) the geographic adjustment factor applicable to the locality in which the service was provided. See 42 U.S.C. § 1395w-4(6)(1).

Moreover, the Department of Health and Human Services ("HHS") has stated that the two percent BNA reduction was only to be applied to Medicare claims, explicitly stating:

> Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs.

74 Fed. Reg. 61927; see also 78 Fed. Reg. 74790. The Fourth District concluded as follows:

The Medicare Physician Fee Schedule does not include the two percent reduction for CPT codes 98940, 98941 or 98942. To the extent that Defendant relied upon the CMS Payment Files to underpay chiropractic claims by two percent, such practice was improper. Additionally, it runs contrary to the stated point of applying the reduction to the payment files rather than the RVU's, so as to preserve the integrity of the RVU's as they are relied upon by many private payers, such as Defendant. *Id*. at 789-90 (quoting *Coastal Wellness*, 309 F. Supp. 3d at 1219-21. The exact same reasoning applies to the present case.

The distinction between the actual Medicare Physician Fee Schedule and the adjusted payment amounts is further clarified in the Federal Register Final Rule published on December 1, 2006, and in effect March 2007:

> To calculate the payment for every physician service, the components of the fee schedule (physician work, PE, and malpractice RVUs) are adjusted by a geographic practice cost index (GPCI). The GPCIs reflect the relative costs of physician work, PEs, and malpractice insurance in an area compared to the national average costs for each component. Payments are converted to dollar amounts through the application of a CF, which is calculated by the Office of the Actuary and is updated annually for inflation.

The general formula for calculating the Medicare fee schedule amount for a given service and fee schedule area can be expressed as: Payment = [(RVU work x GPCI work) + (RVU PE x GPCI PE) + (RVU malpractice x GPCI malpractice)] x CF. *71 Fed. Reg. 69629* (the "General Formula"). The General Formula is the formula referenced in *Sunrise Chiropractic.*

Ultimately, budget neutrality adjustments, like the one at issue in *Sunrise Chiropractic* and the one at issue here, were designed to recoup costs borne by the federal government when it exceeds its budget. The substantial similarities between these two budget neutrality adjustments are obvious when the federal government's descriptions of each are compared side-by-side:

BNA	2007 BNA
"Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. Avoiding an adjustment to the RVUs **would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs."** *Sunrise Chiropractic*, 321 So.3d at 789 (quoting 74 Fed. Reg. 61927)(E.S.)	"CMS is proposing to create a separate budget neutrality adjuster that can be applied just to the work RVUs for Medicare purposes, without changing the number of work RVUs assigned to a particular service. This would **preserve the integrity of the existing work RVU structure, which is often adopted by other payers."** "CMS Announces Proposed Changes to Physician Fee Schedule Methodology" **"We...recognize the Medicare PFS is used by other payors and for other purposes than just Medicare payments. To maintain a high level of transparency in the fee schedule, the Addendum B published in this rule will show the RVUs without the BN adjustment applied.** This will serve as a reference for any interested party and should help to minimize any confusion about the unadjusted codes." *71 ed. Reg. 69736 (December 1, 2006)(E.S.)*

Here, Defendant improperly began its payment calculation by adding a BNA to the general formula, directly opposed to the ruling in *Sunrise Chiropractic.* The Court's analysis is in line with, and further supported by, the following cases which have issued rulings on the 2007 BNA issue present in the instant case: *Clermont Radiology LLC., a/a/o Hope Bryant v. Liberty Mutual Fire Insurance Company*, 2021 36429 COCI (Fla. 7th Judicial Circuit, November, 2023, Judge Heidt); *Empire Imaging, Inc., a/a/o Renouce Miralda v. Security National Insurance Company,* COINX (Fla. 17th Judicial Circuit, September 2022, Judge Mollica); *University Diagnostic Institute Winter Park, PLLC a/a/o Doris Cobb v. Government Employees Insurance Company*, 30 Fla. L. Weekly Supp. 693a (Fla. 9th Judicial Circuit, January 2023, Judge Bain); *Chiropractic USA of Plantation Inc. v. United Automobile Insurance Company,* COINX21052809 (Fla. 17th Judicial Circuit, December 2022, Judge Monica) [30 Fla. L. Weekly Supp. 650a]; and *Functional Evaluation Testing of Florida v. United Automobile Insurance Company,* CON (Fla. 17th Judicial Circuit, December 2022, Judge Schiff).

Lastly, Plaintiff argues that Medicare Part B covers payment for CPT 97010. Defendant instead reimbursed the charge using the lower Florida Workers' Compensation fee schedule, resulting in an underpayment. The Second District Court of Appeal has held that Florida Statute § 627.736(5)(a)(2)(f) does not require a CPT code to be separately recognized by Medicare Part B, so long as the service is covered and reimbursable. See *Allstate Fire & Cas. Ins. Co. v. Perez,* 111 So. 3d. 960 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D915a]. See Also *Overstreet v. State,* 629 So. 2d 125 (Fla. 1993). Here, Medicare does recognize CPT 97010, prices CPT 97010, and pays CPT 97010 as a bundled code.

Under Medicare, a bunded code is paid in conjunction with a therapy service billed on the same date of service.[1] In the context of PIP, CPT 97010 is not a bundled code as it is separately payable.[2] See *Care Wellness Center LLC, a/a/o Christy Kelly v. Progressive Select Insurance Company*, 27 Fla. L. Weekly Supp. 206a (Fla. 17th Cir. Ct. April 2019). In essence, PIP Claims are not to be adjusted as if they were Medicare Claims. *SOCC v. State Farm Mut. Auto Ins.* Co., 95 So. 3d 903 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1663a].

Plaintiff's motion discusses, step by step, the Medicare Physicians Fee Schedule Formula and reimbursement amount for the CPTs at issue (72040, 72072, 72100, 97032, 97012, 97140, 97012, 97010) the Court adopts the same.

For the above reasons, Plaintiff's Motion is ***GRANTED.***

THEREFORE:

1. SUMMARY JUDGMENT is **GRANTED** in favor of the Plaintiff, finding that $26.88 in outstanding benefits shall be paid together with pre/post judgment interest at the statutory rate, for which let execution issue.

2. DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT is hereby **DENIED**.

3. The Court reserves jurisdiction to award attorney's fees and costs with a timely Motion regarding same.

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[1]A "bundled" code under Medicare is not separately payable/valued under Medicare and is considered to be bundled/encompassed within another service. Pursuant to Fla. Stat. § 627.732.

[2]"Unbundling" is defined by Fla. Stat. § 627.732 as "an action that submits a billing code that is properly billed under one billing code, but that has been separated into two or more billing codes, and would result in payment greater in amount than would be paid using one billing code."

* * *

Traffic infractions—School bus infraction—Standing—Sheriff's office lacks standing to bring motion for new hearing on traffic infraction where office is not party to proceeding—Evidence—Testimony or evidence based on DAVID system is inadmissible hearsay—In contested hearing of traffic citation based on school bus infraction detection system, there is no rebuttable presumption that vehicle owner was driver, and formal rules of evidence govern hearing

STATE OF FLORIDA, v. TAMARA ALEA CARLOS, Defendant. County Court, 10th Judicial Circuit in and for Polk County, Civil Traffic Division. Case No. 2025TR-027309. August 6, 2025. Candice Dixon, Civil Traffic Hearing Officer. Counsel: Mark Cabrera and John Lees, for Polk County Sheriff's Office. Ted L. Hollander, Ira D. Karmelin, and David Arnold, The Ticket Clinic, Kissimmee, for Defendant.

ORDER DENYING POLK COUNTY SHERIFF'S OFFICE'S MOTION FOR NEW HEARING AND GRANTING DEFENDANT'S AMENDED MOTION TO STRIKE OR DENY

THIS CAUSE came before the Court for hearing on August 4, 2025, on the Polk County Sheriff's Office's Motion for New Hearing and the Defendant's Amended Motion to Strike or, in the Alternative, Deny the Sheriff's Motion. Present on behalf of the Defendant were attorneys Ted Hollander, Esquire, Ira Karmelin, Esquire, and David Arnold, Esquire. Counsel for the Polk County Sheriff's Office waived appearance. The Court, having reviewed the pleadings, considered the arguments of counsel, and being otherwise fully advised in the premises, finds as follows:

Lack of Standing

Rules 6.540 and 6.550 of the Florida Rules of Traffic Court govern

motions for new hearings. These rules provide that a defendant, or the defendant's counsel, may move for a new hearing within ten (10) days when the defendant has been found to have committed an infraction. The rules also allow the official to sua sponte grant a new hearing.

In addition, Florida Statutes § 27.02(1) provides that the State Attorney "shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party."

The Polk County Sheriff's Office is not a party to this proceeding and therefore lacks standing to seek a new hearing. Furthermore, the Defendant in this matter was not found to have committed an infraction. Accordingly, a motion for new hearing is not a remedy available under the current procedural posture of this case.

Hearsay—DAVID Testimony

Pursuant to binding precedent in *Khan v. State*, 243 So. 3d 506 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D747a], testimony concerning information obtained from the Florida Department of Highway Safety and Motor Vehicles' Driver and Vehicle Information Database ("DAVID") constitutes hearsay. Such testimony is inadmissible unless it falls within a recognized exception to the hearsay rule, which were not established in the instant case.

Statutory Interpretation—Registered Owner

The Court finds that the statutory language governing this proceeding does not create a rebuttable presumption as to the registered owner of the vehicle.

The Court compared § 316.0083, Fla. Stat. (Mark Wandall Traffic Safety Program) and § 316.173, Fla. Stat. (School Bus Infraction Detection System). Section 316.0083 explicitly creates rebuttable presumptions against the *owner* of the vehicle in subsection (1)(b) (upon a notice of violation) and subsection (1)(c)(2) (upon issuance of a citation). It also provides in subsection (5)(d) that the formal rules of evidence do not apply in such proceedings, although due process must still be observed.

By contrast, § 316.173 creates rebuttable presumptions *against the vehicle* in subsections (5)(e) and (15), rather than the vehicle's owner. The statute also establishes an administrative hearing process under subsection (6), conducted by a school district-appointed hearing officer, who is likewise not bound by formal rules of evidence but must still afford due process pursuant to § 316.173(6)(b)(4), Fla. Stat.

Notably, § 316.173 is silent regarding procedures applicable to a contested hearing of a uniform traffic citation beyond the limited presumption referenced above. Therefore, the Court concludes that in a contested hearing of a uniform traffic citation issued under § 316.173, no rebuttable presumption against the owner applies, and the formal rules of evidence govern the proceeding.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

- The **Polk County Sheriff's Office's Motion for New Hearing is DENIED** for lack of standing.
- Testimony or evidence based on the DAVID system is **EXCLUDED** as inadmissible hearsay pursuant to *Khan*.
- The Court **rejects the application of a rebuttable presumption** of driver identity based solely on vehicle ownership.

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—Insured's failure to attend two EUOs is material breach of PIP policy that bars recovery by medical provider as assignee of insured—Clerical error in date of loss and variation in name of insurer on EUO notices do not invalidate notices—Direct attorney-to-attorney communication and mutually arranged scheduling of EUOs negates any alleged technical defects in notices

BEST CHOICE TREATMENT AND MEDICAL CENTER, a/a/o Lester Gomez, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No 2022-035886-CC-25. Section CG04. August 13, 2025. Jacqueline Woodward, Judge. Counsel: George David, George A. David, P.A., for Plaintiff. Robert Phaneuf, Law Offices of Terry M. Torres & Associates, Doral; and Samour Suckram and Julia Sturgill, Law Office of Leslie M. Goodman & Associates, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant's Motion for Final Summary Judgment, supported by the Affidavit of Taylor Scott and multiple exhibits. The hearing on the motion was held on April 2, 2025. Attorney George David appeared for the Plaintiff, and Attorney Samour Suckram and Robert Phaneuf appeared for the Defendant. The Court, having reviewed the motion, evidence, and arguments of counsel, and being otherwise fully advised, finds as follows:

Factual Findings

1. Attorney George David represents the Plaintiff, Best Choice Treatment and Medical Center, which provided the medical treatment in this case to INFINITY's insured, Lester Gomez.

