Volume 30, Number 8, December 30, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 453-525

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.

- **INSURANCE—PROPERTY—ASSIGNMENT. An assignment of insurance benefits that did not include statutorily mandated written, itemized, per-unit cost estimate of services did not comply with section 627.7152 and, as a result, was invalid and unenforceable. A separate estimate of services to be performed did not satisfy the statutory requirement.** *LOSS RESTORATIONS, LLC v. CRUZ. County Court, Ninth Judicial Circuit in and for Orange County. Filed October 19, 2022. Full Text at County Courts Section, page 481a.*

- **CONSUMER LAW—DECEPTIVE AND UNFAIR TRADE PRACTICES—LEASED VEHICLES—COST AND PROFIT DISCLOSURE—PREDELIVERY SERVICE CHARGES. A motor vehicle dealer violated the Florida Deceptive and Unfair Trade Practices Act where the dealer included a costs and profit disclosure regarding predelivery service charges on a retail lease order for a vehicle, but not on the actual motor vehicle lease agreement.** *SIMON v. LEHMAN HYUNDAI SUBARU INC. County Court, Eleventh Judicial Circuit in and for Orange County. Filed May 1, 2022. Order on Motion for Reconsideration Filed September 30, 2022. Full Text at County Courts Section, page 486a.*

- **DUE PROCESS—REMOTE PROCEEDINGS—DEVELOPMENTAL DISABILITIES—INVOLUNTARY ADMISSION TO RESIDENTIAL SERVICES—ANNUAL REVIEW. Although a Chapter 393 annual review hearing implicates a liberty interest sufficient to trigger due process protections, a circuit court judge concluded, after an extensive analysis, that an involuntarily admitted individual was required to appear at this hearing using communication technology, despite counsel's objection.** *IN RE: VELEZ. Circuit Court, Second Judicial Circuit in and for Gadsden County. Filed November 29, 2022. Full Text at Circuit Courts-Original Section, page 461a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing officer's finding that licensee refused test was supported by competent substantial evidence that licensee agreed to submit to breath test but failed to provide adequate second breath sample after being told results of first sample—Although licensee told officer that she had asthma, she did not provide evidence at hearing corroborating that claim—Even if licensee had provided evidence that she has asthma, certiorari relief would not be warranted where there was no evidence that she was experiencing that condition at time of test—No merit to argument that officer was required to reread implied consent warning to licensee after first breath sample in order for consequences of refusal to attach to failure to provide sufficient second sample

NEELAM LOCHAB, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Flagler County. Case No. 2020 CA 000130. August 9, 2022. Counsel: G. Kipling Miller, Daytona Beach, for Petitioner. Mark L. Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(TERENCE R. PERKINS, J.) THIS CAUSE came before the Court on a Petition for Writ of Certiorari filed by Neelam Lochab, by and through her attorney G. Kipling Miller, Esquire. The Petitioner did not request oral argument; therefore, this order is rendered without a hearing on the matter. The Court has carefully reviewed the Petition, and being otherwise fully advised in the premises, finds as follows:

Statement of the Facts

On December 2, 2019, on or about 5:01 p.m., Corporal Myers and Deputy Nguyen of the Flagler County Sheriff's Office Deputies were dispatched to the area of Belle Terre Parkway and Pine Lakes Parkway North in response to a single-vehicle crash. Corporal Myers contacted the driver and sole occupant of the vehicle, identified as the Petitioner, and observed signs of impairment and an empty bottle of Heineken in the rear passenger area of the vehicle. The Petitioner admitted to being involved in the crash. Two witnesses on scene provided law enforcement with statements of how the crash occurred and identified the Petitioner as the driver of the vehicle. Deputy Nguyen contacted the Petitioner and observed signs of impairment, which included watery eyes. Petitioner had the strong odor of an alcoholic beverage coming from her breath.

The Petitioner performed the field sobriety tests poorly. The Petitioner agreed to submit a breath test. Prior to submission of the first breath sample, the arrest report states that another officer read the implied consent warning at 6:50 p.m. Petitioner provided one sample with results of 0.150 g. 210 L. After becoming aware of the result, Petitioner began to cough and advised that she had asthma. Petitioner was asked to provide a second breath sample with the result of "Volume Not Met". Petitioner stated that she had asthma. A third sample was "inconclusive". The Petitioner's failure to provide two valid breath samples is considered a refusal.

The Petitioner was placed under arrested for Driving Under the Influence (DUI) in violation of Section 316.193, Florida Statutes and issued a DUI citation. This citation also served as notice of the Petitioner's license suspension for refusing to submit to a breath test in violation of Florida's Implied Consent Law in Section 316.1932, Florida Statutes. *Id.* She was also issued a citation for refusing to submit to a lawful breath sample in violation of Section 316.1939, Florida Statutes. The Petitioner timely requested an administrative hearing pursuant to Section 322.2615, Florida Statutes to challenge the lawfulness of her driver license suspension.

A hearing was held on February 4, 2020, by Attorney Hearing Officer Kathryn Bischoff with the Department's Bureau of Administrative Reviews. The Flagler County Sheriff's office submitted several documents pursuant to Section 322.26151, Fla. Stat. that were entered into the record without objections. The Petitioner testified that she had a preexisting asthmatic condition that prevented her from submitting a second valid sample of her breath.

At the conclusion of the administrative hearing, the Petitioner's counsel moved to invalidate the suspension based upon arguments now asserted in the Petition. Attorney Hearing Officer Bischoff denied the argument in the final order dated February 10, 2020, as follows:

> Motion 2: To invalidate the suspension because the Petitioner was not told if she failed to provide two valid breath samples it would be considered a refusal, nor was she read Implied Consent after the third attempt to provide a breath sample, therefore the Refusal was not willful. *Citing State v. Sloan*, 2 Fla. L. Weekly Supp. 594a (Fla. Palm Beach County 1995) and *Counts v. DHSMV*, 19 Fla. L. Weekly Supp. 1002a (Fla. 15th Cir. Ct. 2012).
>
> Ruling Motion 2: The Petitioner was read Implied Consent and agreed to submit a breath sample. The Petitioner advised law enforcement she had asthma after she was told the results of the first breath sample (0.150). There is no evidence the Petitioner had any difficulty providing the first breath sample or that she requested to provide a blood sample. The Petitioner did not enter any medical documentation to prove she suffers from asthma or proof of any prescription medication to treat asthma. The cases cited were considered and determined to not be persuasive.

The Petitioner timely challenged the above legal conclusion of Attorney Hearing Officer Bischoff via the Petition filed in the instant matter.

Certiorari Standard of Review

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was afforded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982)). The Court is not entitled to reweigh evidence or substitute its judgment for that of the agency or board. *See Dep't. of Highway Safety and Motor Vehicles v. Trimble*, 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. The Court is restricted solely to the record of the proceedings below and can only consider facts presented therein. *Battaglia Fruit Co. v. City of Maitland*, 530 So.2d 940, 943 (Fla. 5th DCA 1988). Additionally, the Court's certiorari review power does not allow the Court to direct the agency or board to take any action but is limited to quashing the order being reviewed, if appropriate. *See City of Kissimmee v. Grice*, 669 So.2d 307, 309 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D601b] (citing *ABG Real Estate Dev. Co. of Florida, Inc. v. St. Johns County*, 608 So.2d 59 (Fla. 5th DCA 1992)).

The fact-finding portion of this proceeding already occurred in the formal hearing held before the Department pursuant to Section 322.2615, Fla. Stat. At that formal hearing, the hearing officer may solely rely upon documentary evidence submitted by law enforcement, including the contents of crash report, which is deemed self-authenticating. Section 322.2615(2), Fla. Stat., Rule 15A-6.013(2), Fla. Admin. Code. The hearing officer is the sole decision maker as to the weight, relevance, and credibility of any evidence presented.

Furthermore, the burden of proof at the formal hearing is whether the driver license suspension issued by law enforcement was supported by a preponderance of the evidence. *Id.*

When a driver license suspension is sustained and the driver files a petition in circuit court, first tier certiorari review does not provide for a de novo appeal. Section 322.2615, Fla. Stat.; Rule 15A-6.019, Fla. Admin. Code. This Court's scope of review in conduction certiorari review is limited to "whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982).

Pursuant to Section 120.68(7), Florida Statutes, a reviewing court is authorized to "remand a case to [an] agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that . . . [t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." *Alvarez v. State Board of Administration*, 326 So.3d 730, 734 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1777a] ("With the passage of Article V, section 21 of the Florida Constitution effective November 6, 2018, the previously afforded deference to agency interpretation of statutes or rules has been abolished.") (Internal citations omitted). The agency's conclusions of law are consequently reviewed de novo on certiorari review. *G.R. v. Agency for Persons with Disabilities*, 315 So.3d 107, 108 (Fla. 3d DCA 2020) [46 Fla. L. Weekly D140b]. However, a ruling only constitutes a departure from the essential requirements of law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice, *Clay County v. Kendale Land Development, Inc*., 969 So.2d 1177 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a] (citing *Combs v. State*, 436 So.2d 93, 96 (Fla. 1983)), and a writ of certiorari will not be issued as a result of a de minimis legal error. *Futch v. Florida Dept. of Highway Safety and Motor Vehicles*, 189 So.3d 131, 132 (Fla. 2016) [41 Fla. L. Weekly S150a] ("[T]he departure from the essential requirements of law necessary for the issuance of a writ of certiorari is something more than a simple legal error.") (quoting *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 889 (Fla. 2003) [28 Fla. L. Weekly S287a] (further internal citations omitted)).

Jurisdiction

The Court has jurisdiction to consider this Petition pursuant to Rule 9.030(c)(1)(C), Florida Rules of Appellate Procedure and Section 322.31, Florida Statutes.

Legal Analysis

The record evidence reflects that the Petitioner was fully capable of providing a second breath sample but feigned an asthmatic episode once she realized that her alcohol level was beyond the legal limit. This was the conclusion of the hearing officer, and on certiorari review, this Court does not reweigh the evidence. One court, on nearly identical facts, held that a Court's limited scope of review in certiorari proceedings did not require it to evaluate the reason a second sample of breath was not provided. *Santiago v. Dep't of Highway Safety & Motor Vehicles*, 3 Fla. L. Weekly Supp. 43b (Fla. 20th Cir. Ct. Mar. 1, 1995) (holding that the Petitioner's self-serving claim that she was having difficulty breathing as an excuse as to why she did not provide a second valid sample of her breath need not be accepted as true by the hearing officer and would not be reconsidered on certiorari review.) The general principle of law is that a finder of fact is not required to believe the testimony of any witness, even if unrebutted. *Dep't of Highway Safety and Motor Vehicles v. Luttrell*, 983 So.2d 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *Dep't of Highway Safety and Motor Vehicles v. Marshall,* 848 So.2d 482 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b]; *Dep't of Highway Safety v. Dean,* 662 So.2d 371 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2179c].

Claims of medical conditions during administration of the breath test or at the administrative hearing are not required to be accepted as true. The facts of this case are similar to *Avard v. Dep't of Highway Safety and Motor Vehicles,* 18 Fla. L. Weekly Supp. 962a (Fla. 20th Cir. Ct. Aug. 18, 2011). In *Avard*, the licensee told the officer that she had asthma and was unable to blow into the breath testing machine. She offered no evidence at the administrative hearing corroborating the claim that she suffers from asthma, and the Court noted that "Petitioner bears the burden of calling any and all witnesses to support her challenge of the evidence presented against her." In this case, the Petitioner failed to present evidence that she suffers from asthma, and the Petitioner's self-serving claim in her testimony, unsupported by other evidence, is deficient for the same reason. *See also Natrillo v. Dep't of Highway Safety and Motor Vehicles,* 20 Fla. L. Weekly Supp. 388a (Fla. 17th Cir. Ct. Dec. 18, 2012) (the Petitioner stated during the breath test that he was experiencing esophageal spasms and needed his nitroglycerine to continue. The Circuit Court nevertheless held that the hearing officer had competent substantial evidence to conclude that the deliberately avoided submitting valid breath samples.).

Even if there was some supporting evidence backing up Petitioner's claim that he or she suffers from asthma, this would still be insufficient, by itself, to warrant certiorari relief. In *Kenyon v. Dep't of Highway Safety and Motor Vehicles,* 16 Fla. L. Weekly Supp. 399a (Fla. 14th Cir. Ct. July 30, 2009), the licensee proved that she had a history of asthma and a rapid heartbeat. However, there was no evidence that the licensee was experiencing either of those conditions at the time of the breath test such that she was rendered unable to satisfactorily complete the test. The Court held that the burden of proving a physical inability to perform a breath test is on the driver claiming the inability, and the Court denied certiorari relief due to petitioner's failure to meet this burden.

The Petitioner asserts that even if her failure to provide a second or third sample may constitute a refusal, the law enforcement officer must reread the implied consent warning after the first breath sample before the consequences of refusal (i.e., a driver license suspension) can follow. This Circuit Court issued a ruling rejecting this same argument in *Coleman v. Dep't of Highway Safety and Motor Vehicles,* 24 Fla. L. Weekly Supp. 660a (Fla. 7th Cir. Ct. Sept. 19, 2016) by holding that "This Court agrees that there is no statutory requirement that the Petitioner be read the implied consent warning more than once." In a refusal case, the reading of implied consent is relevant because the hearing officer is required to determine, based upon a preponderance of the evidence standard, "Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months." Section 322.2615(7)(b)3., Fla. Stat. Nothing within this subsection requires that the person have an accurate understanding of the consequences of refusal or the various legal idiosyncrasies of what will qualify as a refusal; the plain language only requires that the person be told the consequences of a refusal.

The agency did not depart from the essential requirements of law.

Under the standard of *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982), the Court is not entitled to reweigh the evidence or substitute its judgment for the findings of DHSMV's hearing officer. The Court is constrained to determine simply whether the hearing officer's decision was *supported* by competent substantial evidence. The Court finds that the agency did not depart from the essential requirements of law.

Accordingly, it is,

ORDERED AND ADJUDGED that:

The Petition for Writ of Certiorari is hereby **DENIED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Evidence—Licensee was not deprived of procedural due process by failure of Department of Highway Safety and Motor Vehicles to include his driver's license in documents submitted to hearing officer—Court notes that licensee did not object to omission or otherwise raise issue at hearing—Lawfulness of detention and arrest—Competent substantial evidence supported findings that detention and arrest were lawful notwithstanding alleged inconsistencies in officers' notated observations of licensee's condition and chalky substance found in vehicle—Officers had reasonable suspicion to detain licensee after initial consensual encounter and probable cause to arrest licensee for DUI where licensee requested assistance from law enforcement for a flat tire and admitted to dispatch that he had been drinking, responding officer found licensee asleep in driver's seat, licensee voluntarily opened vehicle door and stumbled out, and officers observed indicia of impairment—Review of documents using military time supports finding that licensee was arrested prior to his refusal to submit to breath test

BRIAN DOUGLAS LEE, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES, Respondent. Circuit Court, 10th Judicial Circuit (Appellate) in and for Polk County. Case No. 2020CA-003170, Section 30. August 31, 2021. Counsel: Mark L. Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

(ELLEN S. MASTERS, J.) This matter came before the Court on Petitioner's *Petition for Writ of Certiorari,* filed on October 20, 2020. Petitioner seeks review of the *Findings of Fact, Conclusions of Law and Decision* issued by The Florida Department of Highway Safety and Motor Vehicles (hereinafter "DHSMV") on September 17, 2020. This Court has jurisdiction. *See* Fla. R. App. P. 9.030(c).

Findings of Fact

The Petitioner sought an administrative hearing before the Florida Department of Highway Safety and Motor Vehicles' Bureau of Administrative Reviews to challenge the lawfulness of his driver's license suspension. The Hearing Officer entered into evidence the documentation that was submitted by the Lakeland Police Department and exhibits submitted by the Petitioner. The Petitioner testified as to the accuracy of written documentation and arguments that he submitted, and his sister testified as to the accuracy of written documentation the Petitioner submitted that was purportedly written by the sister. The Petitioner made no objections during the hearing.

The hearing officer made the following findings of fact:

> On August 2, 2020, Petitioner contacted the Lakeland Police Department seeking assistance for a flat tire. In doing so, Petitioner slurred his speech and admitted drinking to the dispatch operator. Officer Roxanna Smith responded to the scene and observed Petitioner asleep in the driver seat of the vehicle with the keys in the ignition. Upon rousing Petitioner, Officer Smith observed him to have poor motor coordination, to admit drinking, and to admit having been impaired by alcohol. Officer Smith sought assistance for a DUI investigation, and Officer Sean Mulderrig responded to the scene. Officer Mulderrig observed Petitioner to have red and watery eyes, slurred speech, poor balance, and the odor of an alcoholic beverage. Officer Mulderrig arrested Petitioner on other charges and transported him to Lakeland Police Department. At the police department, Officer Mulderrig initiated a DUI investigation, but Petitioner declined to cooperate with the investigation. Officer Mulderrig then arrested Petitioner for DUI and requested that Petitioner submit to a breath alcohol test. Petitioner refused. Officer Mulderrig then read the Implied Consent warning to Petitioner. When Officer Mulderrig then requested that Petitioner submit to a breath alcohol test, Petitioner refused to respond. Officer Mulderrig advised Petitioner that refusal to respond would be deemed a refusal to submit to the breath alcohol test. Petitioner continued to refuse to respond.
>
> Based on the foregoing [the hearing officer found] . . . that Petitioner was placed under lawful arrest for DUI.

Because the Petitioner's driver's license was suspended for refusal to submit to a breath, blood, or urine test, pursuant to section 322.2615(7)(b), Florida Statutes, the scope of the hearing before the hearing officer was limited to, based on a preponderance of the evidence:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

Implicit within this scope of review is consideration of the lawfulness of the arrest. *See Florida Dep't of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a].

Standard of Review

When reviewing an administrative proceeding on a petition for writ of certiorari, a circuit court acting in its appellate capacity must determine "whether procedural due process is afforded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

"The departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error." *Housing Authority of City of Tampa v. Burton,* 874 So. 2d 6, 8 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1142a] (*citing Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a]).

> The required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Haines City Community Dev. v. Heggs, 658 So. 2d 523, 527 (Fla. 1995) [20 Fla. L. Weekly S318a] (quoting *Jones v. State,* 477 So. 2d 566, 569 (Fla. 1985)). "A ruling constitutes a departure from the essential requirements of [the] law when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " *Department of Highway Safety and Motor Vehicles v. Hofer,* 5 So. 3d 766 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D583a] (quoting *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a] (*quoting Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1024 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D1005a])).

As for whether the administrative findings and judgment are supported by competent substantial evidence:

> The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Analysis and Conclusions

The Petitioner argues that the hearing officer's decision is not supported by competent substantial evidence. The Petitioner raises various sub-issues within this argument that will be addressed below.

1) Were Due Process Rights Afforded if Driver's License not Submitted to DHSMV?

The Petitioner first argues that his due process rights were violated because his driver's license was not forwarded to the DHSMV as required byt §322.2615(2), Florida Statutes. Section 322.2615(2)(a), Florida Statutes, provides in part that:

> Except as provided in paragraph (1)(a), the law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, the driver license . . . The failure of the officer to submit materials within the 5-day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing.

The Petitioner cites to *Rouf v. State of Florida, Department of Highway Safety and Motor Vehicles*, Case No. 01-2013-CA-3083 (Fla. 8th Jud. Cir. Aug. 27, 2013) [20 Fla. L. Weekly Supp. 1035a], which held that the "mandatory language in section 322.2615 creates a due process right to inclusion of the listed documents in the record before the hearing officer." The court in *Rouf* treated the failure to submit the driver's license to the hearing officer as a due process issue.

The Department counters that the Petitioner failed to raise the issue below and thus the issue is deemed waived. The Department cites *Dep't of Highway Safety & Motor Vehicles v. Lankford,* 956 So. 2d 527 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a] (Driver did not object during evidentiary hearing to officer's failure to bring videotape of traffic stop and arrest to hearing and therefore the issue was not preserved for review). Alternatively, the Department maintains that failure to include the driver's license does not mandate invalidation of the driver's license suspension when the identity of the driver is not at issue.

In *Skinner v. DHSV,* 17 Fla. L. Weekly Supp. 400a (Fla. 4th Jud. Cir. 2010), the court found no due process violation for law enforcement's failure to submit the driver's license to the DHSMV where the driver did not challenge the correctness of their identification and their driver's license number was provided on other documents in the record before the hearing officer. Citing *Skinner, Rogers v. DHSMV,* 24 Fla. L. Weekly Supp. 410a (Fla. 7th Jud. Cir. June 8, 2016), found that there was no deprivation of due process for failure to include a driver's license in the record before the DHSMV hearing officer where the driver did not contest their identity as the person arrested and submitting to the breath test. *Rogers* further found that the driver failed to demonstrate any prejudice since their driver's license number was on other documents that were part of the record. Also citing *Skinner, Colangelo v. DHSMV,* 21 Fla. Law Weekly Supp. 743a (Fla. 7th Jud. Cir. Sept. 27, 2013), found that the failure to include the driver's license in the record before the hearing officer did not support the driver's claims that the hearing officer's findings were not supported by competent substantial evidence and that the essential requirements of the law were observed because the driver did not challenge the correctness of their identity and the physical driver's license was not necessary for a determination of any issues before the hearing officer.

Unlike other issues, due process issues may be raised for the first time on appeal. The Court's review is whether *procedural* due process was afforded. "Procedural due process requires both fair notice and a real opportunity to be heard . . . 'at a meaningful time and in a meaningful manner.' " *Department of Highway Safety and Motor Vehicles v. Hofer,* 5 So. 3d 766, 771 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D583a] (quoting *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.,* 795 So.2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] (quoting *Matthews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976))). In this case, the Petitioner received notice and was provided an opportunity to be heard. Unlike in *Rouf*, the Petitioner in this case did not object to or otherwise raise the issue of law enforcement's failure to include his driver's license in the documents submitted to the hearing officer. Therefore, the Court finds that the procedural due process was afforded.

2) Was there Competent Substantial Evidence that the Petitioner was Lawfully Detained?

The Petitioner next argues that there was not competent substantial evidence that he was lawfully detained. Specifically, the Petitioner argues that he was illegally detained for 31 minutes while sitting on the curb waiting for Officer Mulderrig to arrive to conduct a DUI investigation. The Petitioner maintains that Officer Roxanna Smith did not have a reasonable suspicion that he had committed or was committing a crime. The Petitioner further contends that the circumstances before Officer Smith and Officer Mulderrig did not justify his detention for a DUI investigation and subsequent arrest.

In support of his arguments, the Petitioner contends that there were inconsistencies and contradictions in the observations made by Officer Smith and Officer Mulderrig regarding his physical appearance and impairment. The Petitioner states that the inconsistency and contradiction is that Officer Mulderrig's affidavit states that he observed that the Petitioner had an odor of alcohol coming from his breath, red and watery eyes, and a lack of balance, while Officer Smith's report does not. Based on the Court's interpretation of the Petitioner's arguments, the Petitioner maintains that because Officer Mulderrig's affidavit and Officer Smith's narrative do not include the same observations, they are contradictory and inconsistent and do not constitute competent substantial evidence.

The Department counters that the record contains competent substantial evidence that Officer Smith's initial contact with the Petitioner was a lawful consensual encounter because the Petitioner personally sought law enforcement assistance for a flat tire. The Department further contends that the Petitioner's request for assistance, coupled with the Petitioner informing dispatch that he had been drinking, Officer Smith finding the Petitioner asleep in the driver's seat upon her arrival at the scene, the Petitioner eventually opening the vehicle on his own and stumbling out, and Officer Smith's request for the Petitioner to sit on the curb to avoid injury, constituted a lawful welfare check.

"It is firmly established that an officer does not need any founded suspicion to approach and ask questions of an individual." *State v. Wilson,* 566 So. 2d 585, 587 (Fla. 2d DCA 1990) (*citing Florida v. Royer,* 460 U.S. 491 (1983)). "During a consensual encounter, an individual is free to leave at any time and may choose to ignore the officer's requests and go about his business." *Caldwell v. State,* 41 So. 3d 188, 195 (Fla. 2010) [35 Fla. L. Weekly S425b] (*citing Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993)).

"The community caretaker exception arises from the duty of police officers to 'ensure the safety and welfare of the citizenry at large." *State v. Fultz,* 189 So. 3d 155, 159 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D246a] (*quoting Ortiz v. State,* 24 So. 3 596, 600 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D2311a] (*quoting*_3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.4(c), at 201-02 (4th ed. 2004))). "It is well recognized that police officers may conduct welfare checks and that such checks are considered consensual encounters that do not involve constitutional implications." *Dermio v.* State, 112 So. 3d 551, 555 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a] (*citing Greider v. State,* 977 So. 2d 789, 792 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D949b]).
Pursuant to *State, Dep't of High. Saf. & Motor Veh. v. DeShong,* 603 So.2d 1349, 1352 (Fla. 2d DCA 1992)), "a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." However, "[e]ven a stop pursuant to an officer's community caretaking responsibilities . . . must be based on specific articulable facts showing that the stop was necessary for the protection of the public." *Agreda v. State,* 152 So.3d 114, 116 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2516a] (*quoting Majors v. State,* 70 So. 3d 655, 661-62 (Fla. 1st DCA 2007) [36 Fla. L. Weekly D1355a]).

A consensual encounter may be converted into an investigatory stop. An officer may not conduct an investigatory stop unless he or she has a reasonable or well-founded "suspicion that a person being stopped has committed, is committing, or is about to commit a crime." *Popple v. State*, 626 So.2d 185 (Fla. 1993) (*citing* §901.151, Fla. Stat. (1991)); *see also Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2nd 889 (1968). Pursuant to *U.S. v. Sokolow,* 490 U.S. 1, 7 (1989) (*quoting Illinois v. Gates,* 462 U.S. 213, 232, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527 (1983); *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)), "[t]he concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules. . . . we must consider 'the totality of the circumstances". "The process does not deal with hard certainties, but with probabilities." *Id.* (*quoting Cortez,* 449 U.S. at 418). Further, the Florida Supreme Court provides in *C.E.L. v. State,* 24 So. 3d 1181, 1186 (Fla. 2009) [34 Fla. L. Weekly S695a], that:

> A stop is justified when an officer observes facts giving rise to a reasonable and well-founded suspicion that criminal activity has occurred or is about to occur. (citations omitted). In turn, whether an officer's well-founded suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory stop and is based solely on facts known to the officer before the stop. (citations omitted).

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 555 (1980). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

Here, the hearing officer found the initial encounter between Officer Smith and the Petitioner to be a lawful consensual encounter, as "Officer Smith stopped and interacted with Petitioner because Petitioner called the Lakeland Police Department and sought assistance." The hearing officer also found that Officer Smith had a reasonable suspicion to detain the Petitioner for a DUI investigation based on Officer Smith's observations of the Petitioner when she arrived at the scene and what was relayed by dispatch. Specifically, the hearing officer pointed out that Officer Smith observed the Petitioner unconscious in the driver seat of the vehicle, she observed the Petitioner display poor motor skills and balance when he was exiting the vehicle, and the Petitioner admitted to drinking to the point of impairment. Additionally, the hearing officer noted that Officer Smith was aware that the Petitioner's speech was slurred when the Petitioner called dispatch for assistance with his flat tire. The Petitioner points out that the hearing officer used the term unconscious in his order, while Officer Smith stated in her narrative that the Petitioner was asleep. While the Court agrees that there is some medical difference between someone being asleep versus being unconscious, the connotation by the hearing officer's use of the word unconscious that is supported by the record is that the driver was not aware or alert while in the driver's seat. Even if the Court were to disregard this finding by the hearing officer, there is still sufficient competent substantial evidence to support the hearing officer's determination that Officer Smith's initial encounter with the Petitioner was consensual and that Officer Smith had a reasonable suspicion to detain the Petitioner for a DUI investigation.

3) Was there Probable Cause to Arrest the Petitioner for DUI?

The Petitioner further argues that there was not competent substantial evidence to support his arrest for DUI because his detention for a DUI investigation was not justified based on the circumstances before Officer Smith and Officer Mulderrig. This argument is intertwined with the Petitioner's detention argument and raises similar inconsistency issues with regard to the observations by the officers.

The Petitioner states in the summary argument section of his Petition that there was an inconsistency with regards to the observations by the officers of a white chalky substance found in his vehicle. Essentially, the Petitioner again maintains that because both Officers did not notate making the observation, then it is a contradictory observation. He also states in his summary argument that pictures taken by Sherri Stewart contradict the officer affidavits regarding the drug test kit and whether the substance tested positive or negative for cocaine. However, these alleged inconsistencies were not mentioned in the main argument section of his Petition. The Hearing Officer did not address these claims, instead finding that they were unrelated to the Petitioner's arrest for DUI.

The Department first reiterates the Hearing Officer's conclusion that the Petitioner's arrest for DUI is unrelated to the alleged cocaine. In the alternative, the Department points out that the officer's affidavits were entered without objection, and that the evidence submitted by the Petitioner, which consisted of a statement from his sister that she found a drug test tube on the Petitioner's vehicle three days after his arrest and five grainy pictures of a tube, do not constitute irrefutable proof, but at best create an issue of fact. The Department states that hearing officers are free to reject the testimony of witnesses, even if the testimony is unrebutted. *Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a] (*citing Dep't of Safety & Motor Vehicles v. Marshall,* 848 So. 2d 482 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b]; *Dep't of Highway Safety v. Dean,* 662 So. 2d 371 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2179c]).

Finally, the Department argues that this Court may not reweigh the evidence or substitute its judgement for that of the hearing officer. The Court agrees. "[T]he circuit court is not entitled to reweigh the evidence [when acting in its appellate capacity to review an administrative order]; it may only review the evidence to determine whether it supported the hearing officer's findings." *Department of Highway Safety and Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. *See also Dep't of*

Highway Safety and Motor Vehicles v. Kurdziel, 908 So. 2d 607, 609 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1963a]. The Court agrees that the alleged cocaine is unrelated to the Petitioner's arrest for DUI and will not reweigh the evidence or substitute its judgment for that of the Hearing Officer.

"Probable cause exists 'where the facts and circumstances, as analyzed from the officer's knowledge . . . and practical experience . . . are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Department of Highway Safety and Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (*citing Department of Highway Safety and Motor Vehicles v. Favino,* 667 So. 2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]). "In administrative hearings held to determine whether an individual's license should be suspended for DUI, the courts have generally held that the circumstances surrounding the incident and the officer's general observations are sufficient to establish probable cause." *State, Dept. of Highway Safety and Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1166 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (*citing Department of Highway Safety & Motor Vehicles v. Silva,* 806 So.2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a]; *Department of Highway Safety & Motor Vehicles v. Smith,* 687 So.2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]; *Department of Highway Safety & Motor Vehicles v. Favino,* 667 So.2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]). Here, the Hearing Officer found that there was probable cause for the Petitioner's arrest for DUI based on the Petitioner's admission of drinking and Officer Mulderrig's observations that the Petitioner had bloodshot eyes, slurred speech, poor balance, and the odor of an alcoholic beverage. The Court finds that this finding is supported by competent substantial evidence.

4) Is the administrative findings and judgment supported by competent substantial evidence?

The Petitioner next argues that the Hearing Officer's findings and judgment are not supported by competent substantial evidence. The Petitioner generally contends that all of the evidence relied on by the hearing officer was uncorroborated, contradictory, and conflicting. Various specific findings have been addressed by the Court in other sections of this order. However, one finding not previously addressed is the hearing officer's finding that the Petitioner refused a breath test and was read the implied consent warning after his arrest.

The details of the Petitioner's argument are gleaned from the summary argument section of his Petition. There, the Petitioner asserts as follows:

> Officer Mulderrig's form REFUSAL TO SUBMIT TO A BREATH, URIN, OR BLOOD TES (a. 40) it specifically states that the Petitioner being place under arrest on August 3, 2020 at 0002 hours (2:00) does not specify am or pm and that the Petitioner's refusal was on August 3, 2020 at 0025 hours (12:25 once again does not specify am or pm and Officer Mulderrig's citation that was issued to Lee 'citation ADO336E' for Refusal to submit to breath test was written on Aug. 3, 2020 @ 1:08 am. Therefore thru Officer Mulderrig's own sworn affidavits Lee was not lawfully arrested prior to the refusal.

Petition at 9. The Petitioner takes issue with am and pm not being used and contends that the time of 0002 listed for his arrest means 2:00, either am or pm. This is important because pursuant to §316.1932(1)(a)1.a., Florida Statutes, an unlawful refusal to submit to a breath test must be "incidental to a lawful arrest." While the Petitioner argued below that he did not refuse to take a breath test, he makes no such argument here. Therefore, the Court does not address whether or not the Petitioner verbally refused to take a breath test.

The Department counters that there were two arrests, one for possession of cocaine and drug paraphernalia, and one for driving under the influence after the Petitioner refused to perform field sobriety exercises. The Department points to *State, Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1167-68 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a], which held that an arrest for fleeing to elude may be considered a lawful arrest leading to a request to submit to a breath test, and *Nill v. State, Dep't of Highway Safety & Motor Vehicles,* 28 Fla. L. Weekly Supp. 647a (Fla. 7th Cir. Ct. Sept. 14, 2020), which held that pursuant to *Whitley,* an arrest on drug possession charges may also be considered a lawful arrest leading to a request to submit to a breath test. As such, the Department maintains that either of the above referenced arrests took place prior to the request that the Petitioner submit to a breath test and the Petitioner's refusal.

A review of the law enforcement documents shows that military time, which is based on a 24-hour clock, was used in the documents submitted by law enforcement to the hearing officer. As such, the need for am and pm is not necessary. Thus, the time of the Petitioner's arrest was 12:02 am, not 2:00, and his refusal was at 12:25 am, which was after his arrest. This sequence is further supported by Officer Mulderrig's affidavit and police report in addition to Officer Smith's police report. Accordingly, the Court finds competent substantial evidence supported the hearing officer's finding that the Petitioner refused a breath test and was read the implied consent warning after his arrest. The Court further finds no merit in the Petitioner's general argument that the hearing officer's findings and judgment are not supported by competent substantial evidence.

Therefore, based on the record before the Court, the Petitioner's *Petition for Writ of Certiorari* is **DENIED**.

* * *

Municipal corporations—Code enforcement—Tree removal—Removal of tree from property without city permit was authorized under section 163.045 where tree was determined to be danger by arborist and, although there was no residence on property, property was zoned residential—Removal of trees from property historically used as mobile home park without city permit was not authorized by statute where property was not zoned residential, and use as mobile home park was not on record as legal nonconforming use

MILLER & SONS, LLC, Appellant, v. CITY OF TAMPA, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appellate Division. Case Nos. 20-CA-8741, 20-CA-8742 (Consolidated), Division X. Code Enf. Case Nos. COD-19-3317, COD-19-3586. August 23, 2022. On review of a final order of the Code Enforcement Special Magistrate for the City of Tampa, Florida. Counsel: Anthony F. Sabatini, Mount Dora, and Lindsay Holt, Tavares, for Appellant. Ursula Richardson and Toyin K. Aina-Hargrett, Tampa, for Appellee.

APPELLATE OPINION

(MELISSA POLO, J.) This consolidated case is before the court to review two decisions of the Code Enforcement Special Magistrate for City of Tampa code enforcement ("magistrate"). The magistrate found that Appellant Miller & Sons, LLC violated the city code's proscription against unpermitted tree removal on two properties. Appellant argues that section 163.045, Florida Statutes (2019), which affords owners of residential property the ability to remove trees from their property under certain circumstances without local government approval, preempts enforcement by the City because both properties were residential property. Because one of the properties, zoned residential, would be considered residential under the applicable version of the statute despite the absence of a residence, the magistrate's decision is set aside as to that property. Because the other property is neither zoned residential nor qualifies as a legal, nonconforming residential use under the city code, however, it is not considered residential under the statute. Accordingly, the magistrate's decision as to that property must be affirmed.

This court has appellate jurisdiction to review the magistrate's decision under section 162.11, Florida Statutes. Review is limited to the record created before the lower tribunal. *Id.* Appeals of final orders of code enforcement boards or magistrates are reviewed to determine whether Appellant received due process, whether the decision observes the essential requirements of law, and whether competent, substantial evidence supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). There is no dispute that Appellant received adequate due process. There is also no dispute that Appellant removed the trees from both properties or, as the entity who allegedly committed the violation, was subject to citation by the City. This case centers on whether the decision comports with the essential requirements of law, specifically, whether the properties were, pursuant to section 163.045, Florida Statutes (2019),[1] residential and exempt from local enforcement.

This consolidated case involves two properties cited for improper tree removal. The first property is located at 3011 W. Gandy Boulevard in Tampa (the Gandy property). The second is located at 3105 Schiller Street in Tampa (the Schiller property). A code enforcement magistrate found both properties to have violated the provisions of the code and state law, and Appellant appealed. The properties were consolidated below and for the appeal.

FACTS PERTAINING TO THE GANDY PROPERTY

In July 2019, Jonathan Lee, an International Society of Arboriculture (ISA)-certified arborist and partner in Appellant Miller & Sons, LLC, opined that a large number of trees presented a danger to persons and property. Thereafter, Miller and Sons, LLC was retained to remove trees at the Gandy property, and, in August 2019, Miller and Sons removed 27 trees without a permit. One of the trees was not even located on the property. Appellant and the property owner, Life O'Reilly MHP, LLC, were cited for unpermitted tree removal under the city code. The owner admitted the violation and settled with the City. Only Appellant appeared before the magistrate. Appellant is a proper party pursuant to sections 27-284.21, 27-284.2.4, and 27-284.2.5, Tampa, Fla. Code.

Appellant did not dispute that it had cut down the trees, only that it was illegal to do so without a permit given the adoption of section 163.045, Florida Statutes (2019). The statute allows an owner of residential property to remove a tree that, in the opinion of an ISA-certified arborist or a Florida licensed landscape architect, presents a danger to person or property.

The Gandy property had historically operated as a mobile home park, but at the time the trees were removed, it was disputed as to whether anyone was *legally* residing on the property. Regardless of whether anyone was living on the property, it was zoned for commercial, not residential, use. In addition, the property's purported use as a trailer park was not on record as a legal, nonconforming use, and it lacked the necessary certification by the State Department of Health for use as a mobile home park. In addition to its contention that the Gandy property was not residential, the City also argued that the trees did not pose a danger to person or property, rather, they were considered by the owners to be obstacles to development.

FACTS PERTAINING TO THE SCHILLER PROPERTY

Located in an area in the single-family residential zoning classification, in the summer of 2019, the Schiller property was vacant land, so no one lived on it. There was a house located on the adjacent property. As it happens it was the neighboring house that the tree was alleged to pose a danger to, but it, too, was unoccupied and owned by the same entity that owns the Schiller property. After several inspections wherein a city arborist determined the subject tree posed little risk to person or property, the property owner nonetheless sought a variance to remove it, because most agreed the tree would be impacted by the contemplated development.

Before the variance process could be completed, however, section 163.045 became law. Thereafter, in August 2019, arborist Jonathan Lee of Miller & Sons determined that the tree was a "moderate danger" and provided the documentation necessary to remove the tree. After the tree's removal, the City issued a notice of violation to Miller & Sons. The property owner, S Tile and Marble, was also cited, but it defaulted when it failed to appear or challenge the notice. That finding is not at issue.

On October 7, 2020, the magistrate issued an order finding Miller and Sons in violation of the code and imposed a fine for unpermitted tree removal on the Schiller property. In so doing, the hearing officer determined that, although zoned residential, the vacant lot was not in residential use at the relevant time. The magistrate determined the tree's removal did not fall under the auspices of the statute.

This appeal followed. Appellant maintains that both properties are residential and enjoy the protection of section 163.045, Florida Statutes. The City argues that neither property is residential and that the magistrate's decision should be affirmed.

LEGAL ANALYSIS

The applicable version (now amended) of section 163.045, Florida Statutes reads:

> A local governmental may not require a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree[2] on residential property if the property owner obtains documentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to person or property.

"Residential," as it modifies "property," is not defined. The applicable statute also includes no standards an arborist or landscape architect must follow to determine whether a tree poses a danger to person or property.

Despite Appellant's argument to the contrary, nothing in either the applicable version or newly enacted statute prevents a local government from ensuring compliance with state law. *Vickery City of Pensacola,* 2022 WL 480742 *3 (Fla. 1st DCA Feb. 16, 2022) [47 Fla. L. Weekly D1366c] (stating that there is no impediment to a municipality asking for the documentation required by section 163.045(1)). If *state* law is complied with, however, the City may do nothing else. *Id.* Here, of course, the City determined that the properties were, among other things, not residential. Based on this, the City initiated code enforcement proceedings.

Appellant urges this court to find that the statute is not vague and that the ordinary dictionary definition should govern. In contrast, the City urges that either a property's legal status *or* presence of a home on the property should control. Under the controlling version of the statute and the only judicial decision interpreting that version of the statute, they're both wrong.[3]

With regard to the Gandy property, the zoning classification or legal status of the property is controlling under the 2019 version of the statute. *Vickery,* 2022 WL 480742 *4 (construing the 2019 statute, stating that " '[r]esidential property' is property *zoned for residential use or, in areas that have no zoning, property used for the same purposes as property zoned for residential use*. To hold otherwise would ignore the term's common use and improperly limit section 163.045(1).") (Emphasis added).[4] Here, the Gandy property was not zoned residential, and it was not on record as a legal, nonconforming use. Under *Vickery,* the Gandy property is not residential property. Accordingly, the magistrate's decision as to the Gandy property is affirmed.

In contrast, under *Vickery*, the Schiller property would be considered residential because it is zoned residential, even though the

owners were not living on the property at the time the tree was removed. *Vickery*, 2022 WL 480742 *4 (rejecting City's contention that the statute was inapplicable where the owners did not yet reside on their land). This requires the court to set aside the judgment as to the Schiller property.

It is therefore ORDERED that the magistrate's order as to the Gandy property is AFFIRMED, and the order as to the Schiller property is REVERSED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

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[1]Section 163.045 has been substantially revised since the subject properties were cited. All references to the statute are to the 2019 version.

[2]The statute's reference to "a tree" presents an interesting view here. Whether one can draw any conclusions as to the legislature's intent to limit removals to a single tree, it at least suggests that mass removal of trees was not intended by the statute.

[3]It must be noted that no one had the benefit of the *Vickery* decision at the time of the underlying hearing.

[4]In *Vickery,* the property was zoned residential, but the owners didn't yet live on the property.

* * *

Volume 30, Number 8
December 30, 2022
Cite as 30 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Developmental disabilities—Involuntary admission to residential services—Annual review—Remote hearing—A Chapter 393 annual review hearing implicates a liberty interest sufficient to trigger due process protections—Although respondent has already been committed and no greater deprivation of liberty is likely, the fact that respondent could be involuntarily held for longer than necessary is enough to trigger due process—Discussion of Chapter 394 Baker Act proceedings, the right to confront witnesses, the right to effective representation, and rule 2.530—Given the significant differences between mental illness and developmental disability, and the nature of a review hearing versus initial commitment, there is no constitutional imperative that would require respondent's in-person attendance at a Chapter 393 annual review hearing on ground that respondent has a right to be in same room as judge—Constitutional right to confront witnesses is not implicated in annual reviews because they are civil hearings—There is no impediment regarding remote oaths, as rules have been adjusted to provide for remote swearing in of witnesses—There is no denial of effective representation simply because respondent and attorney are both appearing remotely—Zoom breakout rooms or equivalent accommodations permit confidential discussions for respondents and their attorneys and can be requested whenever counsel feels the need to consult—Respondent is ordered to appear at annual review hearing via Zoom over objection of respondent's counsel

IN RE: CLINTON VELEZ, Respondent. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2020-MH-000037. November 29, 2022. David Frank, Judge. Counsel: Marcia Perlin, Assistant Public Defender, Tallahassee, for Ward. Michele Lucas, Senior Attorney, Office of the General Counsel, Tallahassee, for Agency for Persons with Disabilities.

ORDER ON RESPONDENT'S OBJECTION TO REMOTE APPEARANCE

This cause came before the Court for hearing on November 8, 2022 on respondent's objection to conducting the annual review hearing via Zoom videoconferencing, and the Court having reviewed the papers submitted in support of and opposition to the objection and the court file, heard testimony and argument of counsel, and being otherwise fully advised in the premises, finds

It was only a matter of time before courts would have to struggle with remote appearance procedures post-pandemic. We knew it was coming. *See* Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, Northwestern University Law Review, 115:1875 (2021)

For the present case, the Court is not asked to determine what is legally sufficient or appropriate during a pandemic emergency. Rather, it is being asked to determine the legal sufficiency of remote video appearances in normal times. Specifically, the issue is whether a respondent in a Chapter 393 (developmental disability) civil commitment annual review can demand to be physically present in the courtroom.

The issue is more complex than it may seem. The analysis must include federal and state constitutional imperatives, Florida statutory requirements, and court rules.

Is there a Liberty Interest Sufficient to Trigger Due Process Protections?

In Florida, there are two ways a person can be involuntarily committed for a mental health related issue—Chapter 394 (Baker Act) and Chapter 393 (for persons with developmental disabilities).

Whether analyzed under the state or federal constitution, there should not be any disagreement over the basic premise and, therefore, the Court will not devote much time to it. Simply put—"Because involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied the right to be present, to be represented by counsel, and to be heard." *Ibur v. State*, 765 So.2d 275, 276 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1934c], citing *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972) (other citations omitted).

Nonetheless, at the hearing, petitioner Agency for Persons with Disabilities ("APD") invited the Court to assess whether a Chapter 393 annual review hearing actually implicates a deprivation. After all, the respondent already has been "committed." The review is to ensure proper care and can only result in the status quo or less restriction (movement to a community-based program).

Even though no greater deprivation is likely, this Court finds the fact that a respondent could be involuntarily held for longer than necessary is enough to trigger due process.

The subject of the present matter is a Chapter 393 annual review hearing. It is not the initial admission or commitment. The question whether due process is required for a Chapter 393 annual review also has been answered:

> A state must release a person who is involuntarily committed if the grounds for his commitment cease to exist. Due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed. But that requirement—release the committed when they deserve to be let out—is toothless if a state does not periodically review whether the grounds for commitment are met. That is, a state could get around the timely-release requirement by simply refusing to ever consider the continued propriety of commitment. To effectuate that requirement, then, the state must undertake some form of periodic review.

J.R. v. Hansen, 803 F.3d 1315, 1321 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C1686a] (striking the predecessor to today's Section 393.11 as unconstitutional due to the absence of effective periodic review).

In 2016, the Florida Legislature amended Section 393.11 to comply with the periodic review requirement. The current statute reads as follows:

> (14) REVIEW OF CONTINUED INVOLUNTARY ADMISSION TO RESIDENTIAL SERVICES.—
>
> (a) If a person is involuntarily admitted to residential services provided by the agency, the agency shall employ or, if necessary, contract with a qualified evaluator to conduct a review annually, unless otherwise ordered, to determine the propriety of the person's continued involuntary admission to residential services based on the criteria in paragraph (8)(b). The review shall include an assessment of the most appropriate and least restrictive type of residential placement for the person.
>
> (b) A placement resulting from an involuntary admission to residential services must be reviewed by the court at a hearing annually, unless a shorter review period is ordered at a previous hearing. The agency shall provide to the court the completed reviews by the qualified evaluator. The review and hearing must determine whether the person continues to meet the criteria in paragraph (8)(b) and, if so, whether the person still requires involuntary placement in a residential setting and whether the person is receiving adequate care, treatment, habilitation, and rehabilitation in the residential setting.
>
> (c) The agency shall provide a copy of the review and reasonable notice of the hearing to the appropriate state attorney, if applicable, the person's attorney, and the person's guardian or guardian advocate, if appointed.

(d) For purposes of this section, the term "qualified evaluator" means a psychiatrist licensed under chapter 458 or chapter 459, or a psychologist licensed under chapter 490, who has demonstrated to the court an expertise in the diagnosis, evaluation, and treatment of persons who have intellectual disabilities.

Doe v. State

The Court must first address Florida Supreme Court precedent in *Doe v. State*, 217 So.3d 1020 (Fla. 2017) [42 Fla. L. Weekly S553b]. Although not directly on point with the current Chapter 393 issue, the *Doe* court held that a person undergoing the initial commitment in a Chapter 394 proceeding has the right to be present in the room with the judge. *Id*. at 1026.

First, it is important to acknowledge that the holding in *Doe* is applicable to a Chapter 394 Baker Act proceeding, *not* a Chapter 393 proceeding. *Id*. at 1025 ("It is clear that the Legislature recognized that individuals subject to the Baker Act are among the most vulnerable in our society.") It could be argued that its mandate is persuasive as to a Chapter 393 proceeding, but not binding.

The *Doe* court was primarily balancing the convenience of the judicial officer against the psychological detriment to the respondent:

> Convenience of the judicial officer is insufficient to justify the violation of an individual's constitutional rights. Indeed, the Amicus Brief of the Fifteenth Judicial Circuit offers no reason other than expediency for desiring a pilot program allowing for the remote appearance of judicial officers via videoconferencing technology. By contrast, the Amicus, Disability Rights of Florida, Inc., offers compelling argument as to why the remote appearance of judicial officers is harmful to patients. . . .

Id. at 1026.

The *Doe* court gave considerable weight to a report by a subcommittee appointed by the Florida Supreme Court in 1997. The court noted:

> In the Report, the subcommittee addressed the conduct of involuntary placement hearings by video. The subcommittee noted that when involuntary placement hearings are held in receiving facilities—as is the case here—patients frequently do not understand that a formal court hearing is taking place. . . . Martha Lenderman pointed out that some individuals' mental health problems include symptoms of paranoia. These persons may react negatively to video hearings. Some individuals with mental illnesses may be too confused to understand a procedure involving a video hearing.

Id. at 1030-31.

This Court similarly gives the factor of judicial convenience little weight when balancing the relevant interests. The comfort of the judge is not a consideration.

However, the concern of harm to the respondent is a distinguishing factor. Mental illness is distinctively different in nature from developmental disability (formerly referred to as "mental retardation").

Prior to the hearing, the Court advised the parties that, although not required, it would appreciate the presentation of expert testimony, especially regarding the differences between mental illness and developmental disability. APD called Martha Mason, Psy.D. to testify at the hearing. The respondent did not offer any expert testimony.

Dr. Mason is a licensed psychologist currently serving as APD's Senior Clinical Psychologist Supervisor. Her degrees include a Doctor of Clinical Psychology, Neuropsychology and Health Psychology, a Master of Arts, Clinical Psychology, and a Bachelor of Science, in Information Systems Management and Criminal Justice. She has been working in the field of clinical psychology (assessments) since 2009.

Dr. Mason testified that there are several distinguishing factors that make video appearances more likely to harm persons who have a mental illness versus persons with a developmental disability. Persons with a mental illness often have an "altered level of awareness" where persons with developmental disabilities have a more "static" mental state. The heightened mental state of persons with mental illness make them more likely to become agitated or confused. She testified that the American Psychological Association has approved video conference for remote assessments and interviews. She testified that the APA had determined that the most important factor was whether the person trusted the proceeding, the perception of fairness, not whether the proceeding was live or remote. In other words, what mattered was whether the person felt he or she was being heard and could participate.

In *Clarington v. State*, the Third District held that remote appearances for a violation of probation hearing were constitutionally and statutorily permissible, at least during a pandemic. 314 So.3d 495 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2671a], cert. denied, No. 3D20-1461, 2021 WL 115633 (Fla. 3d DCA Jan. 13, 2021) [46 Fla. L. Weekly D157a], and review denied, No. SC20-1797, 2021 WL 1561346 (Fla. Apr. 21, 2021). The court noted the *Doe* court's emphasis on the unique harms associated with mental illness (as opposed to developmental disability):

> We also note the significance placed by the Doe Court on the fact that Baker Act proceedings involved a distinct group of Florida's most vulnerable individuals. . . . The Doe Court further noted that "the remote presence of judicial officers could likely be injurious to the patient's condition." Indeed, on at least eight occasions in its opinion, the Doe Court made reference to the "vulnerable" nature of individuals subject to the Baker Act, and the impact remote proceedings would have on such a vulnerable population. . . ."

Id. at 507 (citations omitted).

Interestingly, the Unites States Supreme Court addressed this very issue in *Heller v. Doe by Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). In *Heller*, Kentucky had enacted a procedure that required a lower standard of proof in commitments for developmental disabilities (referred to as "mental retardation') than for mental illness.

The court accepted the premise, noting:

> . . .mental retardation is easier to diagnose than is mental illness. That general proposition should cause little surprise, for mental retardation is a developmental disability that becomes apparent before adulthood. By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years. Mental illness, on the other hand, may be sudden and may not occur, or at least manifest itself, until adulthood.
>
> This difference between the two conditions justifies Kentucky's decision to assign a lower standard of proof in commitment proceedings involving the mentally retarded. In assigning the burden of proof, Kentucky was determining the "risk of error" faced by the subject of the proceedings. If diagnosis is more difficult in cases of mental illness than in instances of mental retardation, a higher burden of proof for the former tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question. From the diagnostic standpoint alone, Kentucky's differential burdens of proof (as well as the other statutory distinction at issue) are rational.
>
> There is, moreover, a "reasonably conceivable state of facts," from which Kentucky could conclude that the second prerequisite to commitment—that "[t]he person presents a danger or a threat of danger to self, family, or others," is established more easily, as a general rule, in the case of the mentally retarded. . . . Mental retardation is a permanent, relatively static condition, so a determination of dangerousness may be made with some accuracy based on previous behavior. We deal here with adults only, so almost by definition in the case of the retarded there is an 18-year record upon which to rely. This is not so with the mentally ill. Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness.

> It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate. For these reasons, it would have been plausible for Kentucky to conclude that the dangerousness determination was more accurate as to the mentally retarded than the mentally ill.

Id. at 321-24 (citations omitted).

The *Heller* court also noted the more sever nature of commitment for mental illness compared to developmental disability:

> There is a further, more far-reaching rationale justifying the different burdens of proof: The prevailing methods of treatment for the mentally retarded, as a general rule, are much less invasive than are those given the mentally ill. The mentally ill are subjected to medical and psychiatric treatment which may involve intrusive inquiries into the patient's innermost thoughts, and use of psychotropic drugs. By contrast, the mentally retarded in general are not subjected to these medical treatments. Rather, " 'because mental retardation is . . . a learning disability and training impairment rather than an illness,' the mentally retarded are provided "habilitation," which consists of education and training aimed at improving self-care and self-sufficiency skills.

Id. at 324-25 (citations omitted).

Regarding a court's ability to observe firsthand the demeanor and characteristics of the respondent, APD argued that a respondent in a Chapter 393 annual review has already been observed when "admitted," and that the purpose of the annual review is more akin to treatment than commitment. It also argued that videoconferencing (Zoom) was effective for such an evaluation.

It is true that respondents at review hearings already have had the more rigorous (live) hearing that decided whether they would be involuntarily committed in the first place.

The silence (regarding an in person hearing requirement) in Section 393.11 is deafening. There is no requirement or suggestion that limited annual review hearings be conducted live, or that remote appearances are prohibited. Indeed, the limitation in Rule of General Practice and Judicial Administration 2.530(b)(2)(C) (below) strongly suggests that somebody envisioned such hearings being conducted with communication technology.

The statute governing ***the initial commitment*** does have a physical presence requirement:

> [A Chapter 393] ***hearing for involuntary admission*** shall be conducted, and the order shall be entered, in the county in which the petition is filed. The hearing shall be conducted in a physical setting not likely to be injurious to the person's condition.
>
> The person who has the intellectual disability or autism must be physically present throughout the entire proceeding. If the person's attorney believes that the person's presence at the hearing is not in his or her best interest, the person's presence may be waived once the court has seen the person and the hearing has commenced.

Fla. Stat. 393.11(7)(a) and (d) (emphasis added).

Because of the express limitation of *Doe* to Chapter 394 proceedings, the significant differences between mental illness and developmental disability, and the nature of a review hearing versus initial commitment, this Court finds that there is no constitutional imperative, either federal or state, that would require a respondent's in person attendance at a Chapter 393 annual review hearing on the ground that the respondent has a right to be in the same room as the judge.