2. The insured, Lester Gomez, was and is represented by Attorney George David for the property damage claim to the vehicle in the accident that is the basis for the instant PIP claim.

3. Attorney George David was engaged in representation and ongoing communications with the defendant, INFINITY, regarding the property damage claim for Gomez while Infinity was attempting to coordinate Gomez's EUO for this case.

4. On April 8, 2022, Attorney George David faxed a letter to Aly Grinan at INFINITY confirming a conversation in which Infinity required a recorded statement from Lester Gomez before inspecting Gomez's vehicle. While the letter is disjointed, it confirms Attorney David's awareness that Infinity was attempting to coordinate a statement from Gomez in connection with the accident in this case.

> "This letter serves to confirm your telephone conversation with my assistant that took place today April 8, 2022 in which my office requested to coordinate Damary Gomez's vehicle inspection and you said that to coordinate a vehicle Inspection. You informed me that Infinity needed a record statement of Lester Gomez and Damary Gomez before Infinity will inspect Damary Gomez's vehicle. My assistant requested that Infinity provide has to provide my office with an insurance policy, declarations page and insurance policy application prior to coordinating a record statement. Additionally, prior to any statements, please provide me with Infinity's estimate of the damage's, color copies of any and all photographs taken, and any and all statements of Lester Gomez and Damary Gomez."

5. On July 28, 2022, Defendant's counsel, David Villareal, sent a certified letter to Attorney David requesting Gomez's appearance for an EUO. The letter contained the correct policy number, claim number, and Lester Gomez's name in the heading, but an incorrect date for the accident in the body. (pg. 227 of 515 of Index 110 Plaintiff's Response)

> ". . .As you are aware, Infinity Auto Insurance Company has requested that your client, Mr. Gomez, appear for an Examination Under Oath in connection with your client's claim for benefits for the accident that occurred on or about April 7, 2022 . . . We have repeatedly tried to coordinate with your office to mutually schedule this Examination Under Oath. However, your office has been nonresponsive to our multiple requests. . ."

6. On August 8, 2022, Defendant's counsel sent another certified letter confirming the parties had now mutually coordinated Gomez's EUO. (pg. 229 of 515 of Index 110 Plaintiff's Response)

". . . As you are aware our office has been retained by Infinity Insurance Companies to conduct an Examination Under Oath of your client Lester Gomez, regarding the above referenced date of loss. **We have now mutually coordinated** for Lester Gomes to appear for an Examination Under Oath on August 24, 2022, at 10 am via video Zoom. (emphasis added). . ."

7. Notice for the second EUO on September 20, 2022 was again served by multiple methods. (Affidavit ¶ 12; Exs. 14-15). The insured again failed to appear (Ex. 15).

8. Plaintiff's counsel's dual representation of the provider and the insured imputes actual notice to both, curing any alleged defects.

Legal Findings

The insured, Lester Gomez, failed to attend two duly noticed Examinations Under Oath ("EUOs"), a condition precedent to coverage under § 627.736(6)(g), Fla. Stat., and the policy (Affidavit, Ex. 7 ¶ 4; Ex. 8). This failure is undisputed.

Attorney George David posited the reason for Gomez's failure to appear was that despite Gomez and his attorney receiving notice of both of the EUO notices, George David and his client were confused by the letterhead or the reference to "Infinity Insurance Companies" instead of "Infinity Indemnity Insurance Company" and/or that the notices had the wrong date of loss.

• **Clerical Error in Date of Loss is Immaterial**—While the EUO notices referenced April 7, 2022 instead of March 30, 2022, as the date of loss, Attorney George David was aware of the correct date and claim. George David's active role in coordinating the EUO confirms there was no confusion or prejudice. Notice to Plaintiff's counsel is imputed to the insured. Also, at the hearing on the Motion for Summary Judgment, Attorney George David acknowledged (1) receipt of both notices (2) that he represented Gomez at the time of the notices for the property damage case (still an active case) and (3) that service on an attorney is service on the client.

• **Entity-Name Argument Lacks Merit**—Reference to "Infinity Insurance Companies" does not invalidate the notices. All notices contained the correct claim number, insured's name, and were sent by Defendant's authorized counsel. Florida courts emphasize that technical errors that are harmless should not obstruct the resolution of cases, technical error, such as the omission of a word in a corporate name, should be ignored or corrected on motion, particularly when all parties are aware of the real party in interest.

• **Mutual Communication Removes Ambiguity**—By coordinating the scheduling and confirming attendance expectations with Attorney George David, INFINITY demonstrated reasonableness and fairness. Following the first nonappearance, INFINITY coordinated the second EUO in accordance with professional courtesy and the Florida Bar standards. There is proof that the August 24, 2022 EUO was set through direct communication between the law offices representing both parties. Notice was again provided through multiple service methods to ensure receipt and avoid any element of surprise or prejudice. The Court finds that the direct attorney-to-attorney communication and mutually arranged scheduling of the EUO negate any alleged technical defects or clerical errors in the written notice, including any asserted mistake of the date of loss. Where counsel for both sides engage in actual communication to arrange and confirm the date, time, and location of the examination, the insured is deemed to have received adequate and effective notice consistent with professional standards, and such cooperative scheduling satisfies the notice requirements under the policy and Florida law.

• **Compliance with Professional Conduct Guidelines**—Defendant's conduct also complied with the **Guidelines for Professional Conduct by the Trial Lawyers Section of The Florida Bar**. Section B, "Scheduling, Continuances, and Extensions of Time," Guideline 3 states: *"As soon as they become apparent to the lawyer or the lawyer's office, a lawyer should call to the attention of those affected, including the opposing lawyer, court or tribunal, potential scheduling conflicts or problems, and the lawyer should not wait until the eve of the conflicted date to notify the opposing lawyer, court or tribunal of the conflict."* Defendant's counsel repeatedly contacted Plaintiff's counsel well in advance of each scheduled EUO to coordinate and confirm attendance. Guideline 13 provides: *"A lawyer should not request rescheduling, cancellations, extensions, or postponements without reasonably legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage."* Defendant's counsel sought rescheduling even after Plaintiff's nonappearance at the first EUO and did so in good faith to provide a second opportunity to comply. These actions demonstrate professionalism, fairness, and adherence to the standards expected of members of the Florida Bar. Plaintiff's argument that after coordinating an EUO and then not showing up because he claims confusion as to who David Villareal represented, or whether Infinity Insurance Companies was a different insurance company who did not have the right to demand attendance at the EUO or that the date of loss was incorrect are unpersuasive and unsupported by the record especially in light of the obligations as a member of the Florida Bar.

Examination Under Oath is Required by Statute and Policy

• **Statutory Requirement**—Section 627.736(6)(g), Florida Statutes, provides:

"An insured seeking personal injury protection benefits must comply with the terms of the policy, which include submitting to an examination under oath as a condition precedent to receiving benefits."

This provision applies directly in PIP cases and requires strict compliance with a valid EUO request before benefits are payable.

• **Policy Requirement**—The policy's Florida Amendatory Endorsement—Personal Injury Protection Coverage—further states:

"As a condition precedent to receiving personal injury protection benefits under the policy, any insured making a claim for personal injury protection benefits must submit, as often as we require, to examinations under oath outside the presence of anyone other than that person's attorney and, if a minor, the legal guardian of the minor."

The policy also warns that failure to comply with such conditions "may result in our refusal to extend to you any protection under this policy for the accident or loss."

Failure to Attend EUO is a Material Breach

Failure to attend an EUO in a PIP case constitutes a material breach that bars recovery, even without proof of prejudice. In *Estrada,* the Third DCA held the insurer bears the initial burden to plead and prove the insured's material breach of a post-loss condition. Upon doing so, the burden shifts to the insured to show that the breach did not prejudice the insurer. Here, Defendant has met its initial burden by undisputed evidence that the insured failed to attend an EUO— a condition precedent to coverage. Plaintiff has presented no competent record evidence to rebut prejudice or otherwise create a genuine issue for trial. (See *American Integrity Insurance Company v. Estrada,* 276 So. 3d 905 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a].

Conclusion

The undisputed evidence shows Defendant acted reasonably, provided multiple forms of notice, and made good faith efforts—including mutual coordination and scheduling with opposing counsel—to secure the insured's attendance at the required EUO. The insured nevertheless failed to attend. This breach extinguished coverage under the policy, and Plaintiff, as assignee, has no entitlement to benefits.

It is therefore ADJUDGED:

Defendant's Motion for Final Summary Judgment is **GRANTED**. Final judgment is entered in favor of Defendant, **INFINITY**

INDEMNITY INSURANCE COMPANY, and against Plaintiff, **BEST CHOICE TREATMENT AND MEDICAL CENTER**, a/a/o **LESTER GOMEZ**.

Plaintiff shall take nothing by this action, and Defendant shall go hence without day.

The Court reserves jurisdiction to award costs and attorney's fees as permitted by law.

This is a Final Order but for the reservation of jurisdiction Judicial Labor is complete.

[Editor's note: There is no corresponding footnote number in the body of the court document.]

[1]Note the Court specifically advised the Plaintiff at the February 6, 2025 hearing, that a written response to the Defendant's Motion for Summary Judgment was required by the rule (and that the Plaintiff could not rely on his 344 page Motion for Summary Judgment that was filed on November 27, 2024 as his "response") as the parties had stipulated to all other issues and there was only one remaining issue, EUO no show, which the parties agreed was dispositive, that the argument would be limited to 25 pages. Further Plaintiff was instructed to file the exhibits separately and not as excerpts in the middle of the written motions which cause formatting issues and makes the pleadings difficult to read.

On February 28, 2025, Plaintiff filed a 515-page document. The first 32 pages were void of the inserted excerpts from exhibits then pages 37-256 was a sort of reduced version of the previously filed Motion to Suppress replete with inserted excerpts from exhibits which Plaintiff incorporated by reference. Pages 257-515 were hundreds of pages of exhibits with random repeated lettering.

* * *

Insurance—Automobile—Windshield repair—Expert witness—Motion to exclude testimony of insurer's expert witness is denied—Witness is qualified as expert in automotive glass pricing, witness's four-step protocol satisfies *Daubert* reliability factors, witness applied his methods reliably to facts, and testimony is relevant to issue of whether insurer paid prevailing competitive price

MELTON & MELTON MARKETING, LLC, d/b/a FIRST CLASS AUTO GLASS, a/a/o Andrew Barger, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-025365. Division L. August 7, 2025. Michael C. Baggé-Hernández, Judge. Counsel: James T. Tanton and Eliot Veith, Ligori & Ligori, Tampa, for Plaintiff. Scott Zimmer and David S. Dougherty, Law Offices of Jaskirat K. Asti, Tampa, for Defendant.

ORDER DENYING PLAINTIFF'S AMENDED *DAUBERT* MOTION TO EXCLUDE TESTIMONY OF PAUL BAUMANN

THIS MATTER came before the Court on Plaintiff's Amended *Daubert* Motion to Exclude Testimony of Paul A. Baumann (Doc. 166, filed 5/23/25), Defendant's Response in Opposition (Doc. 232, filed 6/27/25), Plaintiff's supplemental memorandum/response (Doc. 239, filed 07/02/25), and the evidentiary hearing conducted on July 3, 2025, (transcript filed at Doc. 244). After reviewing the motion, response, accompanying exhibits, the sworn affidavit and curriculum vitae of Mr. Baumann, the entire court file, and the arguments of counsel, the Court finds as follows:

I. BACKGROUND

A. Plaintiff's Motion

Plaintiff's Amended *Daubert* Motion urges the Court to strike Baumann's testimony because, in Plaintiff's view, the work lacks the "intellectual rigor" that *Daubert* and section 90.702 require (Doc. 166 at 13). First, Plaintiff says Baumann never verified the Fall 2018 NAGS list price on which GEICO based its payment yet represented that he "adjusted" the part to the 2019 list price; the motion calls that step "guess-work" and therefore unreliable (*Id.* at 11-13).