The Right to Confront

"The Sixth Amendment gives a criminal defendant the right 'to be confronted with the witnesses against him.' This language 'comes to us on faded parchment. . .' " *Coy v. Iowa*, 487 U.S. 1012, 1015, 108 S. Ct. 2798, 2800, 101 L. Ed. 2d 857 (1988). The *Coy* court gave us an historical and artistic perspective:

> The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16. Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak. . . ." Richard II, Act 1, sc. 1.

Id. at 1016.

The court explained its detour into the past as follows:

> This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'

Id. at 1017.

The confrontation protection is deeply rooted in the notion that witnesses who recount damaging testimony should have to look the criminal defendant in the eye. The *emphasis* is on *accusation*.

Chapter 393 respondents are not criminal defendants. The annual reviews are civil proceedings. the constitutional right to confront witnesses is not implicated in a civil proceeding. *S.D. v. Dep't of Children and Families*, 208 So.3d 320, 322 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D105c].

And this makes sense. There are no accusers. The review is typically based on the examination of one APD expert. The evaluator must be a licensed psychiatrist under Chapter 458 or Chapter 459, or a psychologist licensed under Chapter 490 and have experience in the diagnoses, evaluation and treatment of persons with disabilities. The evaluator does a clinical interview of the respondent, reviews medical and facility records, and renders an expert opinion on the appropriateness and necessity of the current facility and care.

Counsel for the respondent has access to all the same documents that are reviewed by the APD evaluator. She also has the opportunity to discuss the records with her client prior to the hearing. And of course, she has the opportunity to cross examine the evaluator and present the respondent's own evidence.

Several civil courts have approved the use of communications technology to conduct the examination of witnesses. The Third District approved of remote Skype appearance for a key witness during a termination of parental rights trial. 208 So.3d at 322. The witness testified about sexual abuse as a child. *Id*. The trial court ultimately found that clear and convincing evidence supported terminating parental rights. *Id*. The court held that, "The [witness'] testimony via Skype afforded the Father ample opportunity to cross-examine the witness." *Id*. at 321.

There also is no impediment regarding remote oaths. The rules, having now been adjusted to the new normal versus pandemic times, provide for the remote swearing in of witnesses.[1]

The Court finds that there are no confrontation deficiencies in Chapter 393 annual reviews conducted with communication technology (Zoom videoconference).

The Right to Effective Representation

Florida Statutes provide respondents the right to representation in Chapter 393 proceedings. Fla. Stat. 393.11(6)(a) ("The person who has the intellectual disability or autism must be represented by counsel at all stages of the judicial proceeding.").

"While the right to appointed counsel in Baker Act involuntary civil commitment proceedings is provided by Florida statute, the constitutional guarantee of due process would require no less." *Pullen v. State*, 802 So.2d 1113, 1119 (Fla. 2001) [26 Fla. L. Weekly S583a]; and see *Erlandsson v. Erlandsson*, 296 So.3d 431 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1102a]). There is no reason to conclude that this would not apply to an involuntary civil commitment under Chapter 393.

Accordingly, the right to counsel for respondents in Chapter 393 proceedings is guaranteed by state and federal law. But do such respondents have a right to have their attorneys sitting next to them in the courtroom?

The Court can find no binding authority directly on point.

When asked at the hearing to explain her specific objection to the remote (Zoom) hearing, counsel for the respondent stated that she believed not having her client physically in the room and next to her hampered important communication. They could not whisper clarifications or cross examination strategies with each other as evidence is presented.

The court in *Clarington* stopped short of ruling on the idea that remote appearances would deny the kind of attorney - client conversations one might have when together in a courtroom, and that an absence of such conversations would result in ineffective assistance of counsel. *Id*. at 497. It concluded that there was no evidence to support the contention:

> To the extent Clarington alleges that the remote conduct of the proceeding violates his right to effective assistance of counsel, we conclude that such a claim is too speculative at this point to resolve by way of a preemptive petition seeking prohibition relief. In other words, we know, based upon the trial court's order, that the violation hearing will proceed by witnesses testifying remotely, and we are able to conclude (as we have) that this procedure does not violate Clarington's confrontation or due process rights. To the extent, however, that Clarington suggests (for example) that his right to meaningful assistance of, and consultation with, counsel will be violated if he and counsel are in two different locations during the proceeding and communicating by use of audio-video equipment, we decline to address those claims at this point, as we would have to rely upon supposition rather than a record to determine whether (or the extent to which) the proceedings interfered with these rights.

314 So.3d 508.

In rejecting a defendant's argument that a remote sentencing hearing fundamentally infringed upon due process rights, the Third and Fourth Districts noted the trial court's consideration that the defendant:

> (i) was not denied private access to his counsel during the hearing; (ii) had a meaningful opportunity to be heard through his counsel at the hearing; (iii) "was able to present all of the evidence and the argument which he sought to introduce at sentencing"; and (iv) none of the technical difficulties that occurred during the hearing hindered [his] ability to present his mitigation argument to the court.

Gonzalez v. State, 343 So.3d 166, 170 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1577a], review denied, No. SC22-1101, 2022 WL 13670883 (Fla. Oct. 24, 2022), citing *Brown v. State*, 335 So.3d 123 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D611a].

No Florida Appellate court has held that not allowing a litigant to sit next to his or her attorney is a per se violation of constitutional or statutory authorities. *Id*. at 171 ("We decline Gonzalez's invitation to conclude, under circumstances presented here, that a lawyer who is not sitting next to a defendant at counsel table during a probation violation hearing or a probation sentencing hearing is ineffective as a matter of law, such that a trial court commits fundamental error by remotely conducting such proceedings.").

The Court has been doing Chapter 393 civil commitment annual review hearings for more than three years. During this significant period, the Court has not observed instances where a respondent has made a clarification or statement that really impacted the proceeding. Basically, everything is handled by counsel, an Assistant Public Defender, who is an excellent advocate and litigator. She reviews the same materials that the APD expert reviews, is always well prepared, and consistently scores points with precise and searing cross examination of the APD expert. Often her position is in total or partial agreement with APD, as she vigilantly monitors her clients' status.

Even if we assumed that having her client on Zoom rather than in the chair next to her did in fact impede attorney—client chats, there is simply no evidence it would have affected the outcome of any hearing. Typically, if a respondent speaks to the Court, it is to tell the Court that he or she would like to be moved to a particular setting or is doing fine in the current setting. Rarely, if ever, is a respondent called upon to testify to clarify or challenge facts underpinning the APD expert's opinions, or for any other substantive reason.

A 2021 survey was conducted as a joint project of the Washington State Office of Public Defense, the Washington Defender Association, and the Washington Association of Criminal Defense Lawyers. *Defending Clients in the COVID-19 Environment: Survey Results from Private and Public Defense Counsel*. More than 300 attorneys responded to the survey, representing a diverse range of geography, legal specializations, and employment structures. *Id*. The Executive Summary stated, "Defense attorneys are generally satisfied with how courts have conducted web-based hearings. However, confidential client communication continues to be a challenge when courts do not use 'breakout room' features[2]." *Id*. The Summary of Recommendations stated, "To facilitate confidential attorney-client communication: Include breakout room features in remote hearings to ensure the right to confidential advice of counsel; when no breakout rooms are available, invest in alternate forms of communication and exercise patience as parties adapt. . . ." *Id*.

In *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 167 N.E.3d 822 (2021), the defendant challenged the legal sufficiency of Zoom videoconferencing for suppression hearings on various constitutional and other grounds. Specifically, he argued:

> . . .that a Zoom hearing would inhibit his communication with counsel such that it would impair his right to effective assistance of counsel. Specifically, the defendant contends that informal communication between attorney and client, such as passing notes, whispering, or communicating via body language, will be absent during a Zoom hearing.

Id. at 354-55.

As the respondent here, the *Diaz* defendant acknowledged the confidentiality provided by Zoom breakout rooms but argued that they were not enough:

> The defendant recognizes that a Zoom hearing allows him to communicate with counsel privately upon request and through the Zoom "breakout room" feature, but he contends that this form of communication is not sufficient and impermissibly burdens his right to counsel.

Id.

The Massachusetts court disagreed with the defendant and concluded, "that a virtual evidentiary hearing as contemplated by the judge does not deprive the defendant of effective assistance of counsel." *Id*.

Some Florida courts have even condoned remote juvenile delinquency trials, at least during the pandemic. *E.A.C. v. State*, 324 So. 3d 499, 507 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1538a]. *But see, T.H. v. State*, No. 2D20-3217, 2022 WL 16703183, at *6 (Fla. 3d DCA Nov. 4, 2022) [47 Fla. L. Weekly D2260a]. *See also* 208 So.3d at 322 ("The adult daughter's testimony via Skype afforded the Father ample opportunity to cross-examine the witness.").

This Court agrees with Massachusetts on the exact issue, and the Florida appellate courts that have addressed the sufficiency of video appearances from slightly different angles. Zoom breakout rooms, or an equivalent accommodation, permit confidential discussions for respondents and their attorneys and can be requested whenever counsel feels the need to consult. Accordingly, the Court finds that there is no denial of effective representation simply because the

respondent and attorney are both appearing via Zoom.

Practical Precautions

Several United States Supreme Court decisions, ". . .underscore the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976).

In a practical sense, there are several "procedural protections" to ensure respondents are given effective due process during remote video (Zoom) hearings.

First, is the breakout room. *See* discussion in I(B)(3) above.

Second, is the opportunity counsel for the respondent has to go in person to the residential placement facility or group home and be in the room next to her client if she so wishes.

Third, is the opportunity for respondent's counsel to file a motion and explain to the Court why the hearing is atypical in that the respondent himself will need to address factual and expert testimony and the first two measures above would not ensure effective attorney—client interaction to do so. In that case leave to appear live could be granted.

The Rule

The controlling court rule for the present matter is the July 2022 amendment to Florida Rule of General Practice and Judicial Administration 2.530, which states:

> . . . .[A] court official may authorize the use of communication technology ***for the presentation of testimony or for other participation in a proceeding*** upon the written motion of a party ***or at the discretion of the court official***. . . . The decision to authorize the use of communication technology **over objection** shall be ***in the discretion of the court official***.

Fla. R. Gen. Prac. & Jud. Admin. 2.530(b) (emphasis added).

Determining Good Cause [3]

> ***In determining whether good cause exists***, the court official may consider, without limitation, the technological capabilities of the courtroom, how the presentation of testimony through communication technology advances the proceeding or case to resolution, the consent of the parties, the time-sensitivity of the matter, the nature of the relief sought and the amount in controversy in the case, the resources of the parties, the anticipated duration of the testimony, the need and ability to review and identify documents during testimony, the probative value of the testimony, the geographic location of the witness, the cost and inconvenience in requiring the physical presence of the witness, the need to observe the demeanor of the witness, the potential for unfair surprise, and any other matter relevant to the request.

Fla. R. Gen. Prac. & Jud. Admin. 2.530(b)(2)(A) (emphasis added).

The Limitation

> If the use of communication technology is authorized under this rule for a ***proceeding in which the mental capacity or competency of a person*** is at issue, only audio-video communication technology may be used for the presentation of testimony by that person.

Fla. R. Gen. Prac. & Jud. Admin. 2.530(b)(2)(C).

The Exception

> ***Unless governed by another rule of procedure or general law*** and with the exception of ***civil proceedings for involuntary commitment pursuant to section 394.467, Florida Statutes***, communication technology may be used . . . .

Fla. R. Gen. Prac. & Jud. Admin. 2.530(b).

To summarize, the only limitations on the Court's discretion to authorize the use of communication technology over objection are: 1) is does not include involuntary inpatient placement (admission) for mental illness (Baker Act), and 2) the hearing must be video and audio, not just audio.

Applying The Rule

Regarding Rule 2.530(b)(2)(A)'s criteria, the Court finds as follows:

the technological capabilities of the courtroom,

The real question here is what are the technical requirements for a Zoom videoconference. The only technological capabilities the participants need are a computer or smart phone and the Zoom app. Because these hearings have been conducted via Zoom for almost two years, the Court can safely say that all of the attorneys and participants have the equipment and knowledge needed to effectively videoconference with Zoom. In fact, the residential placement facilities are now accustomed to providing a quiet room with all of the equipment needed to give the Court a clear, full-length view of the respondent with good audio, and a staff attendant to assist with any technical issues.

how the presentation of testimony through communication technology advances the proceeding or case to resolution,

The Court has found the virtual courtroom environment very conducive to the direct and cross examination of the APD expert, typically the only witness who testifies.

the consent of the parties,

Up until the present case (Respondent Velez), there has not been a hearing on a formal objection to remote appearances, and thus the hearings have been mostly conducted with the consent of all of the parties. APD's position is that every such annual review should be by remote Zoom videoconference. Counsel for the respondent objects in this case.

the time-sensitivity of the matter,

Typically, APD and respondent counsel work well to coordinate and schedule annual review hearings. They are not usually time sensitive.

the nature of the relief sought and the amount in controversy in the case,

There is no relief or dollar amount requested. The subject of the hearing is the most appropriate care and placement of the respondent. Respondent is entitled to argue for a less restrictive placement or relinquishment of jurisdiction altogether.

the resources of the parties,

The resources of respondents are typically very limited. The resources of the state are not a limiting factor (for this analysis anyway).

the anticipated duration of the testimony,

The anticipated duration of testimony for a typical review hearing is 30-45 minutes.

the need and ability to review and identify documents during testimony,

Exhibits are not typically shown to the witnesses. The APD expert does a report which is filed ahead of the hearing and the respondent's counsel questions the expert about the report and accompanying recommendations. Both parties have access to the respondent's records prior to the hearing. The records are usually discussed but not admitted into evidence.

the probative value of the testimony,

The probative value of the testimony is very high. It is the centerpiece of the annual assessment.

the geographic location of the witness,

Respondents are typically located in Gadsden, Jackson, or Liberty Counties, most often in Marianna, Florida. APD experts could be in any location in Florida; many appear to be located in Leon County.

the cost and inconvenience in requiring the physical presence of the witness,

Transportation of a respondent would be costly and would drain

extremely limited resources in Gadsden County. Currently, there is no transportation officer. A sheriff's deputy would have to be pulled from his or her bailiff duties, or an investigator or patrol officer would have to be pulled from the street, to go to the motor pool, sign out a vehicle, drive an hour to Marianna, process through the facility, pick up the respondent, drive an hour back to the courthouse, drop off the respondent, and repeat the process after the hearing. It is also hard to imagine that the respondent, in this case Mr. Velez, would prefer being taken from his familiar surroundings and hauled into the formal and somewhat daunting environment of a courtroom for a hearing.

the need to observe the demeanor of the witness,

Witness demeanor is always a consideration. However, respondents typically do not testify on substantive or disputed issues. Instead, if they participate at all, they tell the Court where they would prefer to be placed, (which is important). That means the only testimony in almost all cases is the APD expert, the licensed psychologist. Relatively speaking, there is less of a need to observe the demeanor of an APD expert than eyewitnesses telling different versions of who they saw running from the bank during a robbery.

the potential for unfair surprise,

Chapter 393 annual review hearings are usually well coordinated and timed. However, there are a few occasions when the APD expert has done a supplemental review of records, or a supplemental interview of the respondent, and respondent's counsel has not yet received a copy of the report at the time of the hearing. Those situations have been readily resolved.

and any other matter relevant to the request.

At this point, the relevant considerations have been discussed.

Conclusion

Convenience, and even efficiency, will never outweigh due process. Nonetheless, we are compelled to balance the interests of the individual and the state, the exigencies of the moment, and the practicalities of conducting court business in a manner that *does justice*. In the words of Lord Chief Justice Hewart, "There is no doubt that it is not merely of some importance, but of fundamental importance, that justice must be done, and be manifestly and undoubtedly seen to be done." *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, 259.

The fact that this Court has been asked to scrutinize the legal sufficiency of remote appearance is ironic. There is no greater proponent of live appearance than the undersigned. This Court has on more than one occasion expressed its concern that lawyering via computer screens has degraded the quality and efficacy of advocacy to dangerous levels, even though short of constitutional infirmity. This is especially true for younger attorneys who have been denied the indispensable mentoring that comes from watching more experienced lawyers think on their feet as they look the witness, the juror, the judge, or the opposing attorney *in the eye* in that hallowed house of justice called the courtroom. With rare exception, court proceedings should be in court. This is one of those rare exceptions.

Accordingly, it is ORDERED and ADJUDGED that all participants in the annual review of Mr. Velez will appear with communication technology (Zoom session) over the objection of respondent's counsel.

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[1]An oath may be administered to a witness testifying through audio-video communication technology by a person who is not physically present with the witness if the person is authorized to administer oaths in the State of Florida and the oath is administered through audio-video communication technology in a manner consistent with the general laws of the State of Florida. If the witness is not located in the State of Florida, the witness must consent to be bound by an oath administered under the general laws of the State of Florida." Fla. R. Gen. Prac. & Jud. Admin. 2.530(b)(2)(B)(ii).

[2]"Breakout rooms" are a standard feature with Zoom videoconference software (app). With only a few clicks, the host can place designated participants in a separate session completely isolated from the main session. Only the participants in the breakout room can hear and see each other.

[3]Presumably the criteria are given as a guide for use when determining whether a party has good cause to request the use of communication technology rather than appearing live. It seems logical that it also could inform a court's decision to override an objection to the use of communication technology. Although not a limitation on the Court's discretion, the Court will use the criteria to support its rationale for this order.

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Mobile home sales—Torts—Injunctions—Mobile home brokers are enjoined from entering into contracts using "ASAP or "As Soon As Possible," threatening dissatisfied customers with physical violence, and retaliating against customers for bringing suit on their complaints—Judgment is entered against brokers for breach of contract, violation of motor vehicle licensing statute and FDUTPA, fraud, negligence, and theft

ROGER WINKELS, Plaintiff, v. FLORIDA MOBILE HOME BROKERS, LLC, Defendant. Circuit Court, 3rd Judicial Circuit in and for Columbia County. Case No. 22-35 CA. October 11, 2022. Mark E. Feagle, Judge. Counsel: Jerard C. Heller, The Law Offices of Jerard C. Heller, Tallahassee, for Plaintiff.

FINAL DEFAULT JUDGMENT

THIS CAUSE, having come before the Court on September 16th, 2022, to be heard upon the Plaintiff ROGER WINKELS's Second Motion for Default, and the Court having Granted said Motion and a Default having been entered herein against Defendant, Final Default Judgment shall be and hereby is entered in favor of Plaintiff WINKELS and against Defendant FLORIDA MOBILE HOME BROKERS LLC, as follows:

Count I
Breach of Contract

Liquidated Actual Damages: ($36,000 cash; $150/night x 392=58,800)	$ 94,800.00
Unliquidated Actual Damages: Jurisdiction is reserved	
Consequential Damages: Jurisdiction is reserved	
Costs of mitigation: Jurisdiction is reserved	
Attorney's Fees: Jurisdiction is reserved	
Pre-Judgment Interest (361 days @ 4.34% x $90,150.00)	$ 4,418.66
	$ 99,218.66

Count II
Violation of Florida Statute Section 320.27(9)(a)

Liquidated Actual Damages:	$ 94,800.00
Unliquidated Actual Damages: Jurisdiction is reserved	
Consequential Damages: Jurisdiction is reserved	
Costs of mitigation: Jurisdiction is reserved	
Attorney's Fees: Jurisdiction is reserved	
Pre-Judgment Interest (361 days @ 4.34% x $90,150.00)	$ 4,418.66
	$ 99,218.66

Count III
Unfair and Deceptive Trade Practices:
Violation of Florida Statute Ch. 501

Liquidated Actual Damages:	$ 94,800.00
Unliquidated Actual Damages: Jurisdiction is reserved	
Consequential Damages: Jurisdiction is reserved	
Costs of mitigation: Jurisdiction is reserved	
Attorney's Fees: Jurisdiction is reserved	
Pre-Judgment Interest (361 days @ 4.34% x $90,150.00)	$ 4,418.66
	$ 99,218.66

Declaratory Relief:

IT IS HEREBY DECLARED, pursuant to Fla. Stat. Sec. 501.211, that Plaintiff WINKELS has been and is continuing to be aggrieved by the acts and omissions and practices of Defendant FLORIDA

MOBILE HOME BROKERS LLC as described in the Amended Complaint, in violation of Florida Statute Ch. 501 Part II; such acts and omissions and practices are unfair, deceptive and unconscionable acts and practices in the conduct of trade and commerce, in violation of Fla. Stat. Sec. 501.204(1).

Injunctive Relief:

IT IS HEREBY ORDERED that Defendant FLORIDA MOBILE HOME BROKERS LLC be and hereby is permanently enjoined from the further commission of such acts and/or practices by said Defendant, and shall cease and desist forthwith, to wit, Defendant shall not:

1) Enter into any contracts for the sale of mobile homes using "ASAP" or "As Soon As Possible" with the intent of performing its obligations thereunder in any time or manner other than immediately, diligently and without delay;

2) Threaten, in any manner, verbal, written or otherwise, any dissatisfied customer with physical violence of any kind or type whatsoever;

3) Retaliate against any dissatisfied customer for bringing suit on their complaints by stopping work on such sale or installation or improvement, or by taking and removing debris from such jobsite without consent.

COUNT IV
FRAUD

Liquidated Actual Damages:	$ 94,800.00
Unliquidated Actual Damages: Jurisdiction is reserved	
Consequential Damages: Jurisdiction is reserved	
Costs of mitigation: Jurisdiction is reserved	
Punitive Damages: Jurisdiction is reserved	
Attorney's Fees: Jurisdiction is reserved	
Pre-Judgment Interest (361 days @ 4.34% x $90,150.00)	$ 4,418.66
	$ 99,218.66

COUNT V
NEGLIGENCE

Liquidated Actual Damages:	$ 94,800.00
Unliquidated Actual Damages: Jurisdiction is reserved	
Consequential Damages: Jurisdiction is reserved	
Costs of mitigation: Jurisdiction is reserved	
Punitive Damages: Jurisdiction is reserved	
Attorney's Fees: Jurisdiction is reserved	
Pre-Judgment Interest (361 days @ 4.34% x $90,150.00)	$ 4,418.66
	$ 99,218.66

Count VI
THEFT

Liquidated Actual Damages:	$ 94,800.00
Unliquidated Actual Damages: Jurisdiction is reserved	
Consequential Damages: Jurisdiction is reserved	
Costs of mitigation: Jurisdiction is reserved	
Treble Damages: $ 94,800.00x 3 =	$ 284,400.00
Attorney's Fees: Jurisdiction is reserved	
Pre-Judgment Interest (361 days @ 4.34% x $90,150.00)	$ 4,418.66
	$ 288,818.66

JUDGMENT IS HEREBY ENTERED for the following amounts:

Liquidated Actual Damages:	$ 94,800.00
2X and 3X of Actual	$ 189,600.00
Pre-Judgment Interest (361 days @ 4.34% x $90,150.00)	$ 4,418.66
Taxable Costs ($410 Filing Fee; $75 Service of Process)	$ 485.00
Grand Total Final Judgment	$ 289,303.66

LET EXECUTION AND OTHER FINAL PROCESS ISSUE FORTHWITH in the amount of **$289,303.66.** Jurisdiction of the Court is hereby reserved as to all matters not herein disposed of, including for the enforcement of the Permanent Injunction herein, the award of attorney's fees, and for the conduct of further proceedings as to Unliquidated Actual Damages, Consequential Damages and Costs of Mitigation.

ORDERED AND ADJUDGED that the judgment debtor shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or post judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtor(s) to complete form 1.977, including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household resident over age 15

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. STONEY RENALDO MARTIN, ANDRE M. MARTIN, and US AUTO SALES, INC., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2021-CA-003311. October 6, 2022. G.L. Felter, Jr., Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Richard Shuster, Shuster & Saben, L.L.C., Satellite Beach, for Stoney Renaldo Martin, Defendant. Andre M. Martin, Pro se, Jacksonville, Defendant. US Auto Sales, Inc., Pro se, Sunrise, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANTS, STONEY RENALDO MARTIN, ANDRE M. MARTIN AND US AUTO SALES, INC.

THIS CAUSE having come before this Court at the hearing on September 6, 2022, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, STONEY RENALDO MARTIN, ANDRE M. MARTIN and US AUTO SALES, INC., and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

1. This Court finds that the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's application for insurance required STONEY RENALDO MARTIN to disclose all persons, over the age of 15, living at the policy address at the time of the policy inception, that Plaintiff provided the required testimony to establish that STONEY RENALDO MARTIN's failure to disclose that ANDRE M. MARTIN lived at the policy address was a material misrepresentation because had this information been disclosed at the time of the application for insurance it would have resulted in an increase to the policy premium, and thus, Plaintiff properly rescinded the subject insurance policy.

2. The Court finds there are no genuine issues of material fact as to the allegations set forth in the Plaintiff's Complaint for Declaratory Judgment and the Plaintiff's Motion for Final Summary Judgment against Defendants, STONEY RENALDO MARTIN, ANDRE M. MARTIN and US AUTO SALES, INC.

3. The Defendants, ANDRE M. MARTIN and US AUTO SALES, INC., were properly noticed for the hearing on September 6, 2022, and did not appear at the Summary Judgment hearing nor file any summary judgment evidence. With respect to Defendants, ANDRE M. MARTIN and US AUTO SALES, INC., a Clerk's Default(s) was

entered against Defendants on October 1, 2021.

4. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**.

5. This Court hereby enters final judgment for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, STONEY RENALDO MARTIN, ANDRE M. MARTIN and US AUTO SALES, INC.

6. This Court hereby reserves jurisdiction to consider any claim for costs.

7. This Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the Motion for Final Summary Judgment, the transcript of the Examination Under Oath of STONEY RENALDO MARTIN, the transcript of the Examination Under Oath of ANDRE M. MARTIN, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

a. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX9557, is rescinded and is void ab initio;

b. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY;

c. The Defendant, STONEY RENALDO MARTIN, failed to disclose that and additional resident over the age of 15 lived within his household at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX9557, issued by DIRECT GENERAL INSURANCE COMPANY;

d. There is no insurance coverage for the named insured, STONEY RENALDO MARTIN for any property damage liability coverage, personal injury protection benefits coverage, collision coverage, or comprehensive coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9557;

e. There is no insurance coverage for the Defendant, ANDRE M. MARTIN for any personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9557;

f. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, STONEY RENALDO MARTIN, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9557;

g. The Defendant, STONEY RENALDO MARTIN, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9557, for the December 24, 2020 accident;

h. The Defendant, ANDRE M. MARTIN, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9557, for the December 24, 2020 accident;

i. The Defendant, US AUTO SALES, INC. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9557, for the December 24, 2020 accident;

j. There is no insurance coverage for the motor vehicle accident which occurred on December 24, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9557;

a. Plaintiff shall serve a copy of this Order, by regular mail, to all parties not receiving service of court filings through the Florida Court's E-Filing Portal, and shall file a certificate of compliance in the court file.

* * *

Insurance—Personal injury protection—Declaratory action—Motion to dismiss insurer's complaint seeking declaration regarding rescission of policy based on material misrepresentation and repayment of premiums is dismissed—Insurer was not in doubt as to existence of any right, status, immunity, power or privilege where insurer had already rescinded policy, denied claims, and refunded premiums and insurer has not alleged that there are any individuals or entities challenging its denial—Further, insurer's allegations of harm are grounded in speculation and hypotheticals rather than real threat of immediate injury—Insurer is seeking legal or advisory opinion as to numerous issues in Amended Complaint, which court is without jurisdiction to render

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DEBORAH SOLTERO, a/k/a DEBRA SOLTERO, CARISSA TORRES, KARLA LEMUS SERRANO, RAMON AYERS, JOHNNIE LEE ROBERTS, GARY ALAN SANDERS, GEICO INSURANCE COMPANY, INFINITY INSURANCE COMPANY, CLERMONT CHIROPRACTIC LIFE CENTER, P.A., COMPREHENSIVE HEALTH X5, INC., EMERGENCY PHYSICIANS OF CENTRAL FLORIDA, LLP, and FLORIDA ORTHOPEDIC & REHAB, LLC, d/b/a FLORIDA SPORTS INJURY, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CA-011770-O. August 18, 2022. A. James Craner, Judge. Counsel: William J. McFarlane, McFarlane Dolan & Prince, Coral Springs, for Plaintiff. Coretta Anthony-Smith, Anthony-Smith Law, P.A., Orlando, for Defendants.

ORDER ON DEFENDANTS, CARISSA TORRES, DEBORAH SOLTERO AND COMPREHENSIVE HEALTH X5, INC.'s MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

THIS MATTER having come before the Court on July 28, 2022 on Defendants' DEBORAH SOLTERO, CARISSSA TORRES and COMPREHENSIVE HEALTH X5, INC.'s Motion to Dismiss Plaintiff's Amended Complaint, and having heard arguments of the parties and being considered by the Court and being fully advised of the premises; it is hereby **ORDERED AND ADJUDGED**:

BACKGROUND

1. On or about December 14, 2021, Plaintiff initiated this lawsuit for Declaratory Judgment pursuant to Chapter 86, Florida Statutes and Breach of Contract against Defendants' Soltero and Torres.

2. Defendants' Soltero and Torres each filed Motions to Dismiss the Complaint, which was granted by this Court on April 27, 2022, without prejudice.

3. The Court granted Defendants' Motions to Dismiss because the Plaintiff failed to join indispensable parties to the action thereby divesting the Court of jurisdiction to grant complete relief; and, Plaintiff's Complaint filed to comply with the pleading requirements of Rule 1.110, Florida Rules of Civil Procedure.

4. On May 24, 2022, Plaintiff filed its Amended Complaint for Declaratory Judgment and Breach of Contract.

5. On June 3, 2022, Plaintiff withdrew Count III: Alternative Count—Breach of Insurance Policy Contract and Count IV: Rescission Voids Personal Injury Protection Assignment of Benefits.

6. The remaining counts for this Court to consider are: Count I—Declaratory Relief Material Misrepresentation—Rescission As Per Florida Statute § 627.409; Count II—Declaratory Relief—Material Misrepresentation—Rescission as Per Insurance Policy; and, Count V—Alternative Count—Unjust Enrichment—Repayment of Insurance Premium Refund.

LEGAL STANDARD

"A motion to dismiss tests the legal sufficiency of a complaint. A court may not go beyond the four corners of the complaint in considering the legal sufficiency of the allegations." *Barbado v. Green & Murphy, P.A.,* 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1084a], citing *Bess v. Eagle Capital, Inc.,* 704 So. 2d 621 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2571a]; *Sigma Fin. Corp. v. Investment Loss Recovery Servs., Inc.,* 673 So. 2d 572 (Fla. 4th

DCA 1996) [21 Fla. L. Weekly D1189d]; *Fish v. Post of Amvets No. 85,* 560 So. 2d 337, 339 (Fla. 1st DCA 1990). The Court must accept all well-pled allegations as true, construing them in the light most favorable to the pleader. *See Sobi v. Fairfield Resorts, Inc.,* 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1350a].

ANALYSIS

The purpose of the declaratory judgment action is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations, and is to be liberally construed, section 86.101, Florida Statutes (1979); however, the granting of such relief remains discretionary with the court, and not the right of a litigant as a matter of course. *Kelner v. Woody,* 399 So. 2d 35, 37 (Fla. 3d DCA 1981) (citing *North Shore Bank v. Town of Surfside,* 72 So. 2d 659 (Fla. 1954); *Palm Corporation v. 183rd Street Theatre Corp.,* 309 So. 2d 566 (Fla. 3d DCA 1975); *Garner v. De Soto Ranch, Inc.,* 150 So. 2d 493 (Fla. 2d DCA), *cert. denied,* 156 So. 2d 860 (Fla. 1963). One of the key components of being entitled to declaratory relief is that there is a bonda fide, actual, present need for the declaration. *May v. Holley,* 59 So. 2d 636 (Fla. 1952). The declaratory decree statute does not depend upon the existence of an actual controversy, but depends upon whether or not the movant shows that he is in doubt as to the existence or non-existence of some right and that he is entitled to have such doubt removed. *See Rosenhouse v. 1950 Spring Term Grand Jury,* 56 So, 445, 447 (Fla. 1952).

Here, Direct General is not in doubt as to the existence of some right, status, immunity, power or privilege and is not attempting to have such doubt removed. Distinctively, Direct General has already made a determination to rescind the subject policy of insurance, deny any associated claims and have refunded the named insured for any premiums paid. Direct General has not alleged that there are any individuals or entities challenging its denial. In addition, Direct General seeks a declaration to coverages that it admits do not apply to the instant claim, namely comprehensive and collision coverage. Accordingly, Direct General is seeking a legal or advisory opinion as to numerous issues in the Amended Complaint, which this Court is without jurisdiction to render.

Furthermore, to constitute an actual conversation to invoke the declaratory judgment act, an aggrieved party must make some showing of a real threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future. *State v. Fla. Consumer Action Network,* 830 So. 2d 148 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2189b]. In this case, the allegations of the Amended Complaint are grounded in speculation and hypotheticals. Direct General does not allege that it faces an imminent threat of injury or harm.

As to Defendant Torres, Direct General as failed to plead any facts which would bring her within the jurisdiction of the Court. Therefore, the Court lacks jurisdiction over Defendant Torres at this time.

In addition to the above-referenced reasons, Plaintiff's Amended Complaint still runs afoul of the pleading requirements set forth in Rule 1.110, Fla. R. Civ. P.

RULING

Accordingly, this Court hereby grants Defendants' Soltero, Torres and Comprehensive Health X5, Motions to Dismiss Count I and Count II without prejudice. Plaintiff shall have ten (10) days from the date of this Order to amend Counts I and II.

As to Direct General's Count V for unjust enrichment, this count is hereby dismissed with prejudice as a claim for unjust enrichment cannot be had when a true contact exists as the parties' rights are fixed by law and by the terms of the contract. *See 14th Heinberg, LLC v. Terhaar and Cronley General Contractors, Inc.,* 43 So. 3d 877 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2001b].

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure of insured who rents room in landlords' house to disclose landlords as "household residents" on application does not constitute material misrepresentation—Term "household," which is not defined in application or policy, is ambiguous—Court applies definition of household set forth in *Universal Underwriters Ins. Co. v. Evans*, which stated that the "term 'household' is generally synonymous with 'family' for insurance purposes, and includes those who dwell together as a family under the same roof"— "Household" does not encompass landlord-tenant or simple roommate arrangements.

IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Plaintiff, v. VERLYNE NOEL, KESSY JOSEPH, RITCHI JOSEPH, BENITA LIVERT, JEAN F. SYLLIONA, ALLIED HEALTHCARE OF CENTRAL FLORIDA, LLC, WINFIELD MEDICAL SOLUTIONS, LLC, EDGEWOOD HEALTHCARE & REHAB CENTER, LLC, MEDICAL INJURY CARE PROVIDER'S NETWORK, LLC, and ADVANCED 3-D DIAGNOSTICS, INC. v. VERLYNE NOEL, KESSY JOSEPH and RITCHI JOSEPH, Defendants/Counter-Plaintiffs, v. IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Plaintiff/Counter-Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CA-008220-O. June 23, 2022. A. James Craner, Judge. Counsel: William J. McFarlane, McFarlane Dolan & Prince, Coral Springs, for Plaintiff. Coretta Anthony-Smith, Anthony-Smith Law, P.A., Orlando, for Defendants.

ORDER ON DEFENDANTS/THIRD-PARTY PLAINTIFFS' MOTION FOR FINAL SUMMARY JUDGMENT AS TO THEIR CLAIMS FOR COVERAGE AND PLAINTIFF/COUNTER-DEFENDANT IMPERIAL'S CLAIM FOR DECLARATORY RELIEF FOR MATERIAL MISREPRESENTATION

THIS CAUSE, came before this Court for hearing on Friday, June 10, 2022 on Defendants/Third-Party Plaintiffs, Verlyne Noel, Kessy Joseph and Ritchi Joseph's' Motion for Final Summary Judgment as to their Claims for Coverage and Plaintiff/Counter-Defendant Imperial's Claim for Declaratory Relief for Material Misrepresentation. The Court, after reviewing the Defendants/Third-Party Plaintiffs, Motion, reviewed the court docket and having heard argument of counsel, this Court hereby grants Defendants/Third-Party Plaintiffs, Verlyne Noel, Kessy Joseph and Ritchi Joseph's' Motion for Final Summary Judgment as to their Claims for Coverage and Plaintiff/Counter-Defendant Imperial's Claim for Declaratory Relief for Material Misrepresentation for the reasons set forth below.

UNDISPUTED FACTS

The following are the material facts in this matter which are not in dispute. On or about February 11, 2019, Verlyne Noel completed an application for insurance with Imperial Fire & Casualty Insurance Company ("Imperial"). The policy was in full force and effect when Ms. Noel was injured in a motor vehicle accident on March 3, 2019. At the time of the accident, Ms. Noel had two passengers in her vehicle—Kessy Joseph and Ritchi Joseph. After the loss, Verlyne Noel, Kessy Joseph and Ritchi Joseph submitted claims to Imperial under the subject policy of insurance. Imperial denied their claims asserting that the named insured, Verlyne Noel, made material misrepresentations on her application for insurance by failing to list her landlords, Yvena Mettelus and Terry Mettelus.

Specifically, Imperial's application for insurance states:

Driver and Household Member Information—List all persons of eligible driving age or permit age.								
	Name (As shown on license)	Drivers License Number	License State	Drivers Status	Date of Birth	Gender	Marital Status	Relationship to Applicant
1	Verlyne Noel	XXXXXXXX X5460	FL	Rated Driver	02/06/ 1989	Female	Single	Named Insured

Imperial asserts that Verlyne Noel should have listed her landlords in this section of the application for insurance. Since Noel did not list

them, Imperial rescinded the subject policy of insurance and voided it *ab initio*.

On or about April 21, 2020, Imperial filed its Second Amended Complaint for Declaratory Relief, against several defendants, requesting this Court to declare that due to the alleged material misrepresentations made by Noel, that the insurance contract is *void ab initio;* and, that Imperial has no duty to defend or indemnity any named insured or omnibus insured on the insurance contract for any claims(s) for benefits that have been or will be made by any claimant under the insurance contract. In response, on July 15, 2020, Noel and the Josephs, filed their Answer, Affirmative Defenses and Counter-claim. Defendants/Counter-Plaintiffs' requested this Court to determine that there is coverage for the March 3, 2013 and that each of the Defendants/Counter-Plaintiffs are entitled to such coverage.

Prior to the filing of its action for declaratory relief, on May 28, 2019, Imperial took an Examination under Oath ("EUO") of Ms. Noel. In her EUO, she testified that she lived at [Editor's note: address redacted], Orlando, Florida, 32839 and advised Imperial she rented a room from Yvena Mettelus and Terry Mettelus at that address.

On March 5, 2020, Ms. Noel filed an affidavit in this case attesting that at the time of the policy application, she rented a room from Terry and Yvena Mettelus, she was not related by blood or marriage to either Terry or Yvena Mettelus, she had no relationship with them prior to renting a room from them and neither Terry nor Yvena Mettelus have ever driven her vehicle. Additionally, Ms. Noel provided her [Editor's note: address redacted], Orlando, Florida, 32839 address to Imperial when she completed her policy application.

During the course of discovery, the Defendants/Counter-Plaintiffs deposed several of Imperial's employees, including Imperial's Corporate Representative of Claims, Angela Valliere and Corporate Representative of Underwriting, Rose Chrustic. Both witnesses testified that the term "household" is not defined in Imperial's policy, application for insurance or underwriting guidelines.

STANDARD

Pursuant to the newly amended Florida Rule of Civil Procedure 1.510(a) "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Summary judgment puts an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury. *Petruska v. Smartparks-Silver Springs, Inc.,* 914 So. 2d 502 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2614a]. Florida has adopted almost in its entirety the federal rule 56. In applying this new Rule 1.510 the Court is to look to *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *and Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), commonly referred to as the "Celotex trilogy", as well as the overall body of case law interpreting Rule 56.

In *Celotex,* the Supreme Court of the United States held

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986).

In *Matsushita,* the Supreme Court of the United States expounded that to survive a motion or summary judgment there must be a "genuine" issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). Thus, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *See id.* In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial*." *See id.* (quoting Fed. Rule Civ. Proc. 56(e)). Thus, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Id.*

LEGAL ANALYSIS

This case is premised upon Imperial's contention that the named insured, Verlyne Noel, made a material misrepresentation by failing to list Yvena Mettelus and Terry Mettelus as a "driver and/or household resident" on the application for insurance. Imperial concedes that it does not define "household" in any of its documents including the application or the subject policy of insurance.

Therefore, the Court finds that the term "household" is ambiguous. The issue of whether the insurance application is ambiguous is a question of law to be decided by the trial court. *Markel Am. Ins. Co. v. CSI Structured Consulting Corp.,* 2012 U.S. Dist. LEXIS 40506 (S.D. Fla. 2012), *citing James River Ins. Co. v. Ground Down Engineering, Inc.,* 540 F. 3d 1270, 1274 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1012a] (finding that under Florida law, the interpretation of an insurance contract is a question of law). Moreover, it is well-established law that any ambiguity in the application for insurance is to be resolved against the insurer." (citing *Harris v. Carolina Life Insurance Co.,* 233 So. 2d 833 (Fla. 1970); *Fireman's Fund Insurance Co. v. Vordermeier,* 415 So. 2d 1347 (Fla. 4th DCA 1982); *Gaskins v. General Insurance Co.,* 397 So. 2d 729 (Fla. 1st DCA 1981).

Despite the fact that the Court has determined that "household" is ambiguous, the Court finds that the definition of household as addressed in *Universal Underwriters Ins. Co v. Evans,* 565 So. 2d 741 (Fla. 5th DCA 1990) is applicable to the instant case. In *Universal Underwriters,* the Court stated that, "term 'household' is generally synonymous with 'family' for insurance purposes, and includes those who dwell together as a family under the same roof. *Id.* at 742. "Household" does not encompass landlord-tenant or simple room-mate arrangements. *Id.* at 743.

As found in *Universal,* the Court finds that Verlyne Noel was not required to list Yvena or Terry Mettelus on her application for insurance as they were not members of her household. Therefore, Verlyne Noel did not make a material misrepresentation on her application for insurance. Defendants/Counter-Plaintiffs, Verlyne Noel, Kessy Joseph and Ritchi Joseph are entitled to coverage under the subject policy of insurance for the March 3, 2019 motor vehicle accident.

* * *

Insurance—Discovery—Depositions—Witness tampering—Because insurer's corporate representative was receiving email or text communications from attorneys as to how to answer questions during deposition, insurer is sanctioned for witness tampering

PROGRESSIVE SELECT INSURANCE COMPANY, Plaintiff, v. JEAN R. FRANCOIS, et al., Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-CA-002339-O, Division 40. May 12, 2022. Rehearing Denied July 22, 2022. Reginald K. Whitehead, Judge. Counsel: Robert Lyerly and Blake Levine, (former counsel), Progressive Insurance - PIP House Counsel, Maitland; and Bart R. Valdes and Cameron Frye, (current counsel), De Beaubien Simmons Knight Mantzaris Neal, Tampa, for Plaintiff. Don Mathews, Fort Myers, for Defendants Jean R. Francois and Central Florida Chiropractic Care, Inc. Tricia Neimand, Neimand Law, LLC, North Miami Beach, for Defendant Andrise Francois. Shannon M. Mahoney, Shannon M. Mahoney, PLLC, West Palm Beach, for Defendant South Florida Mobile Open MRI.

ORDER ON DEFENDANTS' MOTION TO STRIKE PLEADINGS AND MOTION FOR ENTRY OF FINAL JUDGMENT, INCLUDING AN AWARD OF ATTORNEY'S FEES AND COSTS, IN FAVOR OF DEFENDANTS BASED ON WITNESS TAMPERING AND FRAUD ON THE COURT COMMITTED BY PROGRESSIVE AND ITS IN-HOUSE COUNSEL

THIS CAUSE having come on to be heard before the Court and the Court having reviewed the file and otherwise being duly advised it is hereupon **ORDERED AND ADJUDGED** that:

1. The Defendant, Jean R. Francois, Andrise Francois, South FL Mobile Open MRI, LLC, d/b/a Premier Diagnostic Imaging in Central Florida Chiropractic Care, INC's Motion to Strike Pleadings and Motion for Entry of Final Judgment, including an award of Attorneys Fees and Costs, in favor of Defendants based on witness tampering and fraud on the Court committed by Progressive an it's In-House Counsel is hereby **GRANTED**.

2. On August 27, 2021, the Defendant took the video deposition of Progressive Corporate Representative, Ryan Fredericks.

3. Throughout the deposition Mr. Fredericks was receiving communication by either email or text from Plaintiff's Attorney's as to how to answer the deposition questions.

4. The Court finds that Progressive Attorney's tampered with deposition testimony.

5. The Court finds that Progressive should be sanctioned for tampering with deposition testimony.

6. The Court strikes the pleadings of Progressive and enters a Final Judgment in favor of the Defendant, including an award of fees and costs

* * *

Criminal law—Elections—Voter fraud—Authority of Office of Statewide Prosecutor to prosecute—Multi-jurisdictional crimes—Motion to dismiss asserting that OSP lacks authority to prosecute defendant for allegedly giving false information when registering to vote in Miami-Dade County and voting in general election in that county despite knowing that he was not a qualified elector is granted—Statute defining authority of OSP requires that crime have occurred in two or more circuits, not merely that effects or consequences of crime be felt in two or more circuits—Defendant whose alleged misconduct consisted of registering to vote and voting in his county of residence knowing that he was not a qualified elector could not be prosecuted by OSP simply because his registration application and ballot was, pursuant to a noncriminal ministerial act, transmitted from local supervisor of elections to Office of the Secretary of State in Tallahassee

STATE OF FLORIDA, Plaintiff, v. ROBERT LEE WOOD, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F22-15009. October 21, 2022. Milton Hirsch, Judge.

ORDER ON MOTION TO DISMISS

The present prosecution is brought, not by the Miami-Dade State Attorney's Office, but by the Office of the Statewide Prosecutor ("OSP"). OSP is empowered to bring criminal prosecutions in Florida when one of two conditions is met: either the demised crime must have occurred "in two or more judicial circuits as part of a related transaction," or the crime must be "connected with an organized criminal conspiracy affecting two or more judicial circuits." Fla. Stat. § 16.56(1)(a). Claiming that neither condition is met here, Robert Lee Wood moves to dismiss for lack of statutory authority to prosecute on OSP's part.[1] Thus the issue before me is not whether Mr. Wood committed the crimes charged, nor even whether he is amenable to prosecution for the crimes charged. The very narrow issue raised by the present motion is whether Mr. Wood is amenable to prosecution *by OSP* for the crimes charged.

My task is made easier—a little easier—because the experienced and scholarly attorneys on both sides of this case have very helpfully entered into a *Joint Stipulation of Facts* ("JS"), eliminating any need for evidentiary hearings and fact-finding with respect to the defendant's motion. According to the stipulation, Robert Lee Wood is a Miami domiciliary who, on September 30, 2020, filled out a voter application form in Miami-Dade County. *JS* ¶1. That application, as is the case with all such applications, was transmitted to the Miami-Dade County Supervisor of Elections, *JS* ¶2, and thence to the Office of the Secretary of State in Tallahassee. *JS* ¶3. The following month the Secretary of State notified the Miami-Dade Supervisor of Elections that it had verified Mr. Wood's voter application, *JS* ¶4, and the Supervisor of Elections then issued a voter ID card to Mr. Wood. *Id.* Mr. Wood voted at his local polling place in Miami in the general election of November, 2020. *JS* ¶5. Like all ballots cast in Florida, Mr. Wood's was forwarded to the Division of Elections in Tallahassee for tabulation. *JS* ¶6. At no time material to these charges did Mr. Wood "physically enter the Second Judicial Circuit"—Leon County, the Tallahassee area—"nor did he himself mail or electronically transfer anything to" that circuit. *JS* ¶7.

The parties' final stipulation is that, "The acts charged in the State's Information did not involve a criminal conspiracy." *JS* ¶8. In the language of § 16.56, the charged offenses are not "connected with an organized criminal conspiracy affecting two or more judicial circuits." If OSP is possessed of authority to bring the present prosecution, it must be because the crimes charged occurred "in two or more judicial circuits as part of a related transaction."

The Information charges two crimes. Count I alleges that Mr. Wood gave false information in the filling out of his voter application form. Count II alleges that Mr. Wood voted in the general election knowing that he was not a qualified elector. These acts—the filling out of the voter application form in September, and the actual voting in November—were Mr. Wood's acts and no one else's. They were performed by him, and they were performed by him at or near his place of residence in Miami. Neither he, nor anyone on his behalf, traveled out of Miami-Dade County to perform them.

OSP argues, however, that the requirement of multi-jurisdictionality is met as to Count I because "it would be reasonably foreseeable to anyone who filled out [a voter] application that it would automatically invoke the participation of a government entity in" Tallahassee. *State's Motion to Strike and Legal Response to Defendant's Motion to Dismiss* ("M/Dism") p. 2. The same rationale is offered as to Count II: "Defendant's unqualified, illegal vote, which occurred in the Eleventh Judicial Circuit, was tallied with other legal votes and sent up to the Second Judicial Circuit as part of a vote tallying and election certification process." *Id.* p. 4.

Thus on OSP's version of affairs, it is unnecessary for Mr. Wood to commit a crime in any but his home jurisdiction in order for him to be subject to prosecution by an entity intended to prosecute only multi-jurisdictional crimes. Voter application forms, and completed ballots, are, as a matter of course, shipped off to Tallahassee from all corners of Florida for tabulation. That, without more, according to OSP, causes any voting-related offense to "occur[ ] . . . in two or more judicial circuits," as required by Fla. Stat. § 16.56. As to this point OSP minces no words: "In the State of Florida, it is impossible to complete either the act of registering to vote or the act of participating in an election within a single circuit." *M/Dism* p. 4.[2] It follows, on OSP's version of affairs, that OSP has a general power to prosecute voter crimes in Florida. And OSP does not blink in asserting that power: "*all* criminal cases dealing with voter registration and elections necessarily involve multi-circuit conduct" and are therefore subject to prosecution by OSP. *M/Dism* p. 6 n. 5 (emphasis in original).[3]

Both parties in their pleadings direct me to *State v. Tacher, see supra* n. 1. In *Tacher,* one of four coconspirators brought illicit drugs from New Jersey to Miami. In Miami, he conveyed them to the second coconspirator, who delivered them to the *Tacher* defendants—the third and fourth coconspirators—who then sold them. *Tacher,* 84 So. 3d at 1132. The defense argued that because the first coconspirator—the one who transported the drugs from New Jersey through Florida to Miami never sold or distributed anything until he got to Miami, the entire criminal misconduct took place in Miami-Dade County. Of course that argument failed. The first coconspirator "traveled by bus through seven judicial circuits while possessing the drugs in furtherance of the conspiracy." *Id.* His act of possession in multiple Florida counties was itself a crime in those counties. He committed that crime as part of the larger criminal enterprise. It was his role in that larger criminal enterprise.

Compare the very different facts at bar. Robert Lee Wood's misconduct, if misconduct it was, consisted in registering to vote, and voting, in his county of residence. Yes, his voter application and his ballot were transported to another Florida jurisdiction. But they were not transported by him, nor by any putatively criminal co-perpetrator. They were not transported by someone whose role in Mr. Wood's crime was to transport them. They were not transported at Mr. Wood's behest or bidding. The statutory requirement for OSP's prosecutorial authority is that the demised crime must have occurred "in two or more judicial circuits as part of a related transaction." Here the crime, if there was one, occurred exclusively in Miami. The "related transaction"—the merely ministerial transmission of completed forms to Tallahassee—was not a crime.

OSP describes it as "foreseeable" that the filing of a voter-application form, or the casting of a ballot, would, in due course, "invoke the participation of a governmental entity in the Second Judicial Circuit." *M/Dism* p. 2. Undoubtedly that is true. From every criminal act emanate in a thousand directions ripples of harm that may make themselves felt in a thousand places. But the statute defining and limiting OSP's prosecutorial powers does not seek to know where, jurisdictionally, a given criminal act provokes reaction or involvement. It does not ask whether the sequelae of crimes committed in one jurisdiction are felt in another. It demands that the crime itself *occur,* that it *be committed,* in more than one jurisdiction. For a crime to be prosecutable by OSP, it is that crime, and not its mere consequences or related activities, that must occur in two or more Florida jurisdictions. *See, e.g., Carbajal v. State,* 75 So. 3d 258, 262 (Fla. 2011) [36 Fla. L. Weekly S628a] ("Carbajal is correct that if his *criminal* activity in Florida"—not his activity, but his *criminal* activity—"actually occurred in only Lee County, Florida, the OSP was not authorized to prosecute") (emphasis added). Even assuming that Mr. Wood's passive role in the transmission of his voter application form and completed ballot to Tallahassee is "activity" that can be ascribed to him, it is not his "criminal activity."

One wonders how far OSP is willing to take its argument. Mr. Wood's paperwork traveled, presumably by U.S. mail, from Miami-Dade County through a host of Florida counties until it reached Leon County. Are the mail carriers who transported that paperwork to be analogized to the drug conspirator in *Tacher* who, expressly for the purpose of trafficking in contraband, transported drugs through the state to Miami-Dade? If that is the analogy that OSP offers, I submit that the analogy fails. Indeed it hardly invites rebuttal.

OSP cites to federal authorities, *e.g. Pereira v. United States,* 347 U.S. 1 (1954); *United States v. Reed,* 773 F. 2d 477 (2nd Cir. 1985), *see M/Dism* pp. 5, 6. These cases deal, respectively, with jurisdiction and venue in the federal system. The case at bar deals with neither. The sole question before me at this point in these proceedings is whether the statute pursuant to which OSP exists empowers it to prosecute, as having occurred in two or more Florida jurisdictions, the one act of one Miami resident who once voted in Miami.[4]

Counsel for OSP quite properly directs my attention to *King v. State,* 790 So. 2d 477, 479 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1849a] for the proposition that courts should, "broadly construe the prosecutorial authority of the statewide prosecutor." I am willing to construe the prosecutorial authority of the statewide prosecutor to the very limits of the statutory language creating that authority—to those limits, and not a jot further. The *King* case, relied upon by OSP, makes a useful study in contrast with the case at bar. In *King,* the defendant operated a "chop shop" in Orange County, the Ninth Circuit, as part of which business he obtained stolen motorcycles and parts from Volusia County, the Seventh Circuit. *King,* 790 So. 2d at 479. Undoubtedly the prosecution of such a criminal enterprise—a "chop shop which had tentacles reaching across judicial circuit lines," *id.*—is precisely what OSP was created for. There, criminal misconduct, by the same criminals or their confederates, took place in two Florida counties. Here, all the criminal misconduct, if there was any, was performed by one man in one county.

It is an old truth that all politics is local.[5] OSP seeks to stand that old truth on its head. It seeks, by its own frank admission, authority to prosecute "*all* criminal cases dealing with voter registration and elections," wherever in Florida they may be, however local they may be. *M/Dism* p. 6 n. 5 (emphasis in original). That plenary power—the power to invigilate all Florida elections, whether federal, state, or municipal—is not consigned to OSP by § 16.56.

"His arms spread wider than a dragon's wings," says Shakespeare's Duke of Gloucester about Henry V. Wm. Shakespeare, *The First Part of King Henry VI,* Act I sc. 1. How much wider even than that does OSP seek to extend its reach? In the case at bar the answer is simple: wider than the enabling statute contemplates, and therefore too wide.

Defendant Robert Lee Wood's motion to dismiss is respectfully granted.

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[1]Mr. Wood's pleading is captioned a "motion to dismiss for lack of subject-matter jurisdiction." Strictly speaking, the issue is not one of jurisdiction but of statutory authority. *State v. Tacher,* 84 So. 3d 1131, 1132 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D733a].

[2]Ironically—and unmentioned by OSP—the only exception would be for voter fraud perpetrated in the state capital. A Leon County domiciliary can, on OSP's interpretation of the statute, commit voter fraud to his heart's content without fear of prosecution by OSP. Such a fraudfeasor's ballots would be cast, and tabulated, within a single circuit.