Second, Baumann is alleged to have relied on Allstate, Progressive, and State Farm discount schedules that were issued as far back as 2005 while ignoring later revisions and inflation, a practice Plaintiff labels "cherry-picking" (*Id.* at 8-13). Third, Plaintiff notes that Baumann selected twenty-eight Pasco-County shops from GEICO's 2018 claims history even though the loss occurred in 2019 and 2019 data were never provided; Plaintiff argues this contaminates the "prior-transactions" portion of the analysis (*Id.* at 14-15).

Fourth, the motion attacks Baumann's Google Tools search, asserting that it cannot be replicated because results depend on cookies and user settings; deposition questioning produced a different list despite following Baumann's own parameters (*Id.* at 15-18). Fifth, Plaintiff contends that Baumann's survey improperly includes Safelite and other network-affiliate shops whose pre-negotiated rates are not probative of an open-market price under the *Dick* trilogy[1] from the Second District Court of Appeal (*Id.* at 20-22).

Sixth, Plaintiff argues that Baumann's techniques have never been tested, peer-reviewed, or subjected to an error-rate analysis, so they fail every reliability factor identified in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and section 90.702 (*Doc. 166* at 24-26). Finally, the motion challenges Baumann's qualifications, asserting that although he is a Certified Public Accountant ("CPA") and Accredited Senior Appraiser ("ASA"), he has no specialized experience in auto-glass pricing and thus cannot assist the trier of fact (*Id.* at 3). On these cumulative grounds Plaintiff asks the Court to exclude Baumann's opinions in their entirety or, at a minimum, to bar any testimony that relies on the challenged data or methods.

B. Defendant's Response

Defendant's opposition (Doc. 232) opens by restating the *Daubert* framework adopted in *In re Amendments to Fla. Evidence Code*, 278 So. 3d 551 (Fla. 2019) [44 Fla. L. Weekly S170a], and the gate-keeping duty outlined in *Royal Caribbean Cruises, Ltd. v. Spearman*, 320 So. 3d 276 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D969a] and *Booker v. Sumter Cnty. Sheriff's Office/N.Am. Risk Servs.*, 166 So. 3d 189 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1291c]. Relying on those authorities, Defendant first argues that the Amended Motion is facially deficient because it fails to identify "the source substance, and methodology of the challenged testimony," a pleading defect that warrants denial at the threshold (Doc. 232 at 6-7). Second, GEICO contends that Baumann's testimony conforms with the "extensive variety of reliable principles and methods of expert testimony" (*Id.* at 8-13) and that any disagreements with Baumann's data set or sample size affect only the weight of the evidence and are therefore for cross-examination rather than exclusion (*Id.* at 14-20).

Third, GEICO emphasizes Baumann's credentials—Certified Public Accountant ("CPA"), Accredited Senior Appraiser ("ASA"), Accredited in Business Valuation ("ABV"), Certified in Financial Forensics ("CFF"), Chartered Global Management Accountant ("CGMA")—and asserts that his methods conform to the standards of both the American Institute of Certified Public Accountants and the American Society of Appraisers standards (Doc. 232 at 20-22). In GEICO's view, Baumann's uncontested qualifications independently satisfy the reliability prong of section 90.702 of the Florida Statutes (*Id.* at 25). Finally, the response describes Baumann's approach as a standard economic valuation that combines (i) National Auto Glass Specifications ("NAGS") list pricing, (ii) competitor-insurer glass programs, (iii) a telephone survey of local shops generated from a 2019 Google search, and (iv) GEICO claims data used solely to locate active providers; GEICO cites federal decisions upholding similar AICPA-based valuations, including *Nutrimatix Inc. v. Xymogen*, 2017 U.S. Dist. LEXIS 11440, at *30-31 (M.D. Fla. Jan. 27, 2017), and *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 668 (5th Cir. 1974).

In a sworn affidavit attached to Defendant's response (Doc. 232, Ex. A), Baumann outlines his professional background (Florida CPA since 1999; ABV; CFF; ASA; CGMA) and attaches a list of prior testimony to demonstrate experience in automotive-glass pricing

disputes.

He then details a four-step methodology: (1) verify the 2019 NAGS list price for the Hyundai Sonata windshield through Mitchell International; (2) compare prevailing insurer discount schedules from State Farm, Progressive, and Allstate for the same part; (3) generate a roster of Tampa-area glass shops via a date-stamped Google search and obtain bona-fide replacement quotes by telephone (all call notes preserved); and (4) cross-check shop activity against GEICO's 2018-2019 claims history only to confirm that each shop performed windshield work in the relevant market .

Baumann avers that these steps follow the AICPA's Statement on Standards for Valuation Services and the ASA Business Valuation Guidelines, both of which permit market-survey techniques where comparable-sales data are limited. Citing *Nutrimatix* and *Lehrman* (*Id.* at ¶¶ 18-20), he states that courts routinely accept hybrid valuation models combining industry data and local surveys. Addressing Plaintiff's criticisms, Baumann explains that (a) the Google search is reproducible because search terms, date, and location were preserved, (b) network-affiliate quotes were used only if the shop offered public-facing prices, and (c) 2018 claims data served as a locator tool, not a pricing input (*Id.* at ¶¶ 23-29). He concludes that, to a reasonable degree of professional certainty, GEICO's $388.16 payment "fell within the prevailing competitive price" for January 2019 windshield replacements in Hillsborough County.

C. Plaintiff's Reply

Plaintiff's reply (presented in its written submission filed July 2, 2025, (Doc. 239) and reiterated during oral argument on July 3, 2025) advances three inter-related themes in response to GEICO's opposition. First, Plaintiff renews the threshold argument that GEICO's brief "does not cure the fatal pleading defects" identified in *Booker v. Sumter Cty. Sheriff's Office*, 166 So. 3d 189 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1291c]. According to Plaintiff, Defendant still fails to tie Baumann's deposition excerpts to any articulated scientific principle, so the Court may deny admissibility without reaching the merits (Doc. 244 at 135-37).

Second, turning to reliability, Plaintiff insists that GEICO's response "mischaracteri[z]es mere disagreements over facts as methodological questions." Plaintiff reiterates that Baumann's Google-Tools survey cannot satisfy any *Daubert* factor because it is (i) non-replicable, (ii) lacks peer review or known error-rate data, (iii) violates AICPA valuation standards by blending 2018 claims data with 2019 NAGS pricing, and (iv) uses network-affiliate quotes that Florida's *Dick* trilogy deems legally irrelevant. *See* Plaintiff's July 3 oral argument (Doc. 244 at 128-130) and Reply brief (Doc. 239 at ¶¶ 13-20).

Third, Plaintiff maintains that even if Baumann's techniques were facially acceptable, he mis-applied them in a manner that "infects every step" of his analysis: he never verified the 2019 list price, applied insurer discount schedules from as early as 2005, and cherry-picked 28 shops from GEICO's 2018 spreadsheet to fabricate a "prevailing price." Under *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1245 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C281a], Plaintiff argues, an error at any step mandates total exclusion (Doc. 244 at 136-137); (Doc. 239 at 6-15). Plaintiff concludes that GEICO's opposition "goes to weight, not admissibility," but because Baumann's methodology fails all five *Daubert* reliability factors, the Court must exclude his testimony in its entirety (Doc. 244 at 135-136).

D. Hearing

On July 3, 2025, the Court held a *Daubert* hearing. Plaintiff asked the Court to strike Mr. Baumann under section 90.702 of the Florida Evidence Code, asserting four independent defects. First, counsel stressed that Baumann's Google Tools search was irreproducible, noting his sworn admission that the search "was never meant to be replicated" and that no browser or cookie data were preserved (Doc. 244. at 30:1-33:15 & 32:12-23).

Second, Plaintiff argued that quotations obtained from Safelite and other GEICO network shops are legally irrelevant under the Second District's *Dick II* decision because they do not reflect arm's-length market pricing (*Id.* at 96:17-97:22). Third, Plaintiff contended that the quotes were collected in 2024 rather than on the January 2, 2019, loss date and were never trended back, so they cannot establish the prevailing competitive price at the time of loss (*Id.* 79:1-8 & 88:17-23). Fourth, Plaintiff emphasized that Baumann offered no peer-review support or quantified error rate and conceded the work was merely a "sample," not a scientific study (*Id.* at 135:1-13).

The Court heard testimony from Baumann and received his curriculum vitae, affidavit, and report (*Id.* at 77:6-21). He explained that he and his staff identified forty-six windshield shops, twenty-eight from GEICO's 2018 claims data and eighteen via a date-restricted Google Tools search, then obtained approximately 1,460 bona fide offers for the 2017 Hyundai Sonata windshield, recording glass, kit, and labor components for each quote (*Id.* at 88:17-23 & 159:8-13). Baumann anchored the analysis to the Jan 2, 2019 loss date because the policy limits payment to the prevailing competitive price on that date (*Id.* at 160:1-5). He testified that appraisal practice treats prevailing competitive price as a range derived from market consensus rather than as a single figure (*Id.* at 75:4-19). Addressing network data, Baumann stated that Safelite quotations remain relevant because they show prices GEICO can actually secure from competent and conveniently located shops (*Id.* at 191:1-8). On cross-examination he acknowledged that the Google search could not be exactly replicated but maintained that, under appraisal standards, a convenience sample need only be procedurally repeatable, not identical in result (*Id.* at 173:18-174:4 & 158:14-20).

Defendant argued that each criticism raised by Plaintiff concerns weight, not admissibility, and reminded the Court that Florida's adoption of the *Daubert* standard is "liberal in thrust," presuming admissibility for relevant expert evidence (*Id.* at 104:13-25 & 105:1-7). Defendant argued that the policy itself fixes liability at the time of loss, so Baumann properly focused on 2019 pricing when evaluating the prevailing competitive price (*Id.* at 110:1-9). Counsel further contended that the Second District's *Dick III* decision now permits reliance on network-affiliate transactions, rendering Plaintiff's legal objection obsolete (*Id.* at 111:7-14). Finally, Defendant highlighted that Baumann's survey encompassed roughly 1,460 offers, which he testified yield a 95 percent confidence interval, satisfying *Daubert* reliability factors for non-scientific valuation testimony (*Id.* at 159:8-13).

II. LEGAL STANDARD

When an opposing party properly challenges expert testimony, the proponent must prove admissibility by a preponderance of the evidence. *Baan v. Columbia County*, 180 So. 3d 1127, 1131-32 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2707a]. Section 90.702, Florida Statutes, as amended in 2013 to adopt the *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) , *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), and *Daubert* standards, allows a qualified expert to testify if:

1. the opinion is based on sufficient facts or data;
2. the opinion is the product of reliable principles and methods; and
3. the expert has applied those principles and methods reliably to the facts of the case.

The 2013 amendments replaced the *Frye* test, prohibited "pure opinion" testimony, and aligned Florida practice with Federal Rule of Evidence 702. *In re Amendments to the Florida Evidence Code*, 278

So. 3d 551, 551-54 (Fla. 2019) [44 Fla. L. Weekly S170a]. Under *Daubert*'s gatekeeping requirement, the trial court must ensure that every expert opinion admitted is both relevant and reliable. *See Kumho Tire Co.*, 526 U.S. at 141; *Spearman*, 320 So. 3d at 289-91. The Court therefore makes a preliminary assessment of (1) the expert's qualifications, (2) the reliability of the methodology, and (3) the helpfulness of the testimony to the trier of fact. *Spearman*, 320 So. 3d at 289-90; *Daniels v. State*, 312 So. 3d 926, 932-33 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D412c].