[3]OSP does not argue that it was the intent of the legislature, in creating a statewide prosecutorial authority, to vest that authority with plenary power to prosecute all election-related crimes in all Florida counties except Leon County, and no power whatever to prosecute election-related crimes there. *See* n. 2, *supra.* It does not attempt to reconcile that incongruity.

[4]Just to provide context: The official website of OSP provides that it "focuses on

complex, often large scale, organized criminal activity." *See* https://www.myfloridalegal.com/pages.nsf/Main/D243EF87774E965185256CC600785693. Mr. Wood's crime, if he committed one, is the very antithesis of that "complex, . . . large scale, organized criminal activity" upon which OSP quite properly "focuses."

[5]*See* https://en.wikipedia.org/wiki/All_politics_is_local

* * *

Criminal law—Resisting officer without violence—Search and seizure—Incident to arrest—Officers who entered residence with consent of resident to serve domestic violence injunction on defendant lawfully seized defendant temporarily based on reasonable concerns for their safety and reasonable suspicion of criminal conduct—Officers had probable cause to arrest defendant for resisting officer without violence and to search defendant's pockets incident to arrest when defendant attempted to pull away from officers as they were escorting him outside—Motion to suppress cocaine and drug paraphernalia found in defendant's pockets is denied

STATE OF FLORIDA, v. JONATHAN MONTALVO, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Division 15. Case No. F22-6097. October 21, 2022. Joseph D. Perkins, Judge. Counsel: Ashley Moussa, for State. Amanda Suarez, for Defendant.

ORDER DENYING MOTION TO SUPPRESS PHYSICAL EVIDENCE

This case is before the Court on Defendant Jonathan Montalvo's August 10, 2022 Motion to Suppress Physical Evidence ("Motion") and September 2, 2022 Supplemental Brief ("Defense Supplement"), and the State of Florida's September 23, 2022 Response Brief. The Court held hearings on August 22, 2022 and October 7, 2022.[1] After considering the evidence, the parties' written materials, and the arguments of counsel, the Court **DENIES** the Motion.

FINDINGS OF FACT[2]

The police went to Montalvo's house to serve a domestic violence injunction on him. They responded in emergency mode because the domestic violence petitioner, Ms. Arango, was hiding in the bathroom from Montalvo. Dispatch had also reported that Montalvo was acting violently and possibly armed with a knife. While in route, the Realtime Crime Center advised the officers that Montalvo had an extensive criminal past and posed a possible threat to law enforcement. August 22, 2022 Transcript ("Transcript") at 28-29. When the officers arrived, Arango was outside. She told the officers that Montalvo was in the house and handed them the domestic violence injunction. An officer asked if Montalvo was armed, and Arango responded, "Not that I know of, but he has a violent past."

The officers entered the house and, with their guns drawn, approached the door of a room in which Montalvo was kneeling in a tight space with his hands in a bag. There were also multiple drawers and containers within Montalvo's reach. They officers were concerned for their own safety when they saw both of Montalvo's hands in the bag because they had been advised that Montalvo was possibly armed. They were also concerned for their own safety because he was in a small, cluttered room.

An officer told Montalvo to come out of the room, but he did not respond and kept his hands in the bag. The officer then walked into the room and told Montalvo to stand up to go outside to speak with the officer. Montalvo remained crouched and said, "Okay, what's the problem." The officer commanded Montalvo one more time, "Let's go." When he did not comply, the officers, for their own safety, held onto Montalvo's arms to escort him outside. Montalvo tensed up and tried to pull his arms out of the officers' grasp. Once outside, the officers handcuffed Montalvo, searched him, and located cocaine and drug paraphernalia in his pants pockets.

MONTALVO'S MOTION TO SUPPRESS

Montalvo seeks to exclude the drug paraphernalia and drug residue as being the product of an unlawful search.[3] The parties agree that the search of Montalvo's pockets was lawful if it was a search incident to a lawful arrest. The search was incident to a lawful arrest if probable cause existed to arrest Montalvo at the time of the search, irrespective of the timing of the actual arrest or of the stated subjective intentions of the officers. *See Jenkins v. State*, 978 So. 2d 116, 125 (Fla. 2008) [33 Fla. L. Weekly S147c] (holding that a search incident to a lawful arrest is constitutionally permissible and may be conducted prior to actual arrest so long as probable cause for arrest exists prior to the search) (*citing Rawlings v. Kentucky*, 448 U.S. 98, 111 & n. 6 (1980)); *State v. Jennings*, 968 So. 2d 694, 696 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2787a] (holding that search was lawful so long as probable cause existed to conduct the search, regardless of the subjective intentions of the officers) (citing *Whren v. United States*, 517 U.S. 806 (1996)).

The State argues that before the search the officers had probable cause to arrest Montalvo for resisting an officer without violence in violation of § 843.02, Florida Statutes, which provides:

> Whoever shall resist, obstruct, or oppose any officer . . . in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree . . . .

Id. The Court agrees. The officers, who lawfully entered the home with consent to serve a domestic violence injunction, gave Montalvo lawful commands based on reasonable concerns for officer safety.[4] This temporary seizure was authorized under both *Michigan v. Summers*, 452 U.S. 692 (1981) and *Terry v. Ohio*, 392 U.S. 1 (1968). There is probable cause that Montalvo failed to comply with the officers' lawful commands and resisted again when he pulled away from the officers as they were escorting him outside. The officers therefore had probable cause to arrest Montalvo for resisting an officer without violence, and the search of his pockets was a lawful search incident to arrest.

DISCUSSION

The officers seized Montalvo when they ordered him to step out of the room he was in and again when they escorted him outside of the house. *See Harrison v. State*, 627 So. 2d 583, 584 (Fla. 5th DCA 1993) (discussing when a seizure occurs and collecting cases). The question is whether the seizure was constitutional. If it was not, then there could not be probable cause that Montalvo resisted the officers in the execution of a legal duty. *See Nieves v. State*, 277 So. 3d 745, 751 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1989b].

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Florida Constitution also protects against unreasonable searches and seizures, providing that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated." Art. I, § 12, Fla. Const. The same section contains a conformity clause, providing that "[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." *Id.; see Lopez v. State*, 225 So. 3d 330, 332 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1653b].

A. The officers lawfully entered Montalvo's home with consent from Arango.

The evidence presented, including the body worn camera video of the officers' interaction with Arango, indicates that she consented the police officers entering the house. *See U.S. v. Ramirez-Chilel*, 289 F.3d 744, 752 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C491a]. In Montalvo's supplemental brief, Montalvo argues that the State presented insufficient evidence that Arango was a co-tenant or had apparent authority to consent to the officers' entry. *Id*. at 3. At the

October 7, 2022 hearing, the Court asked how it would be fair to allow Montalvo to wait until after the close of evidence to raise the issue, especially considering that the Motion affirmatively asserts the police entered with Arango's consent and that Arango lived at the residence. Motion at 1. Defense counsel then conceded that whether the police officers entered the house with consent is not at issue in the Motion, and the Court therefore assumes the officers lawfully entered the house with consent.

Montalvo argues that (1) the State failed to establish that the officers were legally inside the residence because there was insufficient evidence presented to establish that Montalvo's consent, if any, was voluntarily given, and (2) even if Montalvo consented to the officers' entering, he could revoke that consent at any point. These arguments are inapposite because, as discussed above, Arango consented to the officers entering the home, and the evidence indicates that Montalvo did not revoke consent.

B. The officers were executing a legal duty to serve the domestic violence injunction on Montalvo and place Arango in possession of the home and could lawfully seize Montalvo temporarily.

The officers entered Montalvo's house (with consent) to execute a legal duty—service of the domestic violence injunction (State's Exhibit 1). The injunction expressly ordered "[t]he Sheriff of Miami-Dade County, or any other authorized law enforcement officer, . . . to serve [it] upon [Montalvo] as soon as possible after its issuance." State's Exhibit 1 at 7.[5] It also required Montalvo to vacate the premises, *id*. at 2, and required the officers to place Arango in possession of the premises. *Id*. at 5, ¶ 7; *see* Fla. Stat. § 741.30(8)(a)(2) ("When an injunction is issued, if the petitioner requests the assistance of a law enforcement agency, the court may order that an officer from the appropriate law enforcement agency accompany the petitioner and assist in placing the petitioner in possession of the dwelling or residence, or otherwise assist in the execution or service of the injunction."). Serving process and legally detaining a person are legal duties under § 843.02. *C.W. v. State*, 76 So. 3d 1093, 1095 (Fla. 3d DCA 2011) [37 Fla. L. Weekly D34a].

As discussed below, the officers could, pursuant to *Summers* and *Terry*, lawfully seize Montalvo temporarily, to protect officer safety, incident to their execution of their legal duty to serve the injunction.

1. The officers could temporarily seize Montalvo under *Summers*.

When an officer temporarily detains an individual, the relevant Fourth Amendment inquiry is whether the government's interest is reasonable when balanced against the individual's constitutional right to be free from governmental intrusion and the nature of the intrusion. *Maryland v. Wilson*, 519 U.S. 408, 411-13 (1997). The government's interest in officer safety is "legitimate and weighty." *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). "As the Supreme Court has recognized, a police officer performing his [or her] lawful duties may direct and control—to some extent—the movements and location of persons nearby, even persons that the officer may have no reason to suspect of wrongdoing." *Hudson v. Hall*, 231 F.3d 1289, 1297 (11th Cir. 2000) (citing *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981) and *Maryland v. Wilson*, 519 U.S. 408 (1997)).

Summers authorizes officers to temporarily detain persons found on premises when executing a search warrant. The authority for detention under *Summers* in such circumstances is "categorical," permitting officers to temporarily detain an individual found on premises even if they lack particularized suspicion that the individual is involved in criminal activity or poses a specific danger to the officers. *Muehler v. Mena*, 544 U.S. 93, 98 (2005) [18 Fla. L. Weekly Fed. S183a] (discussing *Summers*, 452 U.S. at 702-03); *Bailey v. United States*, 568 U.S. 186, 195 (2013) [24 Fla. L. Weekly Fed. S1a]. The governmental interest in allowing such categorical temporary seizures in the search warrant context are preventing flight, minimizing the risk of harm to officers and occupants, and orderly completion of the search. *Summers*, 452 U.S. at 692; *State v. Cromatie*, 668 So. 2d 1075, 1077 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D565a].

A domestic violence injunction, of course, is not a warrant. The parties have not presented, and the Court's independent research has not revealed, any authority discussing temporary seizures incident to service of a domestic violence injunction. The Court holds, however, that the *Summers* rationale applies with equal force in the context of serving a domestic violence injunction.

First, *Summers* is not limited to execution of search warrants. The Eleventh Circuit has, for example, applied *Summers* by analogy to authorize police to temporarily control an innocent passenger during a traffic stop of a vehicle, a bystander on the sidewalk watching a fight, and a son during his father's arrest, reasoning that the interest in officer safety in such circumstances outweighs the liberty interest of the innocent person being temporarily detained. *See Hudson v. Hall,* 231 F.3d 1289, 1292 (11th Cir. 2000) (passenger during a traffic stop); *United States v. Clark,* 337 F.3d 1282, 1283, 1285 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C834a] (bystander to a fight); *Gomez v. U.S.*, 601 Fed. Appx. 841 (11th Cir. 2015) (son during father's arrest); *see also United States v. Enslin*, 327 F.3d 788, 791, 797-98 (9th Cir. 2003) (applying *Summers* in an arrest warrant context and holding that a temporary seizure of another occupant of the premises, who was in bed, by requiring the occupant to raise his hands from under the bed covers was a reasonable seizure to protect the officers' safety).

Second, although technically civil in nature, a domestic violence injunction is not mere ordinary civil process.[6] Like a warrant but unlike civil process, a domestic violence injunction is issued by a neutral judge. Like a warrant but unlike civil process, a domestic violence injunction must be served via personal service by a law enforcement officer and, indeed, commands law enforcement to execute it. *See* Fla. Stat. § 741.30(8); Injunction at 7, ¶ 1 ("The Sheriff of Miami-Dade County, or any other authorized law enforcement officer, is ordered to serve this temporary injunction upon Respondent as soon as possible after its issuance."); *see also Coffin*, 642 F.3d at 1008 (discussing repeat violence injunctions, which must also be personally served by a law enforcement officer). When serving a domestic violence injunction, like when serving a search warrant or making a lawful traffic stop, the risk of harm to officers is minimized when officers "exercise unquestioned command of the situation." *Summers*, 452 U.S. at 702-03. And although an injunction does not require a probable cause showing that would allow entry into a home, a co-occupant's consent to police entering premises without a warrant, like consent to a search without a warrant, tips the scale in favor of the government's reasonable interest in officer safety when balanced against an individual's constitutional right to be free from governmental intrusion. *Cf. State v. Cromatie*, 668 So. 2d 1075, 1077 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D565a] (holding that where driver consented to search of automobile, police could, pursuant to *Summers*, temporarily detain passenger until completing the search). Finally, where, as here, a domestic violence injunction requires the respondent to vacate the premises and requires law enforcement to place the petitioner in possession of the premises, a temporary seizure seconds before service of the injunction to enable officers to safely serve it results in a minimal intrusion on liberty.

In sum, the officers' temporary seizure of Montalvo was reasonable and authorized under *Summers*.

2. The officers could temporarily seize Montalvo under *Terry*.

Terry provides an alternative source of authority for the officers to temporarily seize Montalvo. "[P]olice can stop and briefly detain a person for investigative purposes if the officer has a reasonable

suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *State v. Teamer*, 151 So. 3d 421, 425 (Fla. 2014) [39 Fla. L. Weekly S478a] (quotations omitted). Authority for a temporary detention under *Terry* is separate from, but not mutually exclusive of, authority to conduct a temporary seizure under *Summers*. *See Bailey*, 568 U.S. at 197; *Harper v. State*, 532 So. 2d 1091, 1094 (Fla. 3d DCA 1988) (recognizing that *Terry* and *Summers* are separate sources of authority for temporary seizures).

Terry can authorize a temporary detention when officers are inside a home with consent without a warrant. *See Delhall v. State*, 95 So. 3d 134, 152-53 (Fla. 2012) [37 Fla. L. Weekly S468a] (holding that where police were inside of defendant's house with the consent of another occupant and discovered defendant was hiding in the closet, the officers could temporarily detain defendant because they had reasonable suspicion that he may have been armed); *O'Kelley v. Craig*, 781 Fed. Appx. 888, 894 (11th Cir. 2019) (holding that officers may conduct a warrantless seizure within the home under *Terry* where there is either consent or exigent circumstances); *United States v. Ramirez-Arcos*, 2019 WL 2022649, *2-*3 (M.D. Fla. May 8, 2019) (collecting cases).

Unlike authority for a *Summers* detention, authority for a *Terry* detention is not categorical and requires individualized suspicion. "Under certain factual circumstances . . . concern for an officer's safety may create reasonable suspicion warranting an investigatory stop." *Delorenzo v. State*, 921 So. 2d 873, 876 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D737a]. Here, the defense agrees that Montalvo's crouching down in a small, cluttered room where he could easily access a weapon gave rise to the officers' reasonable concern for their safety. Transcript at 92-93. Their concern was especially reasonable considering that (1) dispatch had reported that Montalvo was acting violently and possibly armed with a knife, (2) while in route, the Realtime Crime Center advised the officers that Montalvo had an extensive criminal past and posed a possible threat to law enforcement, (3) Arango was unsure of whether Montalvo was armed and advised that Montalvo had a violent past. These facts, together with officers' finding Montalvo with his hands inside of a bag, gave officers reasonable suspicion under *Terry* to order Montalvo out of the room and, after he repeatedly failed to comply, to escort him out of the house. *Cf. Delhall*, 95 So. at 152-53; *Brown v. State*, 714 So. 2d 1191, 1192-93 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1829a] (holding that the trial court did not err in concluding that the officer had reasonable suspicion to seize the defendant based upon officer's knowledge of defendant's violent past, together with defendant's behavior when reacting to the officer).

C. Montalvo's cases are distinguishable.

The authorities Montalvo cites in his Motion and Defense Supplement are distinguishable because they involve an officer's physical entry into a home without a warrant. *See Seiracki v. State*, 333 So. 3d 802, 803 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D413a] (officer standing outside of front door, without a warrant, reached into home, grabbed defendant by the wrist, and brought defendant outside); *J.H.M. v. State*, 945 So. 2d 642 (Fla. 2d DCA 2006) [32 Fla. L. Weekly D137a] (officer standing outside of front door, without a warrant, ordered defendant, who was standing inside home, to come outside and used his foot to block the door from shutting when defendant tried to shut it); *Moore v. Pederson*, 806 F.3d 1036, 1039 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C1712a] (officer standing outside of front door, without a warrant, reached into home, handcuffed defendant, and arrested him). " 'It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *State v. Markus*, 211 So. 3d 894, 905 (Fla. 2017) [42 Fla. L. Weekly S98a] (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984)). This case, however, does not involve officers unlawfully entering Montalvo's home, but, rather, their entering with a co-occupant's consent. As discussed above, consent can make lawful conduct that would otherwise be unlawful under the Fourth Amendment.

CONCLUSION

The officers lawfully entered Montalvo's house with consent to execute the legal duty of serving a domestic violence injunction on Montalvo. Incident to execution of such legal duty, and to protect officer safety, the officers were authorized under *Summers* and *Terry* to temporarily seize Montalvo. Montalvo resisted the officers' lawful seizure, thereby giving the officers probable cause to arrest Montalvo for resisting an officer without violence. The officers' search of Montalvo's pockets was therefore a lawful search incident to arrest, and the Court will not suppress the cocaine and drug paraphernalia found in Montalvo's pants pockets.

Montalvo's Motion to Suppress is DENIED.

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[1]The Court thanks ASA Ashley Moussa and APD Amanda Suarez for their thoughtful and well written memoranda.

[2]These facts derive from the live testimony of Officers Arujo and Irvine, which the Court finds to be credible as to the content cited, body worn camera evidence admitted at the August 22, 2022 hearing, and the injunction admitted at the October 7, 2022 hearing.

[3]Actually, Montalvo broadly asks the Court "to suppress all evidence seized as a result of an unlawful search and seizure including, but not limited to, the drug paraphernalia and drug residue." Generalized catch-all phrases, however, do not satisfy Rule 3.190(g)(2)'s requirement that, *inter alia*, "[e]very motion to suppress evidence . . . state clearly the particular evidence sought to be suppressed . . . ." *Id.*; *State v. Christmas*, 133 So. 3d 1093, 1096 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D280d]. The Court therefore denies the Motion as legally insufficient as to any evidence not specifically identified in the Motion.

[4]The defense does not dispute that under the circumstances the officers would have reasonable concern for officer safety. August 22, 2022 Transcript at 92-93.

[5]That the officers had not yet served the injunction at the time of the seizure does not change the fact that they had the lawful duty to execute it. *Cf. Storck v. City of Coral Springs*, 354 F.3d 1307, 1319 (11th Cir. 2003) [17 Fla. L. Weekly Fed. C164a]. At the October 7, 2022 hearing, both the State and defense agreed that the defendant's knowledge of the lawfulness of an officer's command is not an element of the crime of resisting without violence.

[6]*See Coffin v. Brandau*, 642 F.3d 999, 1008 (11th Cir. 2011) [22 Fla. L. Weekly Fed. C2131a] ("The notion that serving a restraining order should be treated differently than serving ordinary process finds some support both in Florida's procedural rules and in the language used in [Florida Statutes].").

* * *

Civil procedure—Service of process—Witness subpoena that omitted process server's identification number was fatally defective

CARLOS FONTANILLA, Plaintiff, v. DOLPHIN TOWING & RECOVERY, INC., et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-008791-CA-01, Section CA22. October 11, 2022. Beatrice Butchko, Judge. Counsel: Jeffrey Davis, for Plaintiff. Michael Sastre, for Defendants. Mark A. Goldstein, Miami, for non party Advanced Orthopedics.

ORDER QUASHING DEFENDANTS' SUBPOENA

This cause came before the Court for hearing on October 11, 2022, by Zoom, on Non-Party, Advanced Orthopedics & Spine Surgery, LLC's Motion to Quash Defendants' subpoena and the Court having heard argument of counsel and being fully advised in the premises, it is

Ordered as follows:

1. Non-Party Advanced Orthopedics & Spine Surgery, LLC's Motion is Granted.

2. The subpoena is fatally defective as it omits the process server's identification number in violation of Section 48.031(5), Fla. Stat. Service of process statutes are strictly construed, *Brown v. U.S. Bank Nat. Ass'n,* 117 So. 3d 823, 824 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1402a] and the failure to list process server's identification number on the subpoena served on the deponent requires the Court to quash the subpoena. *Walker v. Fifth Third Mortgage Company,* 100 So. 3d 267 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D2615b]; *Gabriel*

v. Perez, 29 Fla. L. Weekly Supp. 240c (Fla. 11th Cir. Ct. 2021).

3. If a new subpoena is issued by the Defendants and served on Advanced Orthopedics & Spine Surgery, LLC, the parties and Non-Party Advanced Orthopedics & Spine Surgery, LLC, shall confer to attempt to resolve any objections to the subpoena prior to the objections being set for hearing.

* * *

Insurance—Life—Subject matter jurisdiction—Decision by federal court that it lacked subject matter jurisdiction over life insurance dispute which had been removed from state court because case was not yet ripe does not have collateral estoppel effect on state circuit court to which case was remanded, and federal court's analysis of Florida state court decisions regarding subject matter jurisdiction is not binding on state court—Beneficiary's claim that expiration of 60-day period provided in section 627.428(2) triggered her right to sue lacks merit—Statute establishes that no attorney's fees will be allowed for suit filed less than 60 days after proof of claim was filed with insurer, but does not establish statutory deadline for completion of investigation of claim—State court has subject matter jurisdiction over suit despite fact that insurer has not yet completed incontestability review and formally denied payment on claim—Claim is within class of cases over which court has subject matter jurisdiction, and beneficiary, who has fulfilled her obligations under policy, has standing to pursue claim that is now concrete and actionable

LOUNA MICHEL, Plaintiff, v. LIFE INSURANCE COMPANY OF THE SOUTHWEST, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Circuit Civil Division AH. Case No. 50-2022-CA-000806-XXXX-MB. October 17, 2022. Samantha Schosberg Feuer, Judge. Counsel: Nicholas Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Latanae L. Parker and Jeannine C. Jacobson, Maynard, Cooper & Gale, P.C., Miami; and Alexander B. Feinberg, Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Defendant.

ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on the motion to dismiss filed by defendant Life Insurance Company of the Southwest ("LICS") (D.E. # 16). Plaintiff Louna Michel filed a response on May 26, 2022 (D.E. # 24). The motion was heard on October 3, 2022. The Court has reviewed the submissions of the parties, considered the arguments of counsel, and is otherwise advised and hereby makes the following findings of fact and conclusions of law.

Ms. Michel initiated this action on January 27, 2022 seeking damages against LICS for failure to pay life insurance proceeds to her as sole beneficiary of a life insurance policy issued by LICS on the life of her mother, Avenise Michel Dorvilma, deceased ("Decedent"). (Complaint, D.E. # 3.) LICS removed the case to the United States District Court for the Southern District of Florida (D.E. # 9), *Louna Michel v. Life Ins. Co. of the Southwest*, No. 22-80294-CV-MIDDLEBROOKS (S.D. Fla.). LICS then moved the federal court to dismiss the action for lack of subject matter jurisdiction, claiming that the suit was not ripe. LICS contended because Decedent died within the two-year period of the policy's Incontestability clause, LICS was entitled to perform a claim investigation and review, and because it had not yet formally denied Ms. Michel's claim as beneficiary of the policy, her complaint was not "ripe," thereby depriving the federal court of subject matter jurisdiction.

In its Order dated April 18, 2022, the federal court, applying federal Article III "ripeness" principles, agreed with LICS that because of the Incontestability clause, the fact that the decedent had died within two years after issuance of the policy triggering that clause, and that LICS had not yet formally denied the claim, Ms. Michel's claim was not "ripe," and thus it was without subject matter jurisdiction. The federal court, however, stopped short of formally dismissing the action, ruling that under the governing federal statute, where a case is removed and the federal court determines that it is without subject matter jurisdiction, the proper and only relief available under section 28 U.S.C. § 1447(c) is to remand the case to the state court. Thus the federal court did not grant LICS's request for outright dismissal.

The case is back in state court,[1] and LICS is again seeks dismissal pursuant to Florida Rule of Civil Procedure 1.140. LICS does not specify the subsection of the rule under which it seeks dismissal, but because the body of its motion again focuses on subject matter jurisdiction and ripeness (motion at 10-17), the Court will consider it as invoking Rule 1.140(b)(1)—lack of subject matter jurisdiction.

1. The federal court decision does not have collateral estoppel effect.

LICS argues that the federal district court's decision has collateral estoppel effect that should be applied in granting its motion to dismiss, and plaintiff is impermissibly attempting to "re-litigate" the issue before this Court. This argument has no merit. Although the federal district court laid out in detail the reasons that it lacked subject matter jurisdiction (again applying *federal* Article III ripeness analysis), that court was very careful *not* to dismiss the action on that ground, but instead to remand the case, as it was required to do under 28 U.S.C. § 1447(c). Thus, because the federal district court did not finally adjudicate the subject matter jurisdiction issue, collateral estoppel does not apply. Collateral estoppel requires that the issue in question " 'has already been determined by a final judgment' " on the issue. *Kowallek v. Lee Rhem*, 183 So. 3d 1175, 1177 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D157a] (quoting *Zikofsky v. Marketing 10, Inc.*, 904 So. 2d 520, 525 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1343a]). The federal court order does not constitute a "final judgment" on the issues, it remanded the case to state court. Thus, the question whether this Court has subject matter jurisdiction (applying *Florida* law) remains open to consideration.

2. The federal court's analysis of subject matter jurisdiction is not binding on this Court.

As previously explained, the federal court's order is a remand order. On remand, the issue before this Court is *Florida* law governing subject matter jurisdiction. While the federal court "borrowed" Florida state court decisions in buttressing its rationale that it lacked *federal* subject matter jurisdiction, its interpretation of those decisions is not binding on this Court. *See Pignato v. Great Western Bank*, 664 So. 2d 1011, 1016 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2338a] (decision of federal appellate court based on Florida law not binding on state courts, although they may be persuasive on a point of law). This is discussed in greater detail, later.

3. Section 627.428(2), Florida Statutes, does not govern the time within which Ms. Michel may file suit.

The Court should first address an argument raised by Ms. Michel. She relies upon section 627.428(2), which states, "As to suits based on claims arising under life insurance policies or annuity contracts, no such attorney fees shall be allowed if such suit was commenced prior to expiration of 60 days after proof of the claim was duly filed with the insurer." Yet this only applies to any entitlement to attorneys' fees that Ms. Michel might have; it does not establish a statutory deadline by which LICS must complete its investigation. "The purpose of section 627.428 . . . is to discourage insurance companies from wrongly contesting entitlement to insurance benefits. . . ." *Jones v. Minnesota Mut. Life Ins. Co.*, 759 So. 2d 723, 725 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1113a] (citation omitted). It does *not* establish a deadline by which an insurer must honor or deny a claim, so Ms. Michel's claim that the expiry of the sixty-day period contained in section 627.428 triggered her right to sue is itself without merit. But the analysis does not end here.

4. The Court has subject matter jurisdiction over plaintiff's claim.

The Court finds under Florida law, it has subject matter jurisdiction to entertain Ms. Michel's claim, even though LICS has not yet completed its incontestability review and formally denied payment of benefits. Because LICS relies so heavily upon the federal court's decision in which it determined that it was without *federal* subject matter jurisdiction, the Court will explain why that decision has no bearing upon whether this Court has subject matter jurisdiction under *Florida* law.

(a) The difference between federal and Florida subject matter jurisdiction.

First, as previously noted, the federal district court was applying *federal* Article III subject matter jurisdiction principles based on "ripeness." (Federal Court Order, Part II.) Under *Florida* law applicable to state courts, "subject matter jurisdiction means the authority 'to adjudicate the class of cases to which the particular case belongs.' " *Singer v. Singer*, 308 So. 3d 1036, 1037 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2749a] (emphasis added, quoting *Lovett v. Lovett*, 112 So. 768, 775 (Fla. 1927)). Unquestionably, Ms. Michel's claim is within the "class of cases" over which this Court has subject matter jurisdiction.