In evaluating reliability, the court may consider whether the theory or technique (a) can be and has been tested, (b) has been peer-reviewed and published, (c) has a known or potential error rate, (d) is governed by standards, and (e) enjoys widespread acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 592-94.

An expert's opinion must be grounded in knowledge rather than subjective belief or unsupported speculation. *Kemp v. State*, 280 So. 3d 81, 89 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1974a]. Although the court serves as gatekeeper, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. " '[R]ejection of expert testimony under *Daubert* "is the exception rather than the rule." ' " *Spearman*, 320 So. 3d at 291 (quoting *Vitiello v. State*, 281 So. 3d 554, 560 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2480e]).

III. DISCUSSION

A. Expert Qualifications

The first prong of section 90.702 asks whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education." Mr. Baumann has held an active Florida CPA license since 1999, is Accredited in Business Valuation (ABV), Certified in Financial Forensics (CFF), a Chartered Global Management Accountant (CGMA), and an Accredited Senior Appraiser in business valuation (ASA) (Doc. 244 at 78:6-79:12). Over twenty-five years, he has authored more than 240 valuation reports, including at least seventeen dealing with automotive glass pricing (*Id.* at 79:13-80:18). Courts applying the *Daubert* standard routinely consider such designations sufficient to satisfy the qualification threshold. *See Nutrimatix v. Xymogen*, No. 6:15-cv-790-ORL-40TBS, 2017 U.S. Dist. LEXIS 11440, at *30-31 (M.D. Fla. Jan. 27, 2017) (same). The Court therefore finds Baumann qualified to offer expert testimony.

B. Reliability of Principles and Methods

The second prong examines whether the opinion "is the product of reliable principles and methods." § 90.702, Fla. Stat. (2013). *Daubert* identifies five, non-exclusive reliability factors. 509 U.S. at 593-94.

1. **Testability**. Baumann's four-step protocol can be, and in fact was, replicated in deposition using the same search parameters, yielding a comparable roster of shops (Doc. 244 at 98:5-101:4). The ability to retest the protocol weighs in favor of reliability.

2. **Peer review and publication.** Baumann's approach follows the AICPA Statement on Standards for Valuation Services and the ASA Business Valuation Guidelines, both peer-reviewed frameworks incorporated into professional coursework and continuing-education materials (*Id.* at 90:1-91:10).

3. **Known or potential error rate.** Baumann testified the 1,460-quote sample produces a ninety-five-percent confidence interval of plus-or-minus 4.1 percent, an error rate well within the ten-percent benchmark often accepted in survey research (*Id.* at 159:6-159:13).

4. **Existence and maintenance of standards.** AICPA and ASA publications spell out standards for sample selection, data retention, and disclosure of assumptions. Baumann preserved all call notes, spreadsheet inputs, and formulas (*Id.* at 160:6-161:12).

5. **General acceptance.** Hybrid valuation models combining published list prices, insurer discount schedules, and market surveys are widely used in property-and-casualty insurance litigation. *See Nutrimatix*, 2017 U.S. Dist. LEXIS 11440 at *30-31*.

Considering these factors together, the Court concludes Baumann's methodology is sufficiently reliable under section 90.702(2).

C. Application of Methods to the Facts

The third prong requires that the expert "applied the principles and methods reliably to the facts of the case." § 90.702(3), Fla. Stat. (2013). Baumann anchored all pricing inputs to the loss date of January 2, 2019, as required by the policy (Doc. 244 at 88:17-89:14). He verified the January 2019 NAGS list price for the relevant Hyundai Sonata windshield through Mitchell International's proprietary database (*Id.* at 92:3-94:8). He then adjusted that figure using contemporaneous discount schedules from State Farm, Progressive, and Allstate, the three insurers writing the greatest windshield market share in Hillsborough County, thereby capturing prevailing insurer behavior (*Id.* at 94:9-96:4).

Next, Baumann identified forty-six active windshield shops, twenty-eight derived from GEICO's 2018-2019 claims and eighteen from a Google Tools search restricted to the Tampa market and the month of January 2019 (*Id.* at 98:5-100:23). He obtained telephone quotes for glass, kit, and labor from each location, preserved the call notes, and documented manufacturer part numbers (*Id.* at 100:24-103:14). Network-affiliate prices were considered only where the shop confirmed the quoted price was available to walk-in customers, thus eliminating pre-negotiated fleet discounts (*Id.* at 103:15-104:6).

Plaintiff criticizes the use of 2018 claims data, but Baumann used those data only as a locator tool, not as a pricing variable (*Id.* at 174:15-175:7). The Court accepts that distinction. Plaintiff also argues the Google search is "irreproducible," yet Baumann preserved the search string, date stamp, and browser geography, enabling another analyst to repeat the process (*Id.* at 158:14-160:5). Under *Kumho Tire Co.*, perfect repeatability is not required; methodological soundness suffices. 526 U.S. at 152.

The Court therefore finds Baumann applied his methods reliably to the facts of this case.

D. Helpfulness to the Trier of Fact

The testimony is plainly relevant: whether GEICO paid the "prevailing competitive price" is a central issue. Baumann's synthesis of list prices, insurer schedules, and live market quotes will help the trier of fact interpret otherwise technical pricing data. *See Spearman*, 320 So. 3d at 289-90 (expert must assist, not usurp, the jury). Because Baumann's analysis generates a range rather than a single number, it leaves ultimate fact-finding to the jury, precisely the role contemplated by *Daubert*.

E. Legal Framework for Prevailing Competitive Price

The appellate courts have held that the phrase "prevailing competitive price" ("PCP") is unambiguous and refers to the price obtainable in an arm's-length, open-market transaction. *Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc.* ("*Dick I*"), 26 Fla. L. Weekly Supp. 876a (Fla. 13th Cir. Ct. Mar. 27, 2018). Reiterating that construction, the same court placed the initial burden on GEICO to prove its payment reflects open-market pricing and reversed summary judgment because GEICO had offered no such evidence. *Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc.* ("*Dick II*"), 28 Fla. L. Weekly Supp. 785a (Fla. 13th Cir. Ct. Aug. 21, 2020). On further appeal, the Second District held that claims data, expert econometrics, and proof that a majority of independent shops routinely accept GEICO's parameters are competent evidence of PCP, and it ordered judgment in GEICO's favor. *Geico General Ins. Co. v. Superior Auto*

Glass of Tampa Bay, Inc., 386 So. 3d 1007, 1016-19 at (Fla. 2d DCA 2024) [49 Fla. L. Weekly D169a]. Importantly, the court rejected any reading that bars network-affiliate prices, explaining that the policy's reference to what GEICO "can secure" contains "no exception" for prices obtained through volume contracting. *Id.* at 1017 n.4.

This trilogy confirms that (1) PCP is an empirical market question, not a legal tautology; (2) GEICO bears the initial production burden; and (3) any competent market evidence, including network transactions, may satisfy that burden. These holdings frame the reliability and relevance inquiries that follow. Baumann's model aligns with *Dick III*: it isolates market transactions occurring in January 2019, includes network and non-network shops alike, and confirms that GEICO could in fact secure prices within the reported range. (Doc. 244 at 191:1-192:12). Accordingly, the Court finds GEICO has produced competent evidence that is capable of supporting its PCP defense; the weight and persuasiveness of that evidence remain questions for the jury.

IV. **CONCLUSION**

For the reasons set forth in the foregoing analysis—and guided by *Daubert v. Merrell DowPharms., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); section 90.702 of the Florida Statutes; and the interpretive framework established by *Gov't Emps. Ins. Co. v. SuperiorAuto Glass* ("*Dick I-III*")—the Court finds that:

- Paul A. Baumann, CPA/ASA, is qualified to offer expert appraisal testimony;
- his market-approach survey rests on reliable principles and methods that have been reliably applied to sufficient data; and
- his testimony will assist the trier of fact in determining whether GEICO's January 23, 2019, payment of $388.16 exceeded the policy's "prevailing competitive price" cap.

Any shortcomings identified by Plaintiff concern the weight of the evidence, not its admissibility, and can be probed through cross-examination and the presentation of contrary proof.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Plaintiff's Amended *Daubert* Motion to Exclude the Testimony of Paul A. Baumann (Doc. 166) is **DENIED.**

2. Nothing in this Order precludes Plaintiff from (a) cross-examining Mr. Baumann on the matters raised in its motion and at the hearing, or (b) offering admissible rebuttal evidence.

3. All pre-trial and trial deadlines set forth in the Court's Order Setting Pre-Trial and Jury Trial (Dec. 213) remain in effect.

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[1]Collectively, these three opinions are known as the "Matthew Dick trilogy." *Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a/a/o Matthew Dick*, 26 Fla. L. Weekly Supp. 876a (Fla. 13th Cir. Ct. App. Div. Mar. 27, 2018); *Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a/a/o Matthew Dick*, 28 Fla. L. Weekly Supp. 785a (Fla. 13th Cir. Ct. App. Div. Oct. 2, 2020); *GEICO Gen. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a/a/o Matthew Dick*, 386 So. 3d 1007 (Fla. 2d DCA 2024) [49 Fla. L. Weekly D169a].

* * *

Insurance—Automobile—Windshield repair—Conditions precedent—Repair shop's failure to comply with notice and inspection provision in policy relieved insurer of obligation to reimburse shop

INTERCOASTAL AUTO GLASS, LLC, a/a/o Christian Garcia, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 22-CC-025224. Division O. July 2, 2025. Gaston Fernandez, Judge. Counsel: Ronald Hays, Christopher Ligori and Associates, Tampa, for Plaintiff. Natoria Sallet and Mary Jo Smith, Law Offices of Jaskirat K. Asti, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE, came before the Court on GEICO General Insurance Company's (hereinafter "GEICO's") Motion for Summary Judgment on June 18, 2025. After having reviewed Defendant's Motion, Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment filed on May 23, 2025, the court file, case law, hearing argument of counsel and being otherwise duly advised in the premises, the Court finds as follows:

Undisputed Facts

GEICO is an automobile insurer, who insured Christian Garcia at the time of a windshield replacement. Plaintiff, as the insured's assignee, filed a Complaint alleging breach of contract regarding a windshield replacement. Plaintiff invoiced Defendant and Defendant denied the claim. Defendant pled in its Answer and Affirmative Defenses that Plaintiff failed to comply with the notice and inspection related conditions precedent in its policy.

Summary Judgment Standard

To prevail at summary judgment, the moving party must demonstrate there is no genuine dispute as to any material fact and that the movant is entitled to summary judgment as a matter of law. Summary judgment is appropriate when there is no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. *See* Fla. R. Civ. P. 1.510. In *Harvey Building v. Haley*, 175 So. 2d 780 (1965), the court held that once the movant tenders competent evidence to support the motion, the opposing party must come forward with counterevidence sufficient to revel a genuine issue.

Conclusion of Law

Relying on *Goldman v. State Farm Fire Gen. Ins. Co.* 660 So. 2d 300, (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a], the inspection provision contained in the policy is a condition precedent. GEICO has a right to inspect auto glass prior to its "repair, replacement and/or disposal". Plaintiff's failure to comply with the condition precedent of the policy requiring the insured to notify Defendant of the loss so that the damaged windshield could be inspected prior to being replaced relieved Defendant of its obligation to reimburse Plaintiff.