Second, unlike the federal courts' carefully developed "ripeness" doctrine under federal Article III jurisdictional analysis, Florida law governing "ripeness" is sparse and usually arises in cases involving eminent domain and condemnation cases. "Ripeness" is interrelated with "standing," and Florida law governing standing is much broader than federal law: "Unlike the federal courts, Florida's circuit courts are tribunals of plenary jurisdiction. . . . They have authority over any matter not expressly denied them by the constitution or applicable statutes. Accordingly, the doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 895 (Fla. 2003) [28 Fla. L. Weekly S287a] (quoting *Dept. of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994). "Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it. . . ." *3709 N. Flagler Drive Prodigy Land Trust v. Bank of America, N.A.*, 226 So. 3d 1040, 1041 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1924a] (citation omitted). "Standing means that an individual has 'a sufficient stake in an otherwise justiciable controversy' so that he or she can obtain judicial resolution of that controversy. . . ." *C.H. v. Adoption of N.K.*, 322 So. 3d 177, 180 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1372a] (citations omitted).

Applying these Florida law principles, Ms. Michel has standing, and her claims are "ripe." She has the "sufficient interest" and "stake" in the outcome, and as explained below, under the terms of the policy she has fulfilled her obligations, and her claim thus is now "concrete" and actionable.

(b) The federal court's reference to Florida case law regarding claims against insurers.

The federal court's decision was based upon federal Article III ripeness principles and discussed Florida law governing the triggering of a cause of action against an insurer. The Court, respectfully, does not find the federal court's analysis to be "persuasive" in the specific context of this case. *Pignato*, *supra*.

None of the three cases cited by the federal court involves the rights of a beneficiary of a life insurance policy where the insured has died, none of them contains the operative provisions of the policy at issue here, and thus each is distinguishable. In *Yacht Club on the Intracoastal Condo. Ass'n, Inc. v. Lexington Ins. Co.*, 509 Fed. App'x 919 (11th Cir. 2013), the policy at issue was for property insurance property insurance, and the insured filed a declaratory judgment action against its primary and excess insurers for a determination of coverage for property damage caused by Hurricane Wilma before a denial of coverage occurred. Applying federal Article III ripeness standards (not Florida law), the court ruled that the primary insurer had effectively denied the claim after the suit was filed, thus making the claim ripe. *Id*. at 923.

In *Peer v. Liberty Life Assurance Co. of Boston*, 758 Fed. App'x 882 (11th Cir. 2019), the case centered on whether the insured was totally disabled, triggering a waiver of future premiums on her life insurance policy. The court ruled that the insured's case was premature because she had not yet been determined to be totally disabled, and under the federal Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, (not Florida law) the insured's claim did not accrue until the plan issues a final denial. *Id*. at 884.

Lastly, the Florida Supreme Court's decision in *Kaklamanos*, *supra*, was before the Court on a conflict between decisions of two district courts of appeal, *Kaklamanos v. Allstate Ins. Co.*, 796 So. 2d 555 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1793a], and *Caravakis v. Allstate Indemn. Co.*, 806 So. 2d 548 (Fla. 2d DCA 2001) [27 Fla. L. Weekly D88b]. The cases involved the issue whether an insured may file suit to recover Personal Injury Protection ("PIP") benefits under an automobile insurance policy where the insured had not yet paid for medical services or been sued for payment by the provider. In both cases, the insurer denied benefits finding the treatments were not medically necessary, and in both cases the insurer relied up its obligation to defend or indemnify the insured only in the event that the insured pays the medical bills or is sued by the provider for nonpayment. The trial courts both granted summary judgment to the insurers. The First DCA granted certiorari and reversed, ruling that an insured did not have to make payment or be sued by the provider in order to bring suit against the insurer; the Second DCA upheld the lower court's dismissal. *Id*. at 887-88.

The Supreme Court approved the First DCA's decision, holding that the insured need not first pay for medical services or be sued for nonpayment before filing suit against the insurer. Again, *Kaklamanos* is distinguishable from the specific situation here, and yet it also contains rationale that actually supports Ms. Michel:

> [W]hat should be a determination for the trier of fact—whether a medical expense is reasonable and necessary—would be determined as a matter of law through the insurance company's motion for summary judgment based on the insured's lack of standing. The insurance company could effectively prevail on its contest of a claim, while the person who has paid for the contract of insurance would not be able to even challenge the contested claim. Under this interpretation, there would be no incentive for the insurer to promptly pay claims as there would be no risk of a legal action by the insured. The insurer's risk of legal action would only arise *after* the medical provider has sued the insured or the insured has assigned benefits to the medical provider.

Id. at 897.

(c) Florida law governing accrual of a cause of action for insurance benefits and the circumstances of this case.

It is true that a few Florida decisions contain the broad statement that an *insured*'s cause of action for insurance benefits does not accrue until the insurer formally denies the claim. *J.J. Gumberg Co. v. Janis Services, Inc.*, 847 So. 2d 1048, 1050 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1287a] (quoting *Donovan v. State Farm Fire and Cas. Co.*, 574 So. 2d 285, 286 (Fla. 2d DCA 1991) (action against defendant's general liability insurer accrued when insurer settled underlying action by injured employee).

The Court has carefully perused Florida decisions and can find none addressing the accrual of a life insurance *beneficiary*'s cause of action against the insurer. Likewise, the Court has found no decision addressing the specific policy provisions at issue here.

Under the terms of the policy at issue in this case, Ms. Michel was

expressly named as the beneficiary. (Policy Application, Part C, Motion Ex. 1; incorporated by reference into Policy, page 1, Motion Ex. 2.) As concerns the beneficiary, the policy contains the following provisions:

Death Benefit

> We will pay the Death Benefit to Beneficiary when we receive at our Administrative Office due proof that the insured died while this policy was in force. Due proof of death of the Insured will consisted of a certified copy of the death certificate, including cause and manner of death of the insured, or other lawful evidence providing equivalent information, and proof of the claimant's interest in the proceeds. . . .

(Policy at 6, Motion Ex. 2.)

Ms. Michel did all that was required of her, as beneficiary under the terms of the policy, to make her claim for the policy benefits. Nothing in the policy imposes the additional conditions upon Ms. Michel that are contained in LICS's post-death correspondence to Ms. Michel (Motion Exs. 4-6). Ms. Michel's position is *not* that LICS is foreclosed from performing its investigation pursuance to the policy's incontestability provisions. Instead, she merely takes the position that under the terms of the policy she has done all that is required of her in order to perfect her claim, and there is no policy provision requiring her, as beneficiary, to aid or assist LICS in that investigation. She is correct on this point.

The Court's decision also is influenced by two other factors. First, the Court is guided by the rationale underlying section 627.428: The overall purpose of that statute is to encourage prompt resolution of claims. Ms. Michel, as beneficiary, has staked her claim. Indeed, the Florida Supreme Court was guided by this very principle in *Kaklamanos*, quoted above, 843 So. 2d at 897. The Court cannot accept a result that would allow LICS—or any life insurer—to delay resolution of a beneficiary's claim indefinitely while foreclosing the beneficiary's resort to the courts until the insurer might complete its investigation and finally denies coverage. In so saying, the Court is not accusing LICS of misconduct in completing its investigation. The information it seeks is a legitimate inquiry, but under the terms of the policy Ms. Michel is not obligated to provide that information (assuming that she could), does not prevent her from filing this action.

Second, Ms. Michel might not have access to all of the information sought by LICS and might not have the authority to issue HIPAA authorization forms presented to her. She provided an interview to LICS or its claims investigator, and she substantially completed the Questionnaire Concerning Insured (part of Motion Ex. 5), except for the name of her mother's dentist and all of the health care professionals she might have seen in the past ten years. By proceeding with this action LICS will have access to Decedent's medical and other records through discovery.

For the reasons stated above, LICS's motion to dismiss is **DENIED and the Defendant has 20 days to answer**.

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[1]An order of a federal district court remanding a case for lack of subject matter jurisdiction is not reviewable by appeal or otherwise. 28 U.S.C. § 1447(c), (d). *See Simring v. GreenSky, LLC*, 29 F. 4th 1262, 1265 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C962a] (explaining applicability of statute precluding appeal of remand order based on lack of subject matter jurisdiction).

* * *

Criminal law—Public records—Jurors—Motion requesting court to restrict court personnel and media from releasing identities and other information about jurors publicly and to refer to potential and seated jurors by number rather than by name is denied—While there is a mechanism to keep certain information confidential, this may only be done after an evidentiary hearing—Denial is without prejudice to filing a new motion and requesting a hearing, with copy to media

STATE OF FLORIDA, Plaintiff, v. NIKOLAS CRUZ, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. 18-1958CF10A. February 11, 2022. Elizabeth A. Scherer, Judge. Counsel: Carolyn V. McCann, Assistant State Attorney, Fort Lauderdale, for Plaintiff. Melisa Alice McNeill, Public Defender, and Diane M. Cuddihy, Executive Chief Assistant Public Defender, Broward Public Defender's Office, Fort Lauderdale; and David A. Frankel, Special Assistant Public Defender, Fort Lauderdale, for Defendant. Dana J. McElroy and Daniela B. Abratt, Thomas & LoCicero P.L., Fort Lauderdale, for News Media.

ORDER DENYING, WITHOUT PREJUDICE, DEFENDANT'S MOTION TO REFER TO POTENTIAL AND SEATED JURORS BY NUMBER INSTEAD OF BY NAME (D-229)

THIS CAUSE comes before the Court upon Defendant's Motion to Refer to Potential and Seated Jurors By Number Instead of By Name (D-229). Having considered Defendant's Motion, the State's Response to the Motion (SF-169), arguments of the parties as well as counsel for media at a hearing held on February 2, 2022, applicable law, and being otherwise fully advised in the premises, this Court finds as follows:

In the instant motion, Defendant seeks specific relief which would assure that the identities and other information about the potential jurors in this case would be kept confidential. He requests that court personnel, *including all media outlets*, be restricted from releasing such information publicly. Defendant also requests that any jury questionnaires completed in this case be redacted with all identifying and demographic information of the potential jurors, and that the Court should develop a procedure whereby the jurors are referred to by number instead of by name throughout the course of the trial.

What Defendant requests is not permitted, as exemptions to the specific laws on public records cannot be created from thin air. As the Fourth District Court of Appeal stated in *Times Publishing Company v. State,* 632 So. 2d 1072 (Fla. 4th DCA. 1994), such a ". . . prior restraint on the publication or dissemination of information gathered during a public proceeding . . . is unconstitutional." *Id.* at 1074.

While there is a mechanism to keep certain information confidential, the circumstances must meet a stringent test, and that may only be done after a hearing with the presentation of evidence which would satisfy the test. As such, if Defendant believes the test may be met with evidence, he may file a new motion and request a hearing, with a copy to the media, at which time evidence may be taken and the law analyzed in light of such evidence. However, because the instant motion is insufficient to do so, it must be denied without prejudice. Accordingly, it is

ORDERED AND ADJUDGED that the instant motion is hereby **DENIED without prejudice**.

* * *

Criminal law—Public records—Request for release of blank juror questionnaire and trial calendar distributed to jurors—Documents are public records which are not subject to any exemption, and defense has offered no evidence to support claim that release of records would affect defendant's fair trial rights

STATE OF FLORIDA, Plaintiff, v. NIKOLAS CRUZ, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. 18-01958CF10A. April 18, 2022. Elizabeth A. Scherer, Judge. Counsel: Carolyn V. McCann, Assistant State Attorney, Fort Lauderdale, for Plaintiff. Melisa Alice McNeill, Public Defender, and Diane M. Cuddihy, Executive Chief Assistant Public Defender, Broward Public Defender's Office, Fort Lauderdale; and David A. Frankel, Special Assistant Public Defender, Fort Lauderdale, for Defendant. Dana J. McElroy and Daniela B. Abratt, Thomas & LoCicero P.L., Fort Lauderdale, for News Media.

ORDER ON RELEASE OF RECORDS SUBJECT TO PUBLIC RECORDS REQUEST

THIS CAUSE comes before the Court upon a media public records request to Court Administration. Having considered the request, arguments of the parties at a hearing on April 12, 2022, and applicable law, this Court finds as follows:

The media has submitted a public records request to Court Administration for: 1) a blank juror questionnaire in this case, and 2) the trial calendar distributed to jurors in this case.

In order to hear from the parties regarding this request, this Court held a hearing on April 12, 2022, where counsel for the defense, the State, and the media presented argument.

This Court finds that the subject materials are public record under the applicable law and that no pertinent exemptions exist. The materials are ". . . records made . . . in connection with the transaction of official business by any judicial branch entity" pursuant to Florida Rule of Judicial Administration 2.420(b)(1). Furthermore, while the defense alleged that release of these records would affect his fair trial rights, no supporting evidence was presented nor any allegations as to how this would compromise his constitutional rights. As such, under the applicable public records law, this Court finds that the relevant materials constitute public records not subject to any exemption.

* * *

Criminal law—Public records—Statement of former defense witness—Work product privilege—Where statement taken by state from witness that had been removed from defense witness list has been filed as court record, information contained therein is no longer confidential work product—Defense should have filed motion for protective order before witness's statement was taken if it sought to protect work product—Medical information—Because defendant's medical history will be inherent part of mitigation portion of sentencing phase of his trial, medical information in witness's statement is not protected—However, fact that statement is not sealed does not affect admissibility of statement—Jury will not hear statement or be privy to contents

STATE OF FLORIDA, Plaintiff, v. NIKOLAS CRUZ, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. 18-1958CF10A. August 22, 2022. Elizabeth A. Scherer, Judge. Counsel: Carolyn V. McCann, Assistant State Attorney, Fort Lauderdale, for Plaintiff. Melisa Alice McNeill, Public Defender, and Diane M. Cuddihy, Executive Chief Assistant Public Defender, Broward Public Defender's Office, Fort Lauderdale; and David A. Frankel, Special Assistant Public Defender, Fort Lauderdale, for Defendant. Dana J. McElroy and Daniela B. Abratt, Thomas & LoCicero P.L., Fort Lauderdale, for News Media.

ORDER DENYING DEFENDANT'S MOTION FOR PROTECTIVE ORDER (D-326)

THIS CAUSE comes before the Court upon Defendant's Motion for Protective Order" (D-326). Having considered the Defendant's instant motion, argument heard at a hearing before this Court on August 18, 2022, and applicable law, this Court finds as follows:

On June 9, 2022, the defense listed Dr. Andrew Akerman as a defense witness. On August 4, 2022, the defense struck Dr. Akerman from their witness list. On August 8, 2022, Dr. Akerman received a mandatory subpoena for an August 11, 2022 pretrial conference from the State. Upon notice of the subpoena, that same day, the defense emailed the State that Dr. Akerman was no longer a listed defense witness, that he signed a nondisclosure agreement, and that Defendant had not waived that privilege. On August 11, 2022, the scheduled day of the pretrial conference, the defense again reached out to the State and requested to be present at the conference. The defense was refused entry into the conference. A thirty page statement was taken from Dr. Akerman. The statement was attached as an exhibit to the State's August 16, 2022 filing entitled "Notice to the Court (SF-214)" which now makes it a court record. That statement is the subject of the instant motion.

The defense submitted a proposed order granting the instant motion, to which the State noted that it had no objection. However, the media, as a non-party intervenor, objects to granting the instant motion and presented argument before this Court at the August 18, 2022 hearing.

First, this Court treats the instant motion as a Request to Determine Confidentiality of a Court Record pursuant to Florida Rule of Judicial Administration 2.420(e) and (f). The motion would have been considered a Motion for Protective Order if the defense sought appropriate relief between the time it removed Dr. Akerman from its witness list and the time the State took his statement. But since the statement has already been taken and filed with the Clerk of Court in this matter, it is now a court record which the defense now seeks to seal.

The defense bases its instant request for relief on two grounds: 1) that the statement contains privileged, confidential work product material; and 2) that the statement contains confidential medical information about Defendant.

First, because the statement has already been taken in this case and filed as a court record, the information contained therein is no longer confidential work product. If Defendant knew that the State intended to proceed with the questioning of Dr. Akerman after he was removed from their witness list, as the record appears to reflect, then he should have filed a Motion for Protective Order before the statement was taken. This Court could then have considered the merits of the motion, the potential confidentiality of the information Dr. Akerman possessed, and at the very least, could have determined that no work product material be divulged. No such motion was filed, the statement has now already been taken, the information has already divulged, and the statement in whole has been filed in the court record. Based on the circumstances of what occurred and the fact that the alleged work product has already been divulged to a third party and filed as a court record, this Court finds that it no longer qualifies as confidential material. Defendant cites to *Morgan v. Tracy,* 604 So. 2d 15 (Fla. 4th DCA 1992) as authority, but in that case, a motion for protective order was filed *before* a deposition was taken of a formerly listed witness. That case is wholly distinguishable from the facts of this case, where the statement has already been taken and any alleged work product therein has already been divulged. For these reasons, the information in the statement is no longer confidential.

Second, Defendant argues that one's medical condition and information pertaining thereto is confidential and thus should be sealed on that basis. "Although generally protected by one's privacy right, medical reports and history are no longer protected when the medical condition becomes an integral part of the . . . proceeding. . ." *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988). Thus, when medical information is an inherent part of a proceeding, it ". . . cannot be utilized as a proper basis for closure." *Id.* at 119. In the instant matter, Defendant's personal and medical history will no doubt be explored in the mitigation portion of this sentencing phase trial. As such, any medical information that is contained in Dr. Akerman's statement which is now a court record is not a proper basis for closure.

There is a strong presumption of public access to court records. Based on the reasoning set forth herein and Defendant's failure to satisfy the three-pronged test for closure in criminal proceedings set forth in *Miami Herald Publishing Co. v. Lewis,* 426 So. 2d 1 (Fla. 1982), the instant motion must be denied.

Finally, the ruling in this matter will not affect Defendant's fair trial rights. The fact that Dr. Akerman's statement will not be sealed has no effect on its admissibility. The jury will neither hear the subject statement nor be privy to its contents during this sentencing phase of trial. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's instant motion is hereby **DENIED**.

* * *

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December 30, 2022
Cite as 30 Fla. L. Weekly Supp. ____

COUNTY COURTS

Insurance—Property—Standing—Assignment—Validity—Assignment of insurance benefits was invalid and unenforceable where it did not include the statutorily-mandated written, itemized, per-unit cost estimate of services to be performed—Separate estimate of services to be performed did not satisfy requirement where estimate was not signed by plaintiff assignee and did not include all services that were performed—Letterhead with assignee's name printed at top of estimate did not suffice as assignee's electronic signature

LOSS RESTORATIONS, LLC, a/a/o Teyunis Gonzalez & Nancy Cruz Gonzalez, Plaintiff, v. PEOPLE'S TRUST INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CC-012645-O. October 19, 2022. Brian S. Sandor, Judge. Counsel: William J. Dennis, Tampa, for Plaintiff. Michael B. Greenberg, Deerfield Beach, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT WITH PREJUDICE & DEFENDANT'S MOTION TO STAY DISCOVERY PENDING COURT'S RULING ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT WITH PREJUDICE

THIS CAUSE, having come before the Court, on October 14, 2022, upon Defendant People's Trust Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint with Prejudice ("Defendant's Motion to Dismiss") and Defendant's Motion to Stay Discovery Pending Court's Ruling on Defendant's Motion to Dismiss (the "Motion to Stay Discovery"), and the Court having heard the arguments of both parties' counsel, having reviewed the motions, and otherwise being fully advised in the premises, and it is hereby:

ORDERED and ADJUDGED that:

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

2. Plaintiff's case arises out of an assignment of insurance benefits agreement executed by the insureds-assignors and Plaintiff-assignee on May 13, 2022, which is attached to Plaintiff's Complaint as an exhibit.

3. Plaintiff's assignment of benefits agreement is subject to section 627.7152, Florida Statutes, which applies to assignment agreements executed on or after July 1, 2019. *See Total Care Restoration, LLC v. Citizens Prop. Ins. Corp.*, 337 So. 3d 74, 75-76 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D926a]; *accord Kidwell Grp., LLC v. Olympus Ins. Co.*, No. 5D21-2955, 2022 WL 2897749, at *1-*2 (Fla. 5th DCA Jul. 22, 2022) [47 Fla. L. Weekly D1571a].

4. Section 627.7152(2) provides the specific requirements which must be included in an assignment agreement for such an agreement to be valid and enforceable. *See* § 627.7152(2)(d), Fla. Stat. These requirements are clear and unambiguous.

5. "A court's determination of the meaning of a statute begins with the language of the statute." *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 145 (Fla. 2019) [44 Fla. L. Weekly S298a]. "If that language is clear, the statute is given its plain meaning, and the court does not 'look behind the statute's plain language for legislative intent or resort to rules of statutory construction.' " *Id.* (quoting *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008) [33 Fla. L. Weekly S671a]).

6. Strictly construing the statute, Plaintiff's assignment of benefits agreement does not comply with all the statute's mandatory requirements.

7. Plaintiff's assignment agreement does not comply with section 627.7152(2)(a)(4), which provides that an assignment agreement must "[c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee." Plaintiff asserts that a separate May 13, 2022 estimate satisfied this statutory requirement, but *The Kidwell Grp., LLC v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97, 98 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b], instructs otherwise. *See Lam v. Univision Communications, Inc.*, 329 So. 3d 190, 195 n.4 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2235a] ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." (quoting *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992))).

8. In *Kidwell Grp.*, the Fourth District Court of Appeal affirmed a dismissal with prejudice of an action based on an assignment of benefits agreement where an unexecuted invoice that postdated the assignment agreement did not satisfy sections 627.7152(2)(a)(4) and 627.7152(2)(a)(1), which provides that an assignment agreement must "[b]e in writing and executed by and between the assignor and the assignee." 343 So. 3d at 97-98; *see Clemons v. Flagler Hosp., Inc.*, 385 So. 2d 1134, 1136 n.3 (Fla. 5th DCA 1980) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." (alteration in original) (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949))).

9. Here, while the estimate facially appears to be dated the same as the assignment agreement and signed by the assignors, it is not signed by Plaintiff-assignor. Accordingly, Plaintiff's assignment agreement is invalid and unenforceable because Plaintiff's separate estimate does not comply with subsection (2)(a)(1)'s requirement of execution "by and between the assignor ***and the assignee***," and, consequently, subsection (2)(a)(4) of the statute. *See Kidwell Grp.*, 343 So. 3d at 97-98.

10. Plaintiff argues that the printed letterhead of its name, Loss Restorations, atop the separate estimate suffices as an electronic signature under section 668.50, Florida Statutes (2019), which, among other things, generally provides that electronically signed contracts are enforceable. The Court finds this argument unavailing given the statute's definition of "electronic signature" as being "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." § 668.50(2)(h), Fla. Stat. If an assignee's mere letterhead constituted an electronic signature, an assignee would never have to separately execute an assignment agreement; the same would even apply to an assignor whose name is electronically printed somewhere in the agreement other than the designated signature line. Such a standard would essentially eviscerate the execution requirement of section 627.7152(2)(a)(1).[1]

11. Separately, while the absence of Plaintiff's signature to the separate alone renders the assignment agreement invalid and unenforceable, Defendant's other argument concerning the estimate's failure to include an estimate for tarping services that were ultimately performed and charged for is well taken. Specifically, Plaintiff's estimate included numerous line items relating to water extraction, but entirely omitted any reference or allusion to tarping services. The invoices attached to the Amended Complaint, however, included a $4,800 charge for tarping services. Again, section 627.7152(2)(a)(4) provides that an assignment agreement must "[c]ontain a written, itemized, per-unit cost estimate ***of the services to be performed by the assignee***." (Emphasis added). Given the inherent nature of an estimate, of course the ultimate charges of the services performed do not have to precisely align with the estimate's projected costs of the services to be performed—but at the very least, the estimate must include all of the "services to be performed" to be valid and enforce-

able; otherwise, an assignor could unknowingly sign away rights for various unlisted services that he or she did not want or need. Where, as here, additional services that are not included in an assignment agreement's estimate are to be provided, the assignee must obtain a separate, statutorily compliant assignment of benefits agreement that contains an estimate for said additional services. Thus, Plaintiff's assignment agreement is also invalid and unenforceable on this basis.

12. "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2567a]. An assignment of benefits "is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place." *Progressive Express Ins. Co. v. McGrath Community Chiropractic*, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b].

13. Accordingly, Defendant's Motion to Dismiss **GRANTED**, and the Court hereby dismisses this case with prejudice due to the incurable defects of the assignment agreement. Plaintiff shall take nothing in this action, and the Defendant may go hence without day.

14. The Motion to Stay Discovery is moot.

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[1]Further, the Court notes subsection 668.50(5)(b) provides, in pertinent part, that the statute "applies only to transactions between parties ***each of which*** has agreed to conduct transactions by electronic means." (Emphasis added). Here, the signatures to the assignment agreement of both the assignors and the representative of Plaintiff-assignee, as well as the signatures of the assignors on the separate estimate, are physical, non-electronic signatures. This context facially shows that the parties' conduct was not based on an agreement to conduct the transaction by electronic means. *See* § 668.50(5)(b), Fla. Stat. Still, subsection 668.50(5)(b) aside, the letterhead of Plaintiff's corporate name atop the estimate simply does not suffice as an "electronic signature" as defined by subsection 668.50(2)(h).

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Summary judgment entered in favor of medical provider where there is no genuine dispute as to fact that treatments provided to insured were related to accident, medically necessary, and reasonable in price—Insurer erred in using 2010A Medicare fee schedule to calculate benefits for dates of service after June 1, 2010, rather than using 2010B fee schedule incorporating 2.2 % update to fee schedule mandated by the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010—Insurer failed to elect fee schedule method of reimbursement where PIP policy provides that insurer "will pay ... 80 % of all medically necessary expenses" and does not provide for use of optional fee schedule payment methodology

STEVEN M. BERMAN, D.C., P.A., a/a/o Juselie Deus, Plaintiff, v. UNITED AUTO INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-002829-SP-23, Section ND05. October 4, 2022. Chiaka Ihekwaba, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Rashad El-Amin, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court on September 7, 2022, upon Plaintiff's Amended Motion for Final Summary Judgment, and the Court having considered the motion and the summary judgment evidence presented, having heard argument of counsel, and being otherwise fully advised,

IT IS ADJUDGED that Plaintiff's Amended Motion for Final Summary Judgment is GRANTED, for the following reasons:

MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

United Automobile Insurance Company ("United Auto") issued an automobile insurance policy to Aiselie Deus, under which Aiselie Deus' daughter, Juselie Deus, was a covered person (the "United Auto Policy"). The United Auto Policy did not make a clear and unambiguous election to use the permissive fee schedule method of adjusting PIP claims. Instead, the United Auto Policy provides that "[United Auto] will pay, in accordance with the Motor Vehicle No Fault Law, to or for the benefit of the injured person: (a) medical benefits—eighty percent of all medically necessary expenses . . ."

On May 12, 2010, Juselie Deus was injured as a result of a motor vehicle accident, after which Aiselie Deus executed an Assignment of Benefits and Juselie Deus received treatment from Steven M. Berman, D.C. and West Dixie Chiropractic Center. West Dixie Chiropractic Center submitted bills to United Auto, charging its usual and customary charges. United Auto did not pay those bills based upon eighty percent of all medically necessary expenses as specified in the United Auto Policy. Instead, United Auto paid those bills based upon the Medicare Part B Fee Schedule/the State Fee Schedule (the "Fee Schedule Method"), using the Fee Schedule Method to determine the amount of West Dixie Chiropractic Center's Charges to allow.