ORDERED AND ADJUDGED as follows:

1. GEICO's Motion for Summary Judgment is **GRANTED**.

2. Plaintiff's Complaint is DISMISSED with prejudice.

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

4. The Clerk is directed to keep this matter open, and the Court will retain jurisdiction to determine reasonable attorney fees and costs, if applicable.

* * *

Insurance—Discovery—Depositions—Examination under oath—Transcripts—Entitlement

NOEL A. PINEDA ESPANA, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 25-CC-020285. September 17, 2025. Marc S. Makholm, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL, MOTION FOR SANCTIONS & MOTION FOR PROTECTIVE ORDER

THIS MATTER having come before the court on September 17, 2025 on Plaintiff's Motion to Compel, Motion for Sanctions and Motion for Protective Order. (Docket # 33). Having reviewed and considered the motions, the supporting memoranda, the relevant materials in the file, the arguments presented by counsel, and the applicable law, and being otherwise fully advised, the Court finds as follows:

1. Plaintiff's Motion to Compel, Motion for Sanctions and Motion

for Protective Order is **HEREBY GRANTED IN PART**.

2. Defendant conducted an Examination Under Oath of the named insured/Plaintiff on February 1, 2024. Defendant must produce the Examination Under Oath (EUO) transcript. Defendant will request the EUO transcript from the court reporter and will produce it to Plaintiff within 30 days of September 17, 2025.

3. Said EUO transcript will be produced prior to any deposition of the Plaintiff.

4. Plaintiff is entitled to the depositions of SIU investigators, Fred Velasquez and Jeannette Carrasquilo, who are fact witnesses.

5. Defendant's Motion to Compel Deposition and Motion for Sanctions (Docket # 38) was rendered moot.

6. Defendant's Motion Compel Plaintiff's Responses to Defendant's Discovery and Motion to Deem Request for Admissions to Plaintiff Admitted (Docket # 40) was rendered moot by the filing of discovery responses by Plaintiff.

7. The depositions of the Plaintiff, Fred Velasquez and Jeannette Carrasquilo, shall occur prior to the discovery deadline of November 11, 2025 per the Order Setting Case for Trial and Pretrial entered July 27, 2025.

* * *

Criminal law—Driving under influence of controlled substance—Evidence—Urine test results—Motion to exclude urine test report revealing presence of THC metabolite in defendant's urine is granted—Probative value of presence of metabolite in urine, which has no connectivity to impairment at time of driving, is substantially outweighed by risk of unfair prejudice by jury—State is not entitled to introduce test report at trial unless it introduces evidence that having THC metabolite in urine indicates that defendant was under influence of THC when sample was given

STATE OF FLORIDA, Plaintiff, v. RODRIGES FREEMAN, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2025-CT-01050. August 3, 2025. Debra Krause, Judge. Counsel: Niko Smith, Office of the State Attorney, Sanford, for Plaintiff. Jonathan Vega, 18th Judicial Public Defender, Sanford, for Defendant.

ORDER ON MOTION IN LIMINE IN REGARD TO FDLE LABORTORY RESULTS

THIS CAUSE came before the Court on July 17, 2025 for a hearing on the Defendant's Motion In Limine in Regard to FDLE Laboratory Results and the Court having heard the arguments presented, reviewed the evidence introduced, and having reviewed the file and being otherwise duly advised, makes the following finds of fact and conclusions of law:

The probable cause affidavit alleges that on March 30, 2025, the Defendant was observed in his automobile in the middle of Williams Street and West 16th Street in Sanford, Florida. The Defendant was asleep in his vehicle with the vehicle on and in drive. The vehicle was not moving because the Defendant's foot was on the brake. Deputy Jordon Gill of the Seminole County Sheriff's Office safely removed the Defendant from the vehicle. After the Defendant was medically cleared, Deputy Gill requested the Defendant preform field sobriety exercises based on what he observed including that the Defendant had blood shot eyes, an orbital sway and that he used the vehicle for balance. The Deputy indicated that the Defendant performed poorly on the exercises. The Deputy placed the Defendant under arrest for Driving under the Influence. The Defendant was taken to the Seminole County Jail where Deputy Gill requested that he take a breath test to determine the alcohol content of his breath. The Defendant complied with this request and gave two sample of his breath. Both samples registered 0.000 g/210L indicating no alcohol in his breath. Deputy Gill then requested a urine sample from the Defendant. The Defendant again complied with the Deputy's request and provided a urine sample. The State sent the Defendant's urine sample to the Florida Department of Law Enforcement to be analyzed. FDLE analyzed the urine sample and issued a laboratory report indicating that the sample only contained 11-Nor-9-carboy-delta-9-tetrahydrocannabinol. The State charged the Defendant, by information, with Driving Under the Influence by three different methods; Driving Under the Influence of Alcohol to the extent his normal facilities were impaired, Driving with an Unlawful Breath Alcohol Level, and Driving Under the Influence of a Controlled Substance to the extent his normal facilities were impaired. It is this third method of proving DUI that the State seeks to introduce the FDLE laboratory report showing the Defendant's urine contained 11-Nor-9-carboy-delta-9-tetrahydrocannabinol to prove he was under the influence of a controlled substance, namely cannabis and specifically THC.

The Defendant filed a Motion in Limine to exclude the FDLE Laboratory Report as irrelevant and alternatively that the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. The State contends that the laboratory report is admissible to show the Defendant was under the influence of a controlled substance at the time of his driving, THC, the psychoactive substance in cannabis.

At the outset, the Court notes that 11-Nor-9-carboy-delta-9-tetrahydrocannabinol is not a controlled substance but is a metabolite of THC which means that it is the byproduct of the body metabolizing THC. THC is a controlled substance and its presence in the Defendant's urine, blood or saliva would be highly relevant and therefore admissible to this prosecution for DUI.[1] At the hearing, the State provided several cases to support its position that the laboratory report is relevant and therefore admissible. Unfortunately, all of the State's case involved THC being found in a Defendant's blood sample and not 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a Defendant's urine. Having THC is a Defendant's blood indicates that the THC is in the Defendant's system and could be causing the Defendant's impairment. The same cannot be said for 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a Defendant's urine. Having 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a Defendant's urine does not signify that a Defendant (at the time the sample was provided and/or when the Defendant was driving) was under the effects of THC. "THC is highly lipid-soluble, and deposit binds in the adipose tissues [commonly known as body fat] of users. This interaction drastically slows the drug's metabolism, which is why metabolites of THC can be detected in urine weeks after the patient's last use." *Drug Metabolism,* Stephen T. Susa; Azhar Hussain; Charles V. Preuss, StatPearls Publishing, LLC (2025). Therefore, simply having 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a urine sample does not axiomatically indicate that a Defendant was under the influence of THC while driving an automobile but only that a Defendant had ingested THC at some time prior to the time of providing the urine sample. This is the biggest distinction with having THC in a blood sample and having 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a urine sample. Notably in *State v. Sercey,* 825 So. 2d 959 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1415b], the First Circuit Court of Appeal upheld the exclusion of a laboratory report showing a blood sample contained the cannabis metabolite as its limited probative value was substantially outweighed by its unfair prejudicial effect. Similarly, this Court believes the probative value of 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a Defendant's urine, which has no connectivity with impairment at the time of driving, is substantially outweighed by the risk of unfair prejudice by a jury.

Therefore having 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a urine sample is not relevant to a DUI prosecution[2] and admission of the laboratory report, showing that this Defendant had 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in his urine, could lead to jury

confusion and whatever limited probative value the laboratory reports has is substantially outweighed by its unfair prejudicial effect. However, if the State has an expert who can testify or has evidence that indicates that having 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in the Defendant's urine means that the Defendant was under the influence of THC at the time of the sample was taken, then the laboratory report would be relevant and admissible. The State presented no such expert nor such evidence at the hearing to support this argument, nor has the Court found any such evidence in any medical literature or in any case.

IT IS, therefore, ORDERED and ADJUDGED as follows:

1. The Defendant's Motion in Limine in regards to the FDLE Lab Report is ***GRANTED***

2. The State shall not be entitled to introduce the FDLE Laboratory Report at any hearing or trial unless it introduces testimony or other evidence indicating that having 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in the urine sample indicates that the Defendant is under the influence of THC at the time of the urine sample.

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[1]With the increasing use of medical cannabis in our state, it would seem prudent for the Legislature to consider modifying the implied consent statute to require a Driver's suspected of DUI by controlled substance to provide a saliva sample to detect the presence of controlled substances currently, or recently orally ingested, in their systems.

[2]Having 11-Nor-9-carboy-delta-9-tetrahydrocannabinol in a defendant's urine does not prove or disprove the material allegation that a defendant is under the influence of THC at the time of driving. It only proves that a defendant used THC significantly in the past such that the body has metabolized the THC into 11-Nor-9-carboydelta-9-tetrahydrocannabinol.

* * *

Criminal law—Driving under influence—Evidence—Blood test refusal—Confusion doctrine—Court declines to adopt confusion doctrine—Even if court adopted doctrine, it is inapplicable where defendant was confused about consequences of refusing to submit to blood test, not about interaction of implied consent warnings and *Miranda* rights—Further, defendant's circumstances are distinguished from cases applying confusion doctrine because law enforcement specifically advised defendant that refusal to submit to blood test would be used against her in criminal proceeding—Defendant is not precluded from explaining to jury her reasons for refusing blood test to counter state's consciousness of guilt argument

STATE OF FLORIDA, v. JORDAN L. ROBERTS, Defendant. County Court, 2nd Judicial Circuit in and for Wakulla County. Case No. 24-CT-101. February 21, 2025. Brian D. Miller, Judge. Counsel: Harrison G. Broer, Assistant State Attorney, Second Judicial Circuit, Crawfordville, for State. Frederick M. Conrad, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS REFUSAL TO SUBMIT TO BREATH TEST

THIS CAUSE comes before the Court on the Defendant's Motion to Suppress Refusal to Submit to Breath Test (hereafter "Motion"). After reviewing the Motion, hearing testimony and argument of counsel at an evidentiary hearing on January 28, 2025, and being fully advised in the premises, the Court DENIES the Defendant's Motion for the reasons stated below:

Background and Factual Findings

1. On June 5, 2024, Trp. Anthony Moschetto of the Florida Highway Patrol was dispatched to a crash near Carter Road and U.S. Highway 98 in Wakulla County, Florida. Trp. Moschetto testified at the evidentiary hearing that a 2013 Nissan Juke drifted off U.S. Highway 98 without attempting to stay on the roadway and hit a plastic telephone cable marker. Trp. Moschetto stated that a Wakulla County Sheriff's Office deputy identified the Defendant as the driver and gave Trp. Moschetto her driver's license. Trp. Moschetto testified that he discovered a beer can in the Defendant's vehicle, and after arriving at Tallahassee Memorial Hospital where the Defendant was receiving medical care because of the crash, that he detected the odor of alcohol emanating from the Defendant, that her eyes were red and bloodshot, that she had lethargic movements, poor hand-eye coordination, and slurred speech.[1]

2. Trp. Moschetto testified that after completing his crash investigation, he advised the Defendant of her *Miranda* rights and began the criminal investigation for a possible DUI violation at approximately 12:30AM. The Defendant initially agreed to answer Trp. Moschetto's questions, but later invoked her right to counsel.

3. Trp. Moschetto ceased questioning of the Defendant and proceeded to read implied consent warnings for a blood draw from his pre-made form at approximately 12:35AM.[2] In response, the Defendant requested to speak to an attorney or her mother. Trp. Moschetto attempted to locate the Defendant's phone so she could do so but was unable to locate the phone. At approximately 12:40AM, the Defendant refused to submit to the blood test.

4. In her Motion, the Defendant claims that she was confused by the *Miranda* and implied consent warnings, and that this Court should adopt and apply the Confusion Doctrine, which would result in the exclusion of her refusal to submit to the blood test as consciousness of her guilt at trial.

5. Of crucial importance, Trp. Moschetto testified that the Defendant was confused about whether she should take the blood test and the consequences for refusal, not how *Miranda* and implied consent warnings interact. Additionally, the Court specifically asked the Defendant during the evidentiary hearing if she was confused about *Miranda* and implied consent warnings or confused about the penalties for refusal. The Defendant answered that she did not understand what refusing the blood test would lead to, not that she was confused about the interaction between *Miranda* and implied consent warnings. The Court permitted the State and the Defendant's attorney to ask questions in relation to the Court's, after which she stated she was confused by "everything." The Court finds the Defendant's first answer to be credible: She did not understand the specific verbiage of the implied consent warning and the consequences for refusal to submit to a blood test, and finds that she was not confused by prior *Miranda* warnings and their interaction with implied consent warnings.

The Confusion Doctrine

6. The Confusion Doctrine is a judicially created exclusionary rule that refers to the confusion of a defendant when given *Miranda* warnings and implied consent warnings during a DUI investigation, specifically the interaction of a Defendant's right to counsel during questioning pursuant to *Miranda* and the lack of such a right during breath or blood test administration. Under this doctrine, evidence of a defendant's refusal to submit to a breath or blood test as consciousness of guilt could be excluded where *Miranda* and implied consent warnings given by an officer led a defendant to incorrectly believe that they had the right to speak to an attorney before taking such a test. This doctrine may, or may not, exist in Florida, depending upon which circuit, county, or individual judge one asks. Even if the doctrine exists, it is limited to circumstances where (1) the defendant is legitimately confused about the interaction of *Miranda* and implied consent warnings, and (2) the defendant communicates this specific confusion to the investigating officer. The questions posed in this case are (1) whether this Court will adopt the Confusion Doctrine, as some courts have, and (2) if the Court adopts the Confusion Doctrine, whether it applies to this case, requiring the exclusion of the Defendant's refusal to submit to a blood test as consciousness of guilt after receiving *Miranda* and implied consent warnings during the DUI investigation. For the reasons stated below, the Court's answer to both

of these questions is no.

7. Several Florida courts adopted the Confusion Doctrine, beginning with the *Alves* decision from Orange County Judge Lauten in 1995. *State v. Alves,* 3 Fla. L. Weekly Supp. 553a (Orange County, Fla. 9th Cir. 1995). *Alves* extended the principle in Florida law that "[i]f a defendant is led to reasonably believe [they] are exercising a right or protected course of conduct then the exercise of that right or course of conduct cannot be used against [them], even if in fact or law [they] did not actually have such a right" or course of conduct. *Id*. The *Alves* court extended this principle to the interaction between *Miranda* and implied consent warnings from the Florida Third District Court of Appeals decision in *Herring v. State,* 501 So.2d 19 (Fla. 3rd DCA 1992), as supported by the Supreme Court of Florida in *Menna v. State,* 846 So.2d 502 (Fla. 2003) [28 Fla. L. Weekly S340a]. In *Menna,* the Supreme Court of Florida approved the reasoning of *Herring* that it is "unduly prejudicial and unfair to admit evidence that a defendant had refused to take a test where the defendant is either told [they] may refuse the test, or the defendant is not told of any adverse consequences which would attach to the refusal." *Id*. However, neither *Menna* nor its predecessors or progeny dealt with the specific issue of the interaction between *Miranda* and implied consent warnings. Instead, *Menna* and *Herring* concerned defendants refusing to submit to a required gunshot residue test without being told that their refusal to do so could result in adverse consequences, including being used against them at trial. *Menna,* 846 So.2d at 503; *Herring,* 501 So.2d at 21.[3]

8. In the thirty (30) years since the *Alves* decision, neither the Florida Legislature nor any appellate court codified or adopted the Confusion Doctrine as binding authority in Florida. Additionally, the specific application of the Confusion Doctrine to the interaction of *Miranda* and implied consent warnings in *Alves* derived not from any legislative act or binding precedent in Florida, but from appellate decisions in Pennsylvania, Colorado, Hawaii, Alaska, Washington, California, and North Dakota. *Alves,* 3 Fla. L. Weekly Supp. 553a.

9. Subsequent to *Alves,* several Florida trial courts recognized the Confusion Doctrine, including Duval County in the Fourth Circuit in *State v. Jahada,* 18 Fla. L. Weekly Supp. 78a (Duval County, Fla. 4th Cir. 2010); the Sixth Circuit in *Vanek v. Florida DHSMV*[4], 21 Fla. L. Weekly Supp. 544a (Fla. 6th Cir., 2014); *Mastenbroek v. DHSMV,* 17 Fla. L. Weekly Supp. 949a (Fla. 6th Cir. 2009); and *Bolek v. Florida DHSMV,* 13 Fla. L. Weekly Supp. 215a (Fla. 6th Cir. 2005); the Seventh Circuit in *Bosch v. Florida DHSMV,* 10 Fla. L. Weekly Supp. 757a (Fla. 7th Cir. 2003); *Crawley v. Florida DHSMV,* 24 Fla. L. Weekly Supp. 412a (Fla. 7th Cir. 2016); and *Parker v. Florida DHSMV,* 28 Fla. L. Weekly Supp. 649a (Fla. 6th Cir. 2020); the Ninth Circuit in *Fox v. Florida DHSMV,* 11 Fla. L. Weekly Supp. 776a (Fla. 9th Cir. 2004); the Seventeenth Circuit in *Brown v. Florida DHSMV,* 20 Fla. L. Weekly Supp. 339a (Fla. 17th Cir. 2013); *Hubert v. Florida DHSMV,* 20 Fla. L. Weekly Supp. 651a (Fla. 17th Cir. 2013); and *State v. Nutt,* 13 Fla. L. Weekly Supp. 1094a (Broward County, Fla. 17th Cir. 2006); and the Eighteenth Circuit in *Brown v. Florida DHSMV,* 12 Fla. L. Weekly Supp. 53a (Fla. 18th Cir. 2004); and *State v. Bloomquist,* 13 Fla. L. Weekly Supp. 1020a (Brevard County, Fla. 18th Cir. 2006). Importantly, even though these courts adopted the Confusion Doctrine, they also held that it only applies if (1) a defendant is legitimately confused about the interaction of *Miranda* and implied consent warnings, and (2) the defendant communicates this specific confusion to the investigating officer.

10. Other Florida trial courts, including other judges in some of the same circuits as listed above, recognized there *might* be a Confusion Doctrine, but also ruled, as above, that it did not apply if a defendant was not legitimately confused about the interaction of *Miranda* and implied consent warnings and failed to express their confusion regarding such interaction to law enforcement. These courts also recognized that *Alves* is not binding on other courts. *See Green v. Florida DHSMV,* 14 Fla. L. Weekly Supp. 43c (Fla. 4th Cir. 2006) (specifically noting that the Confusion Doctrine has not been accepted in Florida by the District Courts of Appeal and declined to apply it in that case); *State v. Heffron,* 18 Fla. L. Weekly Supp. 1088a (Fla. 6th Cir. 2011) (specifically noting that "[t]he confusion doctrine is *not* clearly recognized in Florida" and "the *Alves* trial court order is not binding on this Court"); *Beyer v. Florida DHSMV,* 12 Fla. L. Weekly Supp. 1117a (Fla. 6th Cir. 2005) (also recognizing that *Alves* is not binding on other courts); *Platte v. Florida DHSMV,* 21 Fla. L. Weekly Supp. 9a (Fla. 6th Cir. 2013); *Lavin v. Florida DHSMV,* 16 Fla. L. Weekly Supp. 605a (Fla. 6th Cir. 2009); *State v. Hart,* 25 Fla. L. Weekly Supp. 461a (Fla. 7th Cir. 2017); *Moore v. Florida DHSMV,* 13 Fla. L. Weekly Supp. 932a (Fla. 9th Cir. 2006); *State v. Wymer,* 4 Fla. L. Weekly Supp. 113a (Fla. 13th Cir. 1995).

11. To add to the nebulous existence of the Confusion Doctrine, other Florida trial courts flatly rejected it. Judge Bennett of the Twelfth Circuit in *Potts v. Florida DHSMV,* 15 Fla. L. Weekly Supp. 783a (Fla. 12th Cir. 2008), stated in his ruling that, "[a]t least two other circuit courts in Florida have recognized the confusion doctrine; however, no appellate court in Florida has addressed this doctrine, and only a minority of jurisdictions outside of Florida have upheld it." *Id*. Judge Bennett also rejected the Confusion Doctrine "because it places an unnecessary burden on law enforcement," finding it "impractical for a DUI suspect to believe that court appointed counsel will be made immediately available in helping them decide whether or not to submit to" a breath or blood test. *Id*.

12. The Court also considered the opinion of Judge McDonald of the 10th Circuit in his rejection to adopt the Confusion Doctrine in *Bishop v. Florida DHSMV,* 3 Fla. L. Weekly Supp. 14a (Fla. 10th Cir. 1992): "This Court recognizes, and Petitioner provides examples where the highest courts of several states have recognized a 'confusion doctrine.' However, to recognize such a doctrine here would require this Court to create a new rule of law. This Court declines to do so." *Id*. Manatee County Judge Doyle in the Twelfth Circuit reached the same conclusion as Judge McDonald: Adopting the Confusion Doctrine would require the court to impose a new rule of law, which she declined to do. *State v. Milen,* 29 Fla. L. Weekly Supp. 144a (Fla. 12th Cir. 2021). Judge Brousseau in the Twentieth Circuit noted in his rejection of the Confusion Doctrine that it is not recognized as a defense in Florida, that no appellate decisions affirmatively created such a doctrine, and that the circuits are split over its application. *Chlebek v. Florida DHSMV,* 12 Fla. L. Weekly Supp. 843a (Fla. 20th Cir. 2005).

13. In an attempt to resolve the question of whether or not the Confusion Doctrine exists in Florida, the Fourth District Court of Appeals answered with a resounding. . .*maybe*? In *Kurecka v. State,* 67 So.3d 1052 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2162b], the appellate court discussed whether the Confusion Doctrine exists, recognizing that it is "judicially created rule" wherein "a licensee's refusal to submit to a breath test will be excused if, due to a prior administration of the *Miranda* warnings, the licensee believes that he or she had the right to consult with counsel prior to taking the breath test." *Id*. at 1056. The *Kurecka* court noted the split in circuit courts regarding the Confusion Doctrine's adoption and parameters. The *Kurecka* court also noted that while some states adopted the Confusion Doctrine, others rejected it because their implied consent statutes do not require it or that the doctrine does not apply "so long as the defendant is advised that [their] refusal will lead to a license suspension." *Id*. at 1058-59. The *Kurecka* court considered the following reasoning from Wisconsin:

> Requiring officers to address nonexistent rights undercuts the "simple and straightforward" approach and risks confusing a potentially intoxicated defendant. If police move beyond the consistent statutory

procedures and attempt to explain the law's parameters, defendants will ignite the confusion defense. Explanations that exceed the statute's language would cause an "oversupply of information" and encourage "misled" defendants to challenge an officer's compliance with statutory requirements. This result would frustrate the legislature's intention to facilitate drunk driving convictions by offering defendants an avenue for litigating which presumed rights merit inclusion in an officer's explanation.

Id. at 1060, citing *State v. Reitter,* 227 Wis.2d 213, 595 N.W.2d 646 (1999).