On July 6, 2022, Plaintiff filed its Amended Motion for Final Summary Judgment as to the reasonableness, relatedness and medical necessity of the services provided by West Dixie Chiropractic Center (the "summary judgment motion"). At the time of filing the summary judgment motion, Plaintiff also filed and served the following summary judgment evidence in support of its position that the services provided were reasonable, related and medically necessary: (1) the Affidavit of Steven M. Berman, D.C., together with Dr. Berman's medical file; (2) admissions requests propounded to United Auto, together with United Auto's responses; and (3) the transcript of the deposition of Ryan Peeples, together with CPT Code Reports prepared by Mr. Peeples, showing the charges of medical providers in South Florida for CPT Codes 97012, 98941 and 99213, the procedures for which United Auto did not allow West Dixie Chiropractic Center's charges. United Auto failed to submit summary judgment evidence in opposition to the summary judgment motion.[1]

SUMMARY JUDGMENT STANDARD

Amended Rule 1.510, Fla. R. Civ. P., adopts the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986); and *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Pursuant to Rule 1.510(a), Fla.R.Civ.P., "[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." Specifically, "summary judgment is proper 'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *See also Celotex.*

In applying Rule 1.510, "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a] (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

THE CHIROPRACTIC AND REHABILITATIVE SERVICES WERE RELATED TO THE MOTOR VEHICLE ACCIDENT

In *Sevila Pressley Weston v. United Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 306b (Fla. 11th Cir. App., Nov. 26, 2013), the Eleventh Judicial Circuit sitting in its appellate capacity, held that "relatedness is established by showing that injuries and subsequent medical treatment . . . arose out of a subject accident":

> With respect to the issue of relatedness in PIP cases, "the medical treatment covered by the insurance policy is treatment related to the bodily injury arising out of the ownership, maintenance or use of the motor vehicle." *See In re Standard Jury Instructions in Civil Cases*, 966 So.2d 940, 942 (Fla. 2007) [32 Fla. L. Weekly S563a]. In simpler parlance, relatedness is established by showing that injuries and subsequent medical treatment therefor arose out of a subject accident."

In *West Kendall Rehab Center, Inc. a/a/o Michael Salcedo v. State Farm Mut. Auto. Ins. Co*., 28 Fla. L. Weekly Supp. 1135b (Miami-Dade County, February 7, 2021), where the record evidence reflected that the patient had been injured as a result of the subject motor vehicle accident and that the treatment and/or services rendered by the Plaintiff were performed in relation to same, and where Defendant had failed to come forth with any evidence purporting to show that the patient was treated for anything other than the injuries sustained in the motor vehicle accident, the Court granted the medical provider's motion for summary judgment on the issue of relatedness, rejecting the insurer's expert affidavit which failed to establish that the patient was treated for anything other than the injuries he sustained in the subject motor vehicle accident.

See also American Health & Rehab., Inc. v. United Auto. Ins. Co., 23 Fla. L. Weekly Supp. 615b (Broward County, October 16, 2015)("[t]he mere denial by United Auto that the treatment was related . . . without the demonstration of some intervening act or circumstance eliminating the pre-existing relatedness does not create a genuine issue of material fact"); *A-Plus Medical & Rehab Center v. State Farm*, 27 Fla. L. Weekly Supp. 186a (Miami-Dade County, March 19, 2019) (finding affidavit insufficient to create genuine issue of material fact as to relatedness since it failed to set forth "any factual basis to conclude that the claimant was treated for anything other than the injuries in the [subject] accident"); *Marshall Bronstein, D.C. v. United Auto. Ins. Co*., 22 Fla. L. Weekly Supp. 945b (Miami-Dade County, March 11, 2015) ("the term 'related' represents a causal connection between the treated injury and the automobile accident" and does not "hinge on the benefit or necessity of treatment", that is, "the terms 'related' and 'necessary' . . . must be analyzed independent of one another"); *Silverland Medical Center, LLC a/a/o Yisander Garcia v. United Auto. Ins. Co*., 28 Fla. L. Weekly Supp. 720c (Miami-Dade County, April 30, 2020 (Plaintiff's motion for summary judgment granted where the record before the Court reflected that it was undisputed that all treatment rendered by the Plaintiff was related to the subject automobile accident).

The Berman Affidavit demonstrates that there is no genuine dispute as to the material fact that the Patient's injuries and chiropractic and rehabilitative services provided by West Dixie Chiropractic Center arose out of the Motor Vehicle Accident. The evidence is such that a reasonable jury could not return a verdict for United Auto on the issue of relatedness.

THE CHIROPRACTIC AND REHABILITATIVE SERVICES WERE MEDICALLY NECESSARY

Fla. Stat. 627.732(2) specifically defines "medically necessary" as that term is used throughout the No-Fault Act as follows:

> (2) "Medically necessary" refers to a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:
>
> (a) In accordance with generally accepted standards of medical practice;
>
> (b) Clinically appropriate in terms of type, frequency, extent, site, and duration; and
>
> (c) Not primarily for the convenience of the patient, physician, or other health care provider.

Dr. Berman's Affidavit and medical records establishes that the chiropractic and rehabilitative services provided by West Dixie Chiropractic Center were those that a prudent chiropractic physician would provide for the purpose of preventing, diagnosing and treating an injury or symptom that is in accordance with generally accepted standards of medical practice; clinically appropriate in terms of type, frequency, extent, site and duration; and not primarily for the convenience of the patient, physician or health care provider. The Berman Affidavit demonstrates that there is no genuine dispute as to the material fact that the chiropractic and rehabilitative services provided by Dr. Berman and West Dixie Chiropractic Center were medically necessary. The evidence is such that a reasonable jury could not return a verdict for United Auto on the issue of medical necessity.

UNITED AUTO ERRED IN FAILING TO CONSIDER THE 2.2% UPDATE TO THE PHYSICIAN FEE SCHEDULE MANDATED BY THE PRESERVATION OF ACCESS TO CARE FOR MEDICARE BENEFICIARIES AND PENSION RELIEF ACT OF 2010

Pursuant to Sec. 627.736(5)(a)(3), Fla. Stat. (2010), where an insurer limits reimbursement to 80% of 200% of the allowable amount under the participating physicians schedule of Medicare Part B, "the applicable fee schedule of payment limitation under Medicare is the fee schedule or payment limitation in effect at the time the services, supplies or care was rendered, except that it may not be less than the allowable amount under the participating physicians schedule of Medicare Part B for 2007 for medical services, supplies and care subject to Medicare Part B."

In this case, for 10 dates of service of CPT Code 98941 (spinal adjustment) from June 21, 2010 to October 6, 2010, United Auto incorrectly used the 2010A Medicare Part B Physician Fee Schedule instead of the correct 2010B Medicare Part B Physician Fee Schedule. Instead of approving West Dixie Chiropractic Center's charge in the amount of $75 (which was less than 200% of the applicable 2010B Medicare Part B Physician Fee Schedule ($75.46), United Auto approved only $73.96 for each of the 10 dates of service from June 21, 2010 to October 6, 2010. $73.96 is exactly 200% of the 2010 Medicare Part B Physician Fee Schedule amount for a CPT Code 98941 procedure performed in Miami, Florida.

The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 provided for a 2.2% update to the 2010 Medicare Part B Physician Fee Schedule, effective for dates of service June 1, 2010 through November 30, 2010. In approving $73.96 instead of $75 for the CPT Code 98941 procedures performed from June 21, 2010 through October 6, 2010, United Auto failed to give consideration to the 2.2% update to the 2010 Medicare Part B Physician Fee Schedule, as mandated by the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010.

As recognized by Judge Dimitris in *Apple Medical Center, LLC (a/a/o Morales, Maday) v. State Farm Fire and Cas. Co.*, 24 Fla. L. Weekly Supp. 236a (Miami-Dade County, June 22, 2016):

> The statutory language of the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 regarding the 2.2% update to the 2010 Medicare Part B Physician Fee Schedule for dates of service commencing on June 1, 2010 is clear, unambiguous and conveys a clear and definite meaning, and the statute 'must be given its plain and obvious meaning.' *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1 (Fla. 2004) [29 Fla. L. Weekly S788a]; *Dadeland Depot, Inc. v. St. Paul Fire and Marine Insurance Co*., 945 So.2d 1216 (Fla. 2006) [31 Fla. L. Weekly S882a] ("If the language of a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning.")

Accordingly, in *Apple Medical Center*, Judge Dimitris granted the medical provider's motion for summary judgment, holding that State Farm is precluded from using the 2010A Medicare Part B Physician Fee Schedule for a June 29, 2010 date of service, without regard to the 2.2% update to the 2010A Medicare Part B Physician Fee Schedule mandated by The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010.

Just as State Farm was precluded from using the 2010A Medicare Part B Physician Fee Schedule for a post-June 1, 2010 date of service in *Apple Medical Center*, United Auto is similarly precluded from using that incorrect fee schedule for dates of service from June 21, 2010 to October 14, 2010 in this case. There is no genuine dispute as to the material fact that United Auto failed to use the correct 2010B Medicare Part B Physician Fee Schedule for dates of service after the June 1, 2010 effective date of The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010. The evidence is such that a reasonable jury could not return a verdict for United Auto on the issue of United Auto's use of the incorrect fee schedule for 10 dates of service of CPT Code 98941 (spinal adjustment) from June 21, 2010 to October 6, 2010.

UNITED AUTO FAILED TO GIVE NOTICE OF ITS ELECTION TO USE THE PERMISSIVE MEDICARE FEE SCHEDULE METHOD

The 2008 amendments to Sec. 627.736, Fla. Stat. created two separate and distinct PIP payment methodology options. The default method, known as the "fact dependent" or "reasonableness" method, is set forth in Fla. Stat. 627.736(5)(a)1. and requires PIP insurers to pay for medical expenses based upon a fact intensive analysis of various "reasonableness" factors. The second "optional" method is the "Medicare Fee Schedule" method set forth in Fla. Stat. 627.736(5)a.2. allowing PIP insurers to pay for medical services based exclusively on Medicare Fee Schedules without regard to the "reasonableness" of a provider's charge.

In *Geico General Ins. Co. v. Virtual Imaging Services, Inc*., 141 So.3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a], the Florida Supreme Court held that the insurer was required to give notice to its insured by electing the permissive Medicare fee schedules in its policy prior to taking advantage of the Medicare fee schedule methodology to limit reimbursements. In *Virtual Imaging*, the Supreme Court made clear that a policy "election" providing notice to insureds of its intent to limit reimbursement of no-fault benefits under the Medicare Fee Schedules was required "before" an insurer could "take advantage" of the Medicare Fee Schedule methodology.

In *Virtual Imaging Servs., Inc. a/a/o Jacqueline Perez v. United Auto. Ins. Co*., 23 Fla. L. Weekly Supp. 304a (Fla. 11th Cir. App. 2015) and *Virtual Imaging Servs., Inc. a/a/o Soyara Cedeno v. United Auto. Ins. Co*., 23 Fla. L. Weekly Supp. 516a (Fla. 11th Cir. App. 2015), the Eleventh Judicial Circuit Court, in its appellate capacity, acknowledged that insurers were required under the no-fault act to "clearly select" either the "fact dependent" methodology or the "permissive fee schedule" methodology in their policy and could not alternate between the two.

Accordingly, an insurer must choose one of the two payment methodologies and provide express notice of same in its policy. An insurer cannot "alternate" between the two methods and, absent an unequivocal election, will not be permitted to "take advantage" of the "Medicare Fee Schedule" method which provides for the lowest possible reimbursement. *See e.g., Geico General Ins. Co. v. Virtual Imaging Servs. Inc*., 141 So.3d 147, 156 (Fla. 2013) [38 Fla. L. Weekly S517a]; *Kingsway Amigo Ins. Co. v. Ocean Health, Inc*., 63 So.3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] (the plain language of §627.736 "allows an insurer to choose between two different payment calculation methodology options" and "anticipates that an insurer will make a choice"). *See also State Farm Mutual Auto. Ins. Co. v. Plantation Open MRI, LLC, a/a/o Jessica Hall*, 25 Fla. L. Weekly Supp. 698b (Fla. 17th Cir. App. September 27, 2017) ("[a]lthough the Fourth District Court of appeal explained that the Medicare Part B fee schedule could be a factor to determine a reasonable charge, the court reiterated that the Medicare Part B fee schedule cannot be used to limit an insurer's reimbursement without the insurer first electing to do so in its policy as required by the Florida Supreme Court"); *Northwest Center for Integrative Medicine & Rehabilitation, Inc. v. State Farm Mut. Auto. Ins. Co*., 214 So.3d 679, 681-82 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D446b] [*citing Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc*., 141 So.3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]]; *Virtual Imaging Servs., Inc. a/a/o Jacqueline Perez v. United Auto. Ins. Co*., 23 Fla. L. Weekly Supp. 304a (Fla. 11th Cir. App. 2015) (Blake, J.) and *Virtual Imaging Servs., Inc. a/a/o Soyara Cedeno v. United Auto. Ins. Co*., 23 Fla. L. Weekly Supp. 516a (Fla. 11th Cir. App. 2015) ("since the Defendant did not rely upon the remaining factors within its policy of insurance when processing the Plaintiff's bill, it cannot now fall back on the fact dependent inquiry to determine reasonableness of the charge") (acknowledging that the insurer is required to "clearly select" either the "fact dependent" methodology or the "permissive fee schedule" methodology in their policy and could not alternate between the two).

United Auto's Form UAIC 200 (02/08) Policy sets forth what United Auto contractually agreed to pay for PIP benefits—providing that Defendant "will pay . . . 80% of all medically necessary expenses." The Form UAIC 200 (02/08) Policy does not contain the "optional" payment methodology set forth in Fla. Stat. 627.736(5)(a)2., which came into effect as a result of the 2008 statutory amendments to the PIP statute. United Auto's policy, by its clear and unambiguous terms, obligates it to pay 80% of all medically necessary expenses." A Court is not free to rewrite a policy that is clear by its express terms. *See FIGA v. Somerset Homeowners Assn., Inc*., 83 So.3d 850 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2785a]; *see also State Farm Fire & Cas. Co. v. Patrick*, 647 So.2d 983, 984 (Fla. 3d DCA 1994).

Ambiguities in insurance contracts, if any, "are resolved in favor of the insured". *See DCI MRI, Inc. v. GEICO Indem. Co*., 79 So.3d 840 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D170e], *quoting GEICO Indem. Co. v. Virtual Imaging Servs., Inc*., 79 So.3d 55, 58 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2597a] ("Geico should have reimbursed Virtual Imaging for the greatest amount possible within the language of the policies").

The law is also well settled that while the No-Fault Statute establishes the minimum coverage for PIP benefits, an insurer is always free to provide greater coverage than that which is mandated by law and when it does, the terms of the policy will control. *See DCI MRI, Inc. v. GEICO Indem. Co.*, 79 So.3d 840 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D170e], *citing Kingsway Amigo Ins. Co. v. Ocean Health, Inc*., 63 So.3d 63, 68 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] ("when the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control").

PLAINTIFF'S CHARGES WERE REASONABLE IN PRICE

A medical provider may establish a prima facie case that its bills are reasonable by offering testimony through a qualified witness that its prices are based on years of personal experience, consideration of fee and coding reference books and the usual and customary charges of other medical providers in the community for the same procedure codes. *See United Auto Ins. Co. v. Miami Dade County MRI Corp. a/a/o Erlin Duran*, 27 Fla. L. Weekly Supp. 221a (Fla. 11th Cir. App. March 22, 2019) (affirming summary judgment in favor of medical

provider who established reasonableness of its charges by presenting evidence "list[ing] the charges for the same medical services by other medical providers in the community" as well as the "range of charges for like medical services" found in the "Medical Fees in the United States" fee and coding guide); *see also United Auto Ins. Co. v. Hallandale Open MRI, LLC. a/a/o Antonette Williams*, 21 Fla. L. Weekly Supp. 399d (Fla. 17th Cir. App. December 11, 2013); *Cert. Den*., 145 So.3d 997 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1883c]; *Roberto Rivera-Morales, M.D., a/a/o Fabian A. Mejia-Quinteros v. State Farm Mutual Auto. Ins. Co*., 22 Fla. L. Weekly Supp. 271b (Fla. 11th Circuit, Miami-Dade County, Judge King, June 19, 2014) (testimony that charges are within the range of usual and customary charges in the community in which the plaintiff operates and are indicative of amounts accepted from other insurers satisfies the plaintiff's burden of proof).

A plaintiff's prima facie showing of the reasonableness of its charges can also be established by merely presenting the medical bill produced for the service at issue, along with testimony that the patient received the treatment in question. *See A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1677e] ("a medical bill constitutes the provider's opinion of a reasonable charge for the services."); s*ee also State Farm Mutual Auto. Ins. Co. v. Multicare Medical Group, Inc.*, 12 Fla. L. Weekly Supp. 33a (Fla. 11th Cir. App. October 5, 2004); *see also Pan Am Diagnostic Services, Inc. (a/a/o Fritz Telusma) v. United Auto. Ins. Co*., 21 Fla. L. Weekly Supp. 200a (Fla. 17th Circuit, Broward County, Judge Robert W. Lee, October 1, 2013), *A1A Management Servs., LLC. a/a/o Farano Muselaire v. State Farm Mutual Auto. Ins. Co*. 22 Fla. L. Weekly Supp. 835c (Fla. 11th Circuit, Judge Gonzalez-Meyer, January 2015).

In this case, Plaintiff has established a prima facie case that its bills are reasonable by presenting the medical bills produced for the services at issue, in the form of the Patient Ledger attached to the Berman Affidavit, together with the testimony of Dr. Berman that the Patient received the treatment in question. In addition., the Berman Affidavit establishes that in providing the chiropractic and rehabilitative services to the Patient, Plaintiff charged its usual and customary charges for those services during the June 2010 through April 2011 time period; that in establishing those charges, Dr. Berman gave consideration to his reputation, qualifications and experience as a chiropractor, the cost of operating West Dixie Chiropractic Center in Miami-Dade County, reimbursement levels in the community, as reflected in hundreds of Explanations of Benefits received by West Dixie Chiropractic Center from numerous PIP insurers, the Medicare Part B Fee Schedule and 200% of the Medicare Part B Fee Schedule and the Workers Compensation Schedule; that a comparison of West Dixie Chiropractic's charges with the Medicare Part B Fee Schedule demonstrates the reasonableness of West Dixie Chiropractic Center's charges; that while there may have been some practitioners who charged a little less, the charges of West Dixie Chiropractic Center were and are comparable to, in line with and competitive with the charges of other chiropractic physicians in the community of Miami-Dade and Broward counties, being less than the charges of many chiropractors in the community, and well within the range of a reasonable charge; and that with regard to the usual and customary payments that West Dixie Chiropractic Center has accepted for its services, and reimbursement levels in the community, West Dixie Chiropractic Center regularly and consistently received reimbursements of 80 percent of its charges from No-Fault insurers such as United Auto, Allstate, Geico, State Farm, Ocean Harbor and Progressive prior to the 2008 change in the law that allowed insurers to pay those charges based upon 80 percent of 200 percent of Medicare Part B, where the insurer elected the fee schedule limits in its policy; and that to the extent that Dr. Berman accepted an amount from a PIP insurer based upon 200 percent of the Medicare Part B fee schedule or workers compensation fee schedule for services provided during the June 21, 2010 to April 18, 2011 time period, he would have done so based upon his understanding that the PIP insurer had elected the fee schedule limits in its policy, and was in compliance with the change in the law that allowed insurers to pay those charges based upon such fee schedule limits, where the policy had made that express election.

In addition to presenting the medical bill produced for the services at issue, together with the Berman Affidavit, Plaintiff relies upon the CPT Code Reports produced by United Auto in support of the reasonableness of its charges. Those CPT reports reveal that for each of the CPT code procedures for which United Auto failed to approve West Dixie Chiropractic Center's charge (97012, 98941 and 99213), there were numerous medical providers in the community whose charges for those same CPT code procedures were the same or greater than West Dixie Chiropractic Center's charges. As recognized by Judge Lee, "what other medical providers in the community charge for the same service is clearly relevant to the issue of the reasonableness of what an insurer reimburses". *Pembroke Pines MRI v. United Auto. Ins. Co*., 20 Fla. L. Weekly Supp. 629a (Broward County, 2013).

There is no genuine dispute as to the material fact that West Dixie Chiropractic's charges for the 98941, 97012 and 99213 procedures performed in this case were reasonable in price. The evidence is such that a reasonable jury could not return a verdict for United Auto on the issue of the reasonableness of those charges.

CONCLUSION

There can be no question that there is no genuine dispute as to any material fact regarding the reasonableness, relatedness and medical necessity of the chiropractic and rehabilitative services provided by Dr. Berman and West Dixie Chiropractic Center. Clearly, the summary judgment evidence as to the reasonableness, relatedness and medical necessity of those services does not present a sufficient disagreement to require submission to a jury and is such that a reasonable jury could not possibly return a verdict for United Auto.

Accordingly, Plaintiff Steven M. Berman, D.C., P.A. d/b/a West Dixie Chiropractic Center (a/a/o Deus, Juselie). shall recover from United Automobile Insurance Company, 1313 NW 167th St., Miami, FL 33169, PIP benefits in the amount of $170.68 plus prejudgment interest in the amount of $100.62, for a total sum of $271.30, which shall accrue interest pursuant to F.S. §55.03 from the date of this judgment until this judgment is satisfied, at the rate of 4.34%, together with reasonable attorney's fees and costs to be determined at a later date, for all of which let execution issue.

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[1]Rule 1.510(c)(5), Fla.R.Civ.P. provides that "at least 20 days before the time fixed for the hearing, the nonmovant must serve a response that includes the nonmovant's supporting factual position." Pursuant to Rule 1.510(c)(1), "a party asserting that a fact is . . . .genuinely disputed must support the assertion by (A) citing to particular parts of materials in the record . . . "

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Vehicle predelivery service charges—Costs and profit disclosure—Affirmative defenses—Auto dealer that included costs and profit disclosure regarding predelivery service charges on retail lease order for vehicle, but not on motor vehicle lease agreement, cannot avoid liability under FDUTPA for failing to include mandatory disclosure on all documents by asserting substantial compliance with disclosure requirement or relying on contemporaneous instrument rule—Safe harbor provision of FDUTPA, providing that Act does not apply to act or practice required or specifically permitted by federal or state law, is not applicable—Dealer has not proven that Florida statute authorizing dealer to charge fee for using Electronic Filing System allows dealer to charge predelivery service fees without making disclosures required by FDUTPA—Merger clause—Dealer cannot avoid liability based on merger clause because this would violate plain language of FDUTPA and operate as waiver of FDUTPA protections—Estoppel defense fails where dealer cannot show any misleading conduct by plaintiff or reasonable detrimental change in its own position based on plaintiff's conduct—Waiver defense is not supported by any evidence—Defenses attempting to limit dealer's FDUTPA exposure based on doctrine of avoidable consequences and failure to mitigate are contrary to public policy—Conditions precedent—Record evidence refutes defense alleging plaintiff's failure to send the presuit demand letter required by statute—Lack of causation is denial, not an affirmative defense—Summary judgment is granted in favor of plaintiff as to all affirmative defenses—Plaintiff is still required to prove causation and damages elements of claim—On motion for reconsideration, court holds that plaintiff demonstrated per se violation of Section 501.976(18), and thereby established the first element of FDUTPA, where it was undisputed that retail order contained "costs and profit" disclosure and lease did not

MOSHE SIMON, Plaintiff, v. LEHMAN HYUNDAI SUBARU INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-012232-SP-23, Section ND06. May 1, 2022. Motion for Reconsideration as to first element of FDUTPA GRANTED, September 30, 2022. Ayana Harris, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood; and Darren R. Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiff. Edward Quinton, III, Quinton & Paretti, P.A., Miami, for Defendant.

ORDER GRANTING SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSES ONLY AND DENYING FINAL SUMMARY JUDGMENT FOR BOTH PARTIES

THIS CAUSE came before the Court on February 10, 2022, on the Plaintiff's Motion for Summary Judgment and Defendant's response in opposition and incorporated cross Motion for Summary Judgment. The Court, having listened carefully to the arguments of counsel, reviewed the record evidence, the relevant legal authority, and being otherwise fully advised in the premises, hereby finds as follows:

FINDINGS OF FACT

1. On January 30, 2017, Defendant leased a new vehicle to Plaintiff under a Motor Vehicle Lease Agreement.

2. As part of the lease transaction, Plaintiff signed a Retail Lease Order ("the Retail Order") and a Motor Vehicle Lease Agreement ("the Lease").

3. Both the Retail Order and the Lease contain a $199.99 pre-delivery service fee labeled "ELEC REG FILING FEE" and a $999.50 pre-delivery service fee labeled "PRE DELIVERY SERVICE CHARGE." Plaintiff paid both of these fees as part of this transaction.

4. The ELEC REG FILING FEE was for the costs of services Defendant performed like "tag and title work" before the car is delivered to the customer, and the PRE-DELIVERY SERVICE CHARGE related to activities like keeping the car ready for sale, cleaning the car, filling the car with gas, alignments, etc.

5. The Retail Order contained the § 501.976(18) "costs and profit" disclosure, however the Lease did not contain the statutorily required disclosure.

6. Defendant admits that the Lease did not inform Plaintiff about the profit earned from the ELEC REG FILING FEE or the PRE DELIVERY SERVICE CHARGE.

7. Defendant admits that it retained a profit from the PRE DELIVERY SERVICE CHARGE and the ELECREG FILING FEE.

8. Defendant is an Electronic Filing System agent (EFS agent).

9. Plaintiff reviewed and signed the Retail Order and the Lease at or near the same time and concerning the same vehicle lease transaction at Defendant's dealership.

10. At least (30) days before filing suit, Plaintiff sent Defendant a pre-suit demand letter delivered by USPS Certified Mail, return receipt requested, to the address at which Plaintiff's vehicle was leased pursuant to Florida Statute §501.98.

LEGAL STANDARD AND APPLICABLE LAW

Pursuant to the newly amended Florida Rule of Civil Procedure 1.510(a) "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Summary judgment is designed to put an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury. *Petruska v. Smartparks-Silver Springs, Inc.*, 914 So. 2d 502 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2614a]. Florida has adopted almost in its entirety the federal rule 56. In applying this new Rule 1.510 the Court is to look to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *and Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986), commonly referred to as the "Celotex trilogy", as well as the overall body of case law interpreting Rule 56. In *Celotex*, the Supreme Court of the United States held

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53 (1986).

In *Matsushita*, the Supreme Court expounded that to survive a motion for summary judgment there must be a "genuine" issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 585, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). Thus, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *See id*. In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial*." *See id*. (quoting Fed. Rule Civ. Proc. 56(e)).

ANALYSIS AND FINDINGS

Florida Statute § 501.204(1) provides that "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Fla. Stat. § 501.976(18) requires a dealer charging a customer for any predelivery service to have the following disclosure printed on all documents that include a line item for predelivery service: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." The purpose of the statute is to provide a consumer notice that predelivery services represent costs *and profit* to the dealer.

Under Florida law, plaintiffs alleging a FDUTPA violation must prove: (1) a deceptive act or unfair trade practice; (2) causation; and (3) actual damages. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3148a]. Plaintiff's FDUTPA claim is based on a violation of § 501.976(18), specifically, the failure to have the statutory "costs and profit" disclosure for the Predelivery Service Charge and Electronic Registration Filing Fee line items on the Lease Agreement.

Plaintiff has moved for summary judgment on Defendant's ten affirmative defenses. Summary judgment may be granted on an affirmative defense. Fla. R. Civ. P. 1.510(a). "The standard for a motion for summary judgment differs depending on whether the party moving for summary judgment also bears the burden of proof on the relevant issue." *Calderone v. U.S.*, 799 F.2d 254, 259 (6th Cir. 1986) (*quoting* William W. Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984)). As the United States Court of Appeals for the Sixth Circuit has noted:

> When the moving party does not have the burden of proof on the issue, he need show only that the opponent cannot sustain his burden at trial. *Id.*

Where, as here, a party moves for summary judgment on an issue for which it does not bear the burden of persuasion, the movant need not produce any evidence. *In re Amendments to Fla. R. of Civ. Proc. 1.510*, 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a] ("A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." (citation omitted)).

The Court addresses each of Defendant's Affirmative Defenses in turn:

a. First Affirmative Defense—Substantial Compliance

Defendant's substantial compliance affirmative defense fails. In essence, this affirmative defense asks the Court to look behind the statute's plain language to discern the legislature's intent. But as explained above, when a statute's language is plain and unambiguous, courts cannot "resort to rules of statutory (or contract) construction to ascertain intent." *Daniels*, 898 So. 2d at 64. The Court must apply § 501.976(18)'s plain language to the facts at hand. Defendant's affirmative defense asks the Court to do the opposite.