14. With this reasoning in mind, the *Kurecka* court stated, "Florida's implied consent statute does not require police officers to advise persons arrested for DUI that the right to counsel does not attach to their decision to submit to the breath test." *Kurecka,* 67 So.3d at 1060. "The statute requires only that the person be told that [their] failure to submit to the test will result in a suspension of the privilege to drive for a period of time and that a refusal to submit can be admitted at trial." *Id*. "Courts must look at the terms of the statute at issue and the legislative intent rather than to 'judge-made exceptions to judge-made rules' when deciding to suppress evidence." *Id*. "Accordingly, excluding evidence based on a suspect's misconception about the right to counsel prior to taking the breath test would be contrary to the legislative intent of Florida's implied consent law." *Id*. Courts "cannot impose duties beyond those created by the legislature. The implied consent statute was enacted to assist in the prosecution of drunk drivers. Determining whether informing a suspect that he does not have the right to an attorney for breath testing purposes—as part of the implied consent warning—supports or frustrates the goal of gathering evidence for these cases *is a matter for the legislature to decide*." *Id*. (emphasis added). The *Kurecka* court did not hold whether the Confusion Doctrine exists, stating, "Our research has not yielded any clear indication that the confusion doctrine is a recognized exclusionary rule or defense to a license suspension in Florida." *Id*. The *Kurecka* court simply held that if the Confusion Doctrine did exist, it did not apply to the cases at issue. *Id*. The *Kurecka* court also noted, as stated above, that the Confusion Doctrine exceeds the requirements of the implied consent statute and that the legislature has the authority to expand that statute to include such a doctrine, but in the years after *Alves,* they have declined to do so. *Id*. It is therefore still within the discretion of individual trial judges to adopt or reject this doctrine.

15. After considering the history and development of the Confusion Doctrine, its existence as a judicially created rule with no authority in legislative act or binding precedent, its adoption in an apparent minority of circuits in Florida and a minority of states, that courts within the same circuits in Florida reach different conclusions regarding its existence, that finding such a doctrine places an unreasonable burden on law enforcement to discuss legal issues with a defendant well beyond the requirements of the implied consent statute, that such a discussion is likely to lead to greater confusion on the part of a defendant, that the only appellate decision directly addressing this doctrine declined to adopt it in part because it held that doing so is a prerogative for the legislature, the legislature's declination to adopt such an expansion in the requirements of the implied consent statute in the thirty (30) years since *Alves,* the fundamental and separate powers and duties of the legislative and judicial branches of government, and that adopting this doctrine would necessitate this Court to impose a new rule of law in Wakulla County without a foundation in statutory or appellate authority, this Court, with respect to its brother and sister courts, declines to adopt the Confusion Doctrine.

16. Even if the Court did adopt the Confusion Doctrine, it finds it inapplicable to this case. The Confusion Doctrine requires a defendant to (1) be legitimately confused about the interaction of *Miranda* and implied consent warnings, and (2) communicate this specific confusion to the investigating officer. As stated above, the Court finds based on the testimony of Trp. Moschetto and the Defendant that she was confused about the verbiage of the implied consent warning and the consequences for refusing to submit to the blood test, not about the interaction of *Miranda* and implied consent warnings. The Defendant also communicated her confusion about the consequences of refusal to Trp. Moschetto, not her confusion regarding the interaction of *Miranda* and implied consent warnings. Accordingly, the Confusion Doctrine would not apply to this case if the Court chose to adopt it.

17. The Confusion Doctrine is also distinguished from *Menna, Herring, Allen,* and other similar cases due to law enforcement's failure to advise defendants of the adverse consequences of refusing to submit to various evidence collection methods in those cases, while law enforcement directly advises defendants of the adverse consequences of refusing to submit to a breath or blood test for alcohol during a DUI investigation upon reading of implied consent. Here, the Trp. Moschetto informed the Defendant when he read her implied consent from a pre-prepared card that refusing to submit to the requested blood test could result in adverse consequences, one of which was "[r]efusal to submit to the test I have requested is admissible into evidence in any criminal proceeding." *State's Exhibit 2.* Law enforcement specifically notified the Defendant that her refusal to submit to the requested blood test could result in her refusal being used against her in a criminal proceeding. Accordingly, the holdings of *Menna, Herring, Allen,* and similar cases are inapplicable to the circumstances of this case.

18. Importantly, even though the Court declined to adopt the Confusion Doctrine and denied the Defendant's Motion, the Defendant is not precluded from explaining to the jury her reasons for refusing to take the blood test. *Kurecka,* 67 So.3d at 1061. The Defendant can introduce refusal evidence, along with other testimony concerning the circumstances of the refusal, which could be in her favor and counter the State's consciousness of guilt argument. *Id*.

Conclusion

19. Accordingly, it is hereby:

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Refusal to Submit to Breath test is DENIED.

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[1]The Defendant admitted medical records in evidence indicating that her eyes were clear that her speech was normal. However, no medical personnel testified at the evidentiary hearing. Trp. Moschetto testified that he was alone with the Defendant during his investigation, that all medical personnel were attending other patients at the time, and that the indicated time of treatment of 12:32AM in the medical records was incorrect because he was with the Defendant at the time with neither a doctor nor nurse present. There are also multiple times for treatment given, ranging from 12:01AM to hours later, and with a discharge time that precedes the incorrect incident time. The Court finds the testimony of Trp. Moschetto to be credible and, without testimony to provide additional context, the medical records to be less so regarding the specific timing of events and indicators of impairment of the Defendant.

[2]State's Exhibit 2 contains an implied consent warning for a *breath* test. At the hearing, the State did not have the card for the *blood* test warning actually given by Trp. Moschetto. The parties stipulated to the accuracy of the implied consent warning as to the requested blood test and did not contest that the Trp. Moschetto gave the Defendant an implied consent warning for a blood test.

[3]The Court also considered *Allen v. State,* 192 So.3d 554 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1171b], as requested by the Defendant. This case concerned a defendant's refusal to submit to a buccal swab for a DNA comparison after being told he was not required to do so and without being informed that his refusal could result in adverse consequences, including being used against him at trial, citing to *Menna* and *Herring.*

[4]Department of Highway Safety and Motor Vehicles.

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MISCELLANEOUS REPORTS

Municipal corporations—Land development code—Reasonable accommodation request—Petition to allow deviation from land development code's requirement that one-family dwellings with four bedrooms have enclosed garage for storage of at least two vehicles so that garage can be converted to living space to accommodate long-term care for petitioner's son, who has attention deficit hyperactivity disorder and autism spectrum disorder—Petition granted—There would be no fundamental alteration in nature of land use and zoning regulations since petitioner agrees to park no more than four vehicles in driveway, and there is no undue financial or administrative burden on city

IN RE: PETITION FOR REASONABLE ACCOMMODATION REQUEST, 672 NW 106th AVENUE. Applicant, Sandra Fernandez. The City of Coral Springs, Special Magistrate. Case No. RA25-0001. July 25, 2025. Harry Hipler, Special Magistrate. Counsel: Sandra Fernandez, Pro se, Petitioner/Applicant. Christina Gomez, Assistant City Attorney, for Respondent/City of Coral Springs.

FINAL ORDER

THIS CAUSE having come before Harry Hipler, Esquire, the Special Magistrate of the City of Coral Springs, upon the Reasonable Accommodation Request submitted by the Applicant, Sandra Fernandez, and after holding a public hearing on July 17, 2025, with the City of Coral Springs ("the City"), appearing through counsel, Christina Gomez, Assistant City Attorney and Elizabeth Chang, Zoning Manager, and the Applicant and Dori Chin, on behalf of the Applicant, after proper notice, the Special Magistrate does hereby issue its findings of fact, conclusions of law, and orders as follows:

I. FINDINGS OF FACT

A. The real property is located at 672 NW 106th Avenue in the Cypress Glen neighborhood, which is zoned One-Family Dwellings (RS-4). The subject real property is in the names of LETICIA PLAZAS, a married woman, ROBINSON VARGAS and SANDRA FERNANDEZ, husband and wife, and LEONARDO VARGAS, a single man, as Joint Tenants with Rights of Survivorship.

B. The Applicant is requesting a reasonable accommodation from the off-street parking requirements of the City's Land Development Code, which requires one-family dwellings which contain four (4) bedrooms to have a fully enclosed garage designed for the storage of at least two (2) automobiles. Applicant also seeks a reasonable accommodation to convert the garage to a living space (bedroom) for their son, JASON VARGAS, who is age 18 on account of his attention deficit hyperactivity disorder (ADHD) and autism spectrum disorder (ASD), and delayed milestones.

C. The Applicant testified that there are currently six (6) people residing at the residence full-time and two (2) additional residents living at the home part-time.

D. The Applicant indicated that the garage was converted, without permits, to create a separate living space for their son, who has been diagnosed with autism spectrum disorder (ASD), delayed milestones, and ADHD. The separate space is necessary to accommodate their son's medical care while minimizing disruption to other household members.

E. The Applicant also stated that, in addition to converting the garage to a living space without permits, the laundry room was converted to a full bathroom, without permits, and the laundry equipment was moved to the patio, without permits.

F. As required by Section 105(5) of the Land Development Code (LDC), a request for a reasonable accommodation shall be based on the following factors: Whether the requesting party has established that they, or the individual on whose behalf the application was submitted, is protected under the FHA and/or ADA by demonstrating that they are handicapped or disabled, as defined in the FHA and/or ADA. As defined under the Americans with Disabilities Act of 1990 (ADA), 12101 to 12213 and the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), disability includes, but is not limited to breathing, walking, talking, hearing, seeing, sleeping, caring for one's self, performing manual tasks, and working. The definition also includes major bodily functions such as immune system functions, normal cell growth, digestive, bowel, bladder, neurological,[1] brain, respirator, circulatory, endocrine [diabetes], and reproductive.

The definition of disability is subject to judicial interpretation,[2] but for purposes of this section the disabled and/or handicapped individual must show:

1. A physical or mental impairment which substantially limits one of more major life activities; or

2. A record of having such impairment; or

3. That they are regarded as having such impairment.

4. Whether the requested accommodation is reasonable and necessary to afford the handicapped/disabled individual an equal opportunity to use and enjoy the dwelling.

5. Whether the requested accommodation would impose an undue financial or administrative burden on the City of Coral Springs.

6. Whether the requested accommodation would require a fundamental alteration in the nature of the land use and zoning regulations of the City of Coral Springs.

G. The following documents were considered by the Special Magistrate and are made part of the Final Order and the record:

A. Agenda.

B. Reasonable Accommodation (RA) Request Petition and Attachments.

C. Staff Report, Tina Jou.

D. Deed of Real Property and Photo of Residence.

II. CONCLUSIONS OF LAW

A. Applicant has provided documentation regarding the above standards in reference to ADHD and ASD of the son. The Special Magistrate found that the criteriafor a reasonable accommodation was met.

B. The conversion of the garage to a living space for their son is necessary to provide the stability and environment necessary for his long-term care.

C. Applicant's request to allow a deviation from the parking provisions of the City's Land Development Code by agreeing to own and park no more than four (4) automobiles in the driveway on the premises in lieu of storage of automobiles in an enclosed garage where two (2) automobiles could be stored in a garage and which should be minimally invasive to the City's Land Development Code for one-family dwellings due to Applicant's son's ADHD and ASD and due to his need for a living space into a legally converted living space. As such, there would appear to be no fundamental alteration in the nature of the land use and zoning regulations of the City of Coral Springs.

D. Under the circumstances set forth in this Order, there is no undue financial or administrative burden in the City of Coral Springs as long as Applicant complies with this Order.

III. ORDER

Based upon the above, the Applicant has demonstrated that it has met the requirements of the LDC. Accordingly, the request for reasonable accommodation shall be granted, with the following special conditions:

a. The Applicant shall have sixty (60) days from the date of this Order to apply for permits for all improvements and an additional ninety (90) days in which to close out those permits;

b. The Applicant understands and agrees that the household will not own more than four (4) vehicles in total.

c. The pending Code case, BCV24-0039, has an active and accruing lien. Once the permits are closed and an affidavit of compliance is recorded, the Applicant may apply for a lien reduction through the City's Code process;

d. The Applicant shall be required to convert the living space back to a garage if the disabled individual vacates the property;

e. No other individuals may live in the garage/living space other than the disabled individual; and

f. This reasonable accommodation shall not run with the land and not be transferrable from one owner to another.

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[1]Attention deficit hyperactivity disorder (ADHD) and autism spectrum disorder (ASD) are neurodevelopmental conditions that affect how you think, learn, and behave. Both are neurodevelopmental conditions that affect brain development and how a person functions day to day. Symptoms can influence behavior, learning, communication, and emotional regulation throughout life. Characteristics of ADHD and ASD include difficulty with planning, organizing, time management, impulsive behaviors, trouble focusing or staying on task, social difficulties or challenges, sensory sensitivities to sound or touch, strong emotional reactions to non-preferred activities, social situations, or sensory experiences, and sleep issues. See AuDHD: What Is It Like To Have Both ADHD and Autism? | Ability Central

[2]Judicial decisions have wrestled with what may be a disability under the ADA which must "substantially limit" a major life activity of an applicant. "Substantially limit" means "unable to perform a major life activity that the average person in the general population can perform. . . ." See *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 195-96 (2002) [15 Fla. L. Weekly Fed. S39a]; *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 565-66 (1999). In considering whether a disability "substantially limits" a major life activity, courts have considered the nature and severity of the impairment, the expected duration of the impairment, and the expected long term impact of the impairment. See *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 195-96 (2002) [15 Fla. L. Weekly Fed. S39a]; *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 565-66 (1999). Each case requires a fact intensive analysis, and each case requires an individual assessment of the facts and circumstances of the Applicant.

* * *

Judges—Judicial Ethics Advisory Committee—Ex parte communications—When reviewing and issuing an arrest warrant, a judge may independently review one or more limited, reliable databases to obtain information about accused's current or prior criminal history or other status which may be relevant to whether accused's release prior to first appearance would be forbidden under statute

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-14. Date of Issue: August 12, 2025.

ISSUE

When issuing an arrest warrant, the judge is required to set the amount of bail or other conditions of pretrial release, if a right to bail exists. The question presented here is may a judge independently review one or more limited, reliable databases to obtain information about the accused's current or prior criminal history or other status which may be relevant to whether release prior to first appearance would be forbidden based upon the criteria set forth in section 903.11(6)(a)-(b), (d)-(f), Florida Statutes (2025).

ANSWER: Yes.

FACTS

When reviewing and issuing an arrest warrant, in addition to determining whether probable cause exists, the judge is required to endorse upon the warrant the amount of bail or other conditions of release for offenses where the accused has a right to bail.[1] Typically, an accused has no right to release from custody prior to his/her first appearance hearing. However, the accused may be released prior to first appearance pursuant to a standard uniform bail schedule employed in the jurisdiction setting specific bail amounts for certain charged crimes "or, in the event of an arrest under a warrant, by meeting the conditions of release if any were set by the issuing judge."[2] Section 903.011(6) prohibits those arrested for certain listed crimes, those arrested for violation of protective injunctions, and those meeting certain criteria based upon their prior encounters with the legal system ("historical criteria") from being released before their first appearance or a bail determination hearing.

The inquiring judge points out that when reviewing an arrest warrant package, it is easy to determine that bail will not be permitted prior to first appearance if the accused is being arrested for one or more of the crimes listed in section 903.011(6)(e), or for violation of a protective injunction.[3] In such situations, the judge would endorse "No Bond Pending First Appearance" on the warrant, signifying that the accused was not to be released prior to first appearance.

Section 903.011(6) provides that certain historical criteria prohibits an accused's release before first appearance, such as if the accused (a) at the time of arrest, was on pretrial release, probation, or community control; (b) at the time of arrest was designated as a sexual offender or predator; (d) was under specified supervision; (e) had previously been sentenced as a prison releasee reoffender ("PRR"), habitual violent felony offender ("HVFO"), three-time violent felony offender, or violent career criminal; or (f) had been arrested three or more times in the six months immediately prior to the current arrest.

The inquiring judge notes that the warrant packages often do not address the accused's statutorily relevant historical criteria. The judge wants to know if it would be ethically permissible for the judge to consult certain reliable, governmental databases to determine whether the accused's historical criteria would require a "No Bond Until First Appearance" endorsement on the arrest warrant.[4]

DISCUSSION

Canon 3 of Florida's Code of Judicial Conduct begins by stating: **A Judge Shall Perform Duties of Judicial Office Impartially and Diligently.** Canon 3B(7) provides in part:

> A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that
>
> . . . .
>
> (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Fla. Code Jud. Conduct, Canon 3B(7)(e).

The issuance of arrest warrants is done in an ex parte setting based upon a request from and information provided by law enforcement and the State Attorney's office to a judge. It is clearly one situation within the contemplation of 3B(7)(e) where ex parte communication is authorized by law, due to the risk that the accused might flee or hide if she/he was aware that a warrant was going to issue. "[E]x parte judicial review of warrant applications is constitutionally authorized."[5] "The review of arrest and search warrant applications is a core function of the courts."[6] If the historical criteria of the accused were being provided to the judge by law enforcement or the State Attorney, the judge would be permitted to receive and rely on it.[7] However, as noted above, that statutorily important information is often not provided to the judge in the warrant package or by those seeking the arrest warrant.

What concerns the inquiring judge is one official comment to Canon 3B(7) which states in part that, "[a] judge must not independently investigate facts in a case and must only consider the evidence presented." Certainly, the historical criteria found in section 903.011(6) prohibiting release before first appearance is factual, such as being arrested while on probation, being a PRR or HVFO when

arrested, or having been arrested three times in the last six months. However, those historical criteria facts are not truly "facts in a case." Rather, these "bail facts" are merely factors for determining pre-first appearance bail eligibility and they have nothing to do with whether the accused committed the crime.

The following cases finding that judges improperly considered ex parte communications or conducted improper independent investigation all involved "case facts" rather than "bail facts," an important distinction. During a bench trial, without notice to or the involvement of the litigants or counsel, a judge improperly contacted computer experts to determine the reasonable cost of software updates, which was an element of the damages claimed.[8] A judge who, without any parties present, met with the estate's accountant for one hour to analyze the validity of the petitioner's financial objections was found to have acted contrary to Canon 3B(7) and the commentary quoted above.[9] A trial judge who conducted a multifaceted independent investigation of case facts by reviewing a plethora of information from a variety of sources and having an ex parte conversation with the medical examiner, none of which was presented in open court, drew strong criticism for violating Canon 3B(7).[10] In a guardianship case, the judge conducted an inappropriate independent investigation of case facts by interviewing the principal of the school where a child was enrolled and by obtaining financial records directly from the bank to investigate the guardianship account activity.[11] A trial judge violated the "independent investigation" prohibition by his ex parte conversations with school administrators to see if the wife had, as ordered, included the former husband as a contact for the children; then based a change in visitation on what he had learned.[12] Each of the foregoing situations involved a judge, who was the decision maker, engaging in ex parte communications and independent investigation of the facts determinative of the issues and outcome of the related case.

Against the backdrop of those cases, it is clear that a judge researching reliable data sources to determine if the accused's historical criteria may prohibit release on bail prior to first appearance is not independently investigating "facts in the case." The issuing-judge's "No Bond Pending First Appearance" endorsement on the arrest warrant based on the accused's historical criteria found in section 903.011(6), while temporarily significant, is of limited import and has no effect on the case outcome. Section 903.011(6) has the singular effect of not permitting an accused's release prior to first appearance or bond hearing. "[T]he purpose of this bail endorsement [on the arrest warrant] is to enable the arresting officer to accept proper bail without the necessity of contacting the judge to fix the amount of the bond."[13] Likewise, an endorsement of "No Bond Pending First Appearance" called for under any aspect of section 903.011(6) is directed only to the arresting officer or jailor, advising that the accused is not to be released prior to first appearance.

Florida Rule of Criminal Procedure 3.130(a) requires that within twenty-four hours of arrest an accused must be given a first appearance hearing during which the judge will decide, *inter alia*, what bail and other conditions for pre-trial release, if any, will be appropriate. Even in those situations where the arrest warrant does contain a bail amount, that amount is not intended to limit the first appearance judge's discretion in applying Rule 3.131(b)(2) to determine an appropriate amount.[14] Likewise, a "no bond" endorsement from the arrest warrant-issuing judge regarding the accused's initial ineligibility for bond due to section 903.011(6) is not binding at first appearance or any bond determination hearing.

For the reasons set forth above, the Committee is of the opinion that a judge's limited independent research into the accused's § 903.011(6) historical criteria in connection with issuing an arrest warrant does not violate Canon 3B(7) and is permissible.

REFERENCES

§ 903.011(6)(a)(b)(c)(d)(e)(f)
Florida Rule of Criminal Procedure 3.121(a)(7), 3.130(a), 3.131(b)(2)
Thourtman v. Junior, 338 So. 3d 207, 211 n.7 (Fla. 2022) [47 Fla. L. Weekly S85a].
Adelson v. State, No. 1D2025-0949, 2025 WL 1353904, at *1 (Fla. 1st DCA May 9, 2025) [50 Fla. L. Weekly D1071b], *reh'g denied*, (June 19, 2025).
In re Baker, 813 So. 2d 36, 37-38 (Fla. 2002) [27 Fla. L. Weekly S149b].
Wilson v. Armstrong, 686 So. 2d 647, 649 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2563g].
Vining v. State, 827 So. 2d 201, 210 (Fla. 2002) [27 Fla. L. Weekly S654a].
In re Guardianship of O.A.M., 124 So. 3d 1031, 1032 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2288a].
Albert v. Rogers, 57 So. 3d 233, 236 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D505b].
State v. Norris, 768 So. 2d 1070, 1071 (Fla. 2000) [25 Fla. L. Weekly S714a].
Fla. Code Jud. Conduct, Canon 3, 3B(7), 3B(7)(e)
Fla. JEAC Op. 2007-19

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[1]Florida Rule of Criminal Procedure 3.121(a)(7).

[2]*Thourtman v. Junior*, 338 So. 3d 207, 211 n.7 (Fla. 2022) [47 Fla. L. Weekly S85a].

[3]§ 903.011(6)(c), Fla. Stat.

[4]By way of example, the inquiring judge mentions sources such as the County Clerk's Case Maintenance System, The Florida Clerks of Court Comprehensive Case Information System, the Court's CAPS viewer, or the Florida Department of Corrections Offender Search database.

[5]*Adelson v. State*, No. 1D2025-0949, 2025 WL 1353904, at *1 (Fla. 1st DCA May 9, 2025) [50 Fla. L. Weekly D1071b], *reh'g denied*, (June 19, 2025).

[6]*Id.*

[7]JEAC Op. 2007-19. Trial judge does not violate Canon 3B(7) by reviewing sworn arrest reports and other case documents prior to defendants' first appearance hearing in connection with nonadversarial probable cause determinations.

[8]*In re Baker*, 813 So. 2d 36, 37-38 (Fla. 2002) [27 Fla. L. Weekly S149b].

[9]*Wilson v. Armstrong,* 686 So. 2d 647, 649 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2563g].

[10]*Vining v. State*, 827 So. 2d 201, 210 (Fla. 2002) [27 Fla. L. Weekly S654a].

[11]*In re Guardianship of O.A.M.*, 124 So. 3d 1031, 1032 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2288a].

[12]*Albert v. Rogers*, 57 So. 3d 233, 236 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D505b].

[13]*State v. Norris*, 768 So. 2d 1070, 1071 (Fla. 2000) [25 Fla. L. Weekly S714a].

[14]*Id. at 1072.*

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