The legislature enacted FDUTPA, and more specifically, § 501.976(18) to provide "additional protections to consumers who purchase motor vehicles from motor vehicle dealers." Florida Staff Analysis, S.B. 1956, April 8, 2001. Allowing Defendant to avoid liability based on "substantial compliance" departs from FDUTPA and § 501.976(18)'s consumer protection purpose. Substantial compliance not only ignores the plain language of § 501.976(18) but would also harm consumers by allowing unscrupulous car dealers to bury statutory disclosures in a mountain of documents, leaving consumers uninformed and financially harmed.

This Court also finds that it cannot add language into a statute that does not exist. Nowhere does § 501.976(18) allow car dealers to substantially comply with its disclosure requirement. Had the legislature wanted to add such language, it could have, but clearly did not.

Defendant relies heavily on *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, Inc.*, 94 So. 3d 541, 545 (Fla. 2012) [37 Fla. L. Weekly S395a]. But *Chalfonte* is too dissimilar to have precedential value here. *Chalfonte* in part was about whether an implied remedy existed against the defendant for not complying with an insurance statute when the statute did not provide an express remedy. The Supreme Court thus reached its holding without considering the important consumer protection issues at play here. Unlike *Chalfonte*, the issue here is whether Defendant can escape liability when an express remedy *does* exist in a consumer protection statute like FDUTPA. Fla. Stat. § 501.976 ("It is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act. . .") *c.f.* Fla. Stat. § 501.211(1)-(2).

Defendant cannot avoid FDUTPA liability based on substantial compliance because it would render the plain language of a consumer protection statute meaningless. Such a result would depart from the litany of caselaw requiring consumer protection statutes to be broadly construed and applied to afford consumers the most protection possible.

In sum, this Court cannot abrogate § 501.976(18)'s plain and unambiguous language. Accordingly, summary judgment on Defendant's first affirmative defense is appropriate.

b. Second Affirmative Defense—Contemporaneous Instrument Rule

The plain language of the statute requires the dealers charging fees for predelivery service to have the §501.976(18) disclosure printed on *all* documents. As such, Defendant cannot avoid liability based on the contemporaneous instrument rule as such a conclusion would allow dealers to only place the required disclosure in a single instrument, contrary to the requirement of the statute, which would operate as a waiver of FDUTPA protections and go against public policy. *See Coastal Caisson Drill Co., Inc. v. Am. Cas. Co. of Reading, Pa.*, 523 So. 2d 791, 793 (Fla. 2d Dist. App. 1988), *approved sub nom. Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957 (Fla. 1989), ("[A]n individual cannot waive the protection of a statute that is designed to protect both the public and the individual."). For these reasons, summary judgment is appropriate on Defendant's second affirmative defense.

c. Third Affirmative Defense—Safe Harbor Provision

Defendant's third affirmative defense involves FDUTPA's safe harbor provision. Fla. Stat. §501.212(1) (FDUTPA does not apply to "[a]n act or practice required or specifically permitted by federal or state law.") Defendant seeks safe harbor protection because, under Florida Statute § 320.03(10), it is an EFS Agent and allowed to charge a fee for using the electronic filing system. Fla. Stat. § 320.03(10). This affirmative defense fails.

"The defendant bears the burden of establishing the applicability of the safe harbor provisions." *Marty v. Anheuser-Busch Companies, LLC*, 43 F. Supp. 3d 1333, 1343 (S.D. Fla. 2014). The issue the Court should decide, then, is whether Defendant can prove that a "specific federal or state law affirmatively authorized it to engage in the conduct alleged. . . ." *State of Fla., Off. of Atty. Gen., Dept. of Leg. State of Fla., Off. of Atty. Gen., Dept. of Leg. State of Fla., Off. of Atty. Gen., Dept. of Leg. Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005). In deciding this issue, "it is a well-recognized rule of statutory construction that exceptions or provisos should be narrowly and strictly construed." *Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1100-01 (Fla. 1990).

Defendant has not proven that § 320.03(10)(d) allows car dealers

to ignore § 501.976(18)'s clear and unambiguous language. Section 320.03(10)(d) states: "An authorized electronic filing system agent may charge a fee to the customer for use of the electronic filing system." While § 320.03(10)(d) does authorize car dealers to charge a fee for use of the EFS system, nowhere does the provision allow car dealers to charge predelivery service fees without § 501.976(18)'s disclosure. Accordingly, the Court enters summary judgment for Plaintiff on Defendant's third affirmative defense.

d. Fourth Affirmative Defense—Merger Clause

Defendant's fourth affirmative defense fails for the same reasons the first and second affirmative defenses fail. A merger clause's purpose "to affirm the parties' intent to have the parol evidence rule applied to their contracts." *Id. quoting Centennial Mortg., Inc. v. SG/SC, Ltd.*, 772 So. 2d 564, 565 (Fla. 1st Dist. App. 2000) [25 Fla. L. Weekly D2536a]. "Generally, a merger clause states 'that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract.' " *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. 1st Dist. App. 2011) [36 Fla. L. Weekly D1307a] *quoting Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 53 (Fla. 1st Dist. App. 2005) [30 Fla. L. Weekly D2291a] n. 1.

The merger clause in the Lease provides:

> **O. ENTIRE AGREEMENT. Important. Read before signing. The terms of this Lease should be read carefully because only those terms in writing are enforceable. Terms and promises, including oral promises, are not enforceable unless they are expressly contained in this Lease. This Lease is the final expression of the lease agreement between you and us. This Lease may not be contradicted by evidence of any prior oral lease agreement or of a contemporaneous oral lease agreement between you and us.**

The purpose of the merger clause is to preclude introduction of parol evidence to vary or contradict its terms. "Parol evidence includes 'a verbal agreement or other extrinsic evidence where such agreement was made before or at the time of the instrument in question.' " *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. 1st Dist. App. 2011) [36 Fla. L. Weekly D1307a] *quoting J. M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So. 2d 484, 485 (Fla. 1957). "The parol evidence rule precludes consideration of such evidence 'to contradict, vary, defeat, or modify a complete and unambiguous written instrument, or to change, add to, or subtract from it, or affect its construction.' " *Id.* at 486 (citation omitted); *see Allett v. Hill*, 422 So. 2d 1047, 1050 (Fla. 4th Dist. App. 1982) (finding error in "the admission of parol evidence to add a term to [a] written lease which, whether part of the preliminary negotiations or a separate subsequent condition, plainly violates . . . the doctrine of merger and the parol evidence rule").

Defendant cannot avoid liability based upon the merger clause because this conclusion would violate the plain language of § 501.976(18) and operate as a waiver of FDUTPA protections. The Court thus enters summary judgment on the fourth affirmative defense.

e. Fifth Affirmative Defense—Estoppel

Defendant relies on the estoppel doctrine as its fifth affirmative defense. To succeed on this affirmative defense, a party "must have relied on its adversary's conduct in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (internal quotations and citations omitted).

Because the function and purpose of the doctrine of estoppel is the prevention of fraud and injustice, there can be no estoppel where there is no loss, injury, prejudice, or detriment to the party claiming it. *See State ex rel. Watson v. Gray*, 48 So. 2d 84 (Fla. 1950). Defendant cannot show any misleading conduct by Plaintiff. Nor can Defendant show a reasonable, determinantal change in its position as a result of the Plaintiff's conduct, nor any resulting damages. The Lease was a contract of adhesion in which the Plaintiff to this action had no control over the terms. Plaintiff had no knowledge that Defendant had to include § 501.976(18)'s disclosure on the Lease. Accordingly, it would be impossible for the Plaintiff to influence the Defendant to detrimentally change its position. As a result, Defendant cannot assert it was misled by Plaintiff. *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1096, 1103 (Fla. Dist. Ct. App. 2006) [31 Fla. L. Weekly D2375c] ("The essence of estoppel is that a person should not be permitted to unfairly assert inconsistent positions, but estoppel will not lie unless the party seeking to assert it was misled.")

For these reasons, Defendant's estoppel affirmative defense fails as a matter of law and summary judgment is entered on the Defendant's fifth affirmative defense.

f. Sixth Affirmative Defense—Waiver

For its sixth affirmative defense, Defendant claims Plaintiff has waived FDUTPA's protection by some unidentified action or inaction. Defendant's attempt to limit FDUTPA's liability is against public policy. *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. 3d Dist. App. 1984) ("any attempt to limit one's liability for deceptive or unfair trade practices would be contrary to public policy.") *citing John's Pass Seafood Co. v. Weber*, 369 So. 2d 616 (Fla. 2d Dist. App. 1979) (it would diverge from public policy to enforce an exculpatory clause that attempts to immunize one from liability for breach of a positive statutory duty).

Defendant also cannot show Plaintiff has waived FDUTPA's protection. Waiver "is the intentional relinquishment of a known right, or the voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right." *Fireman's Fund Ins. Co. v. Vogel*, 195 So. 2d 20, 24 (Fla. 2d Dist. App. 1967). "When a waiver is implied from conduct, the acts, conduct, or circumstances relied upon to show waiver must make out a clear case." *Fireman's Fund Ins. Co.*, 195 So. 2d at 24 *citing Gilman v. Butzloff*, 155 Fla. 888 (1945). "There can be no waiver unless the party against whom the waiver is invoked was in possession of all the material facts." *Fireman's Fund Ins. Co.*, 195 So. 2d at 24.

Defendant has not legally nor factually proven waiver. No evidence exists in the record to support Defendant's waiver affirmative defense. Accordingly, the Court therefore enters summary judgment on the Defendant's sixth affirmative defense.

g. Seventh and Eighth Affirmative Defenses—Avoidable Consequences and Failure to Mitigate

In its seventh affirmative defense, Defendant relies on the doctrine of avoidable consequences. The doctrine of avoidable consequences "prevents a party from recovering those damages inflicted by a wrongdoer that the injured party could have reasonably avoided." *System Components Corp. v. Fla. Dept. of Transp.*, 14 So. 3d 967, 982 (Fla. 2009)[34 Fla. L. Weekly S393a]*quoting* The Florida Bar, Florida Civil Practice Damages § 2.43, at 2-30 (6th ed. 2005). Likewise, Defendant's eighth affirmative defense is failure to mitigate damages.

These affirmative defenses attempt to limit Defendant's FDUTPA exposure, but this too is against public policy. *See Rollins, Inc.*, 454 So. 2d at 585 ("any attempt to limit one's liability for deceptive or unfair trade practices would be contrary to public policy.") *citing John's Pass Seafood Co.*, 369 So. 2d 616 (it would conflict with public policy to immunize one from liability for breach of a positive statutory duty). As such the Court grants summary judgment in Plaintiff's favor on the seventh and eighth affirmative defenses.

h. Ninth Affirmative Defense—Failure to Comply With Condition Precedent

For its ninth affirmative defense, Defendant asserts that the Plaintiff is barred from recovery under Fla. Stat. § 501.98. The Court concludes that there is sufficient evidence in the record to find that Plaintiff complied with the demand letter requirement of § 501.98. The Court thus enters summary judgment on Defendant's ninth affirmative defense.

i. Tenth Affirmative Defense—Lack of Causation

Defendant's tenth affirmative defense is lack of causation. This is a denial, not an affirmative defense. "The absence of proximate cause is not an affirmative defense; rather, it is 'a requirement of plaintiff's cause of action put at issue by a general denial.' " *Coquina Investments v. Rothstein*, 10-60786-CIV, 2011 WL 4971923, at *15 (S.D. Fla. Oct. 19, 2011), *aff'd sub nom. Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300 (11th Cir. 2014) [25 Fla. L. Weekly Fed. C230a] *citing Clement v. Rousselle Corp.*, 372 So. 2d 1156, 1158 (Fla. 1st Dist. App. 1979)); *see In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense.") Thus, the Court enters summary judgment on Defendant's tenth affirmative defense.

CONCLUSION

Notwithstanding the Court granting summary judgement as to Defendant's affirmative defenses, Defendant made a denial of each element of Plaintiff's FDUTPA claim in its Answer and Plaintiff is still required to prove all elements of a FDUTPA claim including: (1) a deceptive act or unfair trade practice; (2) causation; and (3) actual damages.

A practice is deceptive under FDUTPA when "there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C400a] (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) [28 Fla. L. Weekly S229a]). It is undisputed that Plaintiff reviewed and signed both the Retail Lease Order and the Lease Agreement at or near the same time concerning the same vehicle lease transaction. However, because the Retail Order contained the "costs and profit" disclosure and the Lease did not, material facts remain in dispute about whether the manner in which Defendant disclosed the fee on one document and not the other was likely to mislead consumers.

Additionally, even if Defendant technically violated § 501.976(18), Plaintiff still bears the burden of proving the remaining elements of its FDUTPA claim. The Court finds that there also remains a genuine issue of material fact as to whether Plaintiff can prove causation and actual damages under these particular facts. Accordingly, Plaintiff motion for summary judgment must be denied.

In light of the foregoing, it is hereby **ORDERED AND ADJUDGED:**

1. Plaintiff's Motion for Summary Judgment as to Defendant's affirmative defense is **GRANTED,** however it's moton for final summary judgment is **DENIED.**

2. Defendant's cross motion for summary judgment is **DENIED.**

3. The parties shall confer within 10 days of the date of this Order to schedule a 15-minute Zoom status conference to occur within 30 days.

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND MOTION FOR SUMMARY JUDGMENT AS TO THE FIRST ELEMENT OF FDUTPA

THIS CAUSE came before the Court on Plaintiff's Motion for Reconsideration, and the Court having carefully considered the summary judgment evidence in the record, the briefing and arguments of counsel and the applicable law, finds as follows:

1. On May 1, 2022, this Court entered an Order on Plaintiff's Motion for Summary Judgment and Defendant's cross Motion for Summary Judgment, denying Defendant's Motion and granting Plaintiff's Motion for Summary Judgment as to Defendant's affirmative defense only.

2. On May 23, 2022, Plaintiff filed a Motion for Reconsideration of the Court's Order, arguing that the Court mistakenly denied summary judgment as to the first element of FDUTPA.

3. On June 1, 2022, this Court held a hearing on Plaintiff's Motion for Reconsideration. At the conclusion of the hearing, the Court withheld ruling, and allowed a period for Defendant to file a response and Plaintiff to file a reply. This Order follows.

Motions for reconsideration apply to "nonfinal, interlocutory orders, and are based on a trial court's 'inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action . . . .' " *Seigler v. Bell*, 148 So. 3d 473, 478-79 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2012c]. A motion for reconsideration may be filed at any time before the entry of final judgment. *N. Shore Hosp., Inc. v. Barber,* 143 So.2d 849, 851 (Fla.1962).

In order to prevail on a FDUTPA claim, a plaintiff must show (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages. *Hucke v. Kubra Data Transfer, Corp.*, 160 F.Supp.3d 1320, 1328 (S.D. Fla. 2015).

To satisfy the first element of a FDUTPA claim, a party may allege either a traditional or *per se* violation. *Felice v. Invicta Watch Co. of Am., Inc.*, No. 16-CV-62772, 2017 WL 3336715, at *2 (S.D. Fla. Aug. 4, 2017).

If a defendant violates a "law, statute, rule, regulation, or ordinance" that expressly prohibits unfair and deceptive conduct, then a *per se* violation of FDUTPA has occurred. *State Farm Mutual Automobile Insurance Company,* 315 F. Supp. 3d at 1306; Fla. Stat. 501.203(3)(c).

In the instant case, it is undisputed that the Retail Order contained the "costs and profit" disclosure and the Lease did not. As such, in its Motion for Reconsideration Plaintiff correctly points out that the Court mistakenly overlooked whether Plaintiff proved a *per se* violation and satisfied the first element of FDUTPA in its original Summary Judgment Order.

Although there still remain genuine issues of material fact as to the elements of causation and actual damages, Plaintiff has demonstrated a *per se* violation of Fla. Stat. § 501.976(18), and a such is entitled to summary judgment on that element.

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

1. Plaintiff's Motion for Reconsideration and Motion for Summary Judgment as to the first element of FDUTPA is **GRANTED.**

* * *

Contracts—Account stated—Summary disposition is granted in favor of defendant where plaintiff's evidence shows balance of $0.00

SYNCHRONY BANK, Plaintiff, v. MARI FRAGA, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-004998-SP-25, Section CG02. July 20, 2022. Elijah A. Levitt, Judge. Counsel: Jessica Fagen, for Plaintiff. Robert Wayne, for Defendant.

SMALL CLAIMS FINAL JUDGMENT FOR DEFENDANT AFTER NON-JURY TRIAL

This cause came before the Court for non-jury trial and Defendant's *ore tenus* Motion for Summary Disposition after the conclusion of Plaintiff's case-in-chief on July 8, 2022, and the Court, being advised in the premises and having reviewed the trial evidence, hereby grants Plaintiff's Motion for Summary Disposition. Plaintiff's Exhibit 2 at enumerated page 55 reflects a new balance owed of $0.00

for which summary disposition is appropriate.

Assuming *arguendo* that Summary Disposition should not be granted, the Court further finds that Plaintiff failed to prove its case by a preponderance of the evidence. Plaintiff's evidence consisted of a stipulation of admissibility of the documentary evidence. Plaintiff did not provide any testimony. The documentary evidence, standing alone, is insufficient to meet the elements of the breach of contract and account stated claims.

Wherefore, judgment is hereby entered in favor of Defendant. Plaintiff shall take nothing from this action, and Defendant shall go henceforth without day.

* * *

Landlord-tenant—Eviction—Waiver—Landlord waived right to evict tenant and created new month-to-month tenancy by accepting rent after giving 60-day notice—Complaint dismissed without leave to amend

IMPERIAL APARTMENTS, LLC, Plaintiff, v. JUANA GUTIERREZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-020881-CC-05, Section CC02. September 23, 2022. Miesha S. Darrough, Judge. Counsel: Stephen Meruelo, Miami Beach, for Plaintiff. Robert Jack, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER OF DISMISSAL

THIS CAUSE came before the Court on September 22, 2022, on Defendant's Amended Motion to Dismiss, having heard argument at hearing, reviewing the file and pertinent case law, and being otherwise fully advised, the Court makes the following findings:

1. Plaintiff filed this Eviction Complaint on July 18, 2022 based on a 60 Day Notice to terminate the month-to-month tenancy.

2. The 60 Day Notice is dated May 5, 2022 and alleges the tenancy is terminated effective July 5, 2022.

3. Defendant's monthly rent is $1,200 and due on the 1st day of the month.

4. On July 16, 2022, Plaintiff accepted Defendant's payment of $1,200 which covered the total due for rent for July 1, 2022 through July 31, 2022.

5. By accepting the rent due for July 2022, Plaintiff:

a. Waived its right to evict based on the 60 Day Notice alleging the tenancy was terminated effective July 5, 2022, and

b. Created a new month-to-month tenancy that has not been properly terminated since the 60 Day Notice is now moot.

7. A proper and non-defective notice is a statutory condition precedent to filing an eviction action.

8. A statutory cause of action cannot be commenced until Plaintiff has complied with all conditions precedent. *See Ferry Morse Seed Co. v. Hitchcock,* 426 So.2d 958 (Fla. 1983).

9. The Plaintiff's *ore tenus* request to amend the notice pursuant to Fla. Stat. § 83.60(1)(a) is not applicable to this case because the ability to cure a defective termination notice does not apply to evictions for reasons other than non-payment of rent.

It is ORDERED AND ADJUDGED:

1. The Defendant's Amended Motion to Dismiss is GRANTED.

2. The case is DISMISSED with PREJUDICE and without leave to amend.

3. The Court reserves on attorney's fees and costs.

* * *

Criminal law—Possession of cannabis—Search and seizure—Vehicle stop—Traffic infraction—Officer had probable cause to stop defendant for failing to maintain single lane and failing to drive on right half of roadway after observing vehicle cross center line and drive into lane with oncoming traffic more than once

STATE OF FLORIDA, Plaintiff, v. JOSE THOMAS RIOS, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. B21-019715, Section Jail Division. June 28, 2022. Cristina Rivera Correa, Judge. Counsel: Kassandra Cabrera, Assistant State Attorney, Miami, for Plaintiff. Alexa Flora, Assistant Public Defender, Miami, for Defendant.

ORDER ON MOTION TO SUPPRESS

THIS CAUSE having come before the Court on June 28, 2022, on the Defendant, Jose Thomas Rios' Motion to Suppress, which was filed June 12, 2022, and the Court having heard argument of counsel and being fully advised in the premises therein, finds as follows:

FINDINGS OF FACT

Officer Elio Valdes of the Miami-Dade Police Department was on vehicle patrol in a marked police car with another officer on September 24, 2021 at around 8:00pm in the area of Leisure City in Miami-Dade County when he observed a vehicle traveling in the southbound lane of Southwest 152nd Avenue, just south of 296th Street, heading toward 304th Street. Officer Valdes observed the vehicle fail to maintain a single lane of travel as half of the vehicle passed the center median—or white stripes that divide the southbound lane from the northbound lane—into the oncoming lane, more than once. Officer Valdes observed this driving pattern over the course of approximately 4 to 5 blocks, between 152nd Avenue at 296th Street and 153rd Court at 304th Street.

During his observation, Officer Valdes testified that there was a busy, decent, amount of traffic, as well as a shopping center, in the vicinity of where the subject vehicle was traveling. More importantly, there were other cars in the northbound lane when the subject vehicle drove against traffic, causing Officer Valdes to have a reasonable concern for the safety of the occupants in the subject vehicle, as well as other motorists. The vehicle was not, at the time, attempting to overtake a vehicle in front of it. According to Officer Valdes, the driving pattern he observed was consistent with an impaired, a distracted or a sleepy driver. Accordingly, police lights and sirens were activated to conduct a traffic stop. The subject vehicle turned into the shopping center, picked up speed and proceeded to flee from the officers' lights and sirens. Ultimately, the subject vehicle came to a stop, at which point the driver and the passenger, who was later identified as Defendant Jose Thomas Rios, exited the vehicle, looked back at Officer Valdes, who was in police uniform, and began to run away. As a result, Defendant was charged with Resisting an Officer Without Violence, in violation of Fla. Stat. §843.02. In addition, Defendant was charged with Possession of Cannabis 20 grams or less, in violation of Fla. Stat. §893.13(6)(b).

CONCLUSIONS OF LAW

Officer Valdes' stop of the vehicle in which Defendant was an occupant was legal because Officer Valdes had probable cause to believe the driver of the vehicle had committed a traffic violation. *See generally*, *Whren v. U.S.*, 517 U.S. 806 (1996). Namely, the driver of the subject vehicle's actions constituted a violation of both Fla. Stat. §316.089(1) and Fla. Stat. §316.081(1). The driver of the subject vehicle's conduct created a reasonable safety concern, as other vehicles were in danger due to his failure to maintain a single lane, in violation of Section 316.089(1). *See Crooks v. State*, 710 So. 2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b]. Moreover, Officer Valdes testified that he believed the driver to be impaired. Additionally, the driver of the vehicle Defendant was traveling in failed to "drive[ ] upon the right half of the roadway," as required by Fla. Stat. §316.081(1).

It is hereby **ORDERED AND ADJUDGED** that Defendant, Jose Thomas Rios' Motion to Suppress is hereby **DENIED**.

* * *

Insurance—Homeowners—Coverage—Water damage—Exclusions—Insured's deposition testimony that water loss to interior of home was caused by rain established that loss fell within policy exclusion for damage caused by rain, and insured failed to produce any admissible evidence proving that loss fell within exception to exclusion applicable when a covered peril first damages property and creates opening in roof that allows rain to enter home—Report asserting that rain entered home when wind uplifted shingles is inadmissible where qualifications of person that prepared report were not established, report was not accompanied by affidavit, and opinion in report was based on inspection of roof three years after loss and two years after roof was damaged by hurricane—Summary judgment granted in favor of insurer

YADIRA BORGES, et al., Plaintiffs, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-011021-CC-05, Section CC06. September 4, 2020. Luis Perez-Medina, Judge.

[AFFIRMED. 47 Fla. L. Weekly D1997b (Fla. 3DCA, Case No. 3D21-0216)]

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

This cause came before the Court on July 6, 2020, on Defendant's Motion for Final Summary Judgment, and the Court having heard the argument of counsel, having reviewed Defendant's Motion and Plaintiffs' Response, the summary judgment evidence, the pertinent case law, and being otherwise fully advised in the premises, it is hereby ORDERED and ADJUDGED:

Defendant's Motion for Final Summary Judgment is GRANTED. This matter is hereby dismissed, and Defendant shall go hence without day.

STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits conclusively show that there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510; *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a].

The burden is on the moving party to establish the non-existence of any genuine issue of material fact. *Romero v. All Claims Ins. Repairs, Inc.,* 698 So. 2d 605, 606 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1919b]. Once the movant offers competent evidence to support the motion, the party against whom judgment is sought must present contrary evidence to reveal a genuine issue. *Landers v. Milton,* 370 So. 2d 368, 370 (Fla. 1979). It is not enough for the party opposing summary judgment merely to assert that an issue exists. *Id*.

"In reviewing a summary judgment, the Court must consider evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party." *Tropical Glass & Const. Co. v. Gitlin,* 13 So. 3d 156, 158 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1163a]. If the slightest doubt exists as to a genuine issue of material fact, summary judgment is not appropriate. *Gidwani v. Roberts,* 248 So. 3d 203, 207 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1024a].

STATEMENT OF UNDISPUTED FACTS

Plaintiffs, Yadira Borges and Ernesto Borges, filed suit against their insurer, Citizens Property Insurance Corporation, for failing to pay an insurance claim stemming from a water loss to the interior of their residence. According to the deposition testimony of Ernesto Borges, sometime in April 2017 while it was raining, Mr. Borges noticed water entering his residence from the flat concrete roof above the master bedroom. *Deposition of Ernesto Borges,* at 26, 30, 33. Mr. Borges also noticed water entering through the garage and kitchen ceiling. *Id.* at 36. According to Mr. Borges, the water entering the residence came from an area where the flat roof meets the garage tiled roof. *Id.* at 55-56. After the rain event, Mr. Borges went up on the roof and noticed water pooling over the master bedroom area where the leaking occurred. *Id.* at 34. Mr. Borges waited several days for the water to evaporate before he repaired the effected portion of the flat roof by applying silicone. *Id.* at 34-35. While on the roof, Mr. Borges did not see any holes or creases which would lead him to believe there was an opening in the roof. *Id.* at 54. Mr. Borges further testified that on the date he noticed the leak in the master bedroom, there was no hurricane, hail, or tornadoes in the area. *Id.* at 110-11.

To oppose summary judgment, Plaintiffs filed a report by Rafael Leyva asserting that water entered the interior of the residence through a hole in the roof created by wind uplifting several shingles. However, Mr. Leyva's qualifications to render an expert opinion as to the events which caused the damage to the roof on or about April 2017 were not discussed in the report. Nor was the report accompanied by an affidavit from Mr. Leyva. Accordingly, this Court did not consider Mr. Leyva's report as admissible evidence in opposition to Defendant's Motion.

Nevertheless, even if Mr. Leyva's report was found to be admissible, his opinion would still amount to conjecture and surmise since Mr. Leyva inspected the residence three years after the loss event and two and a half years after the residence was damaged by Hurricane Irma. *See Gonzalez v. Citizens Property Insurance Corp.,* 273 So. 3d 1031, 1037 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D686a] (holding that an engineer's expert opinion that a leak in the damaged roof was created by strong winds and a rain event was, at best, based on conjecture and surmise since the expert inspected the subject property's roof a year after a new roof had been installed). According to Mr. Leyva, he examined Plaintiffs' residence of on April 02, 2020, three years after the reported loss and two and a half years after Hurricane Irma damaged the same area of the roof on September 10, 2017. Indeed, several months after the April 2017 water claim, Plaintiffs filed a claim for damages from the effects of Hurricane Irma. *Id.* at 89. The same areas damaged in April of 2017 were also claimed by Plaintiffs to have been damaged by Hurricane Irma. *Id.* at 97. Yet, according to Mr. Leyva, he was able to determine within a reasonable degree of professional certainty that the damages to the interior of the residence were caused by a "short-term water event which damaged the roof and allowed water to enter the home". He was also able to determine that "the wind uplifted the shingles creating a hole which allowed water to enter" the property. Mr. Leyva, did not state how he was able to determine that the uplift occurred in April of 2017 rather than in September 2017 when Hurricane Irma struck South Florida.

On August 16, 2017, Citizens denied Plaintiffs' claim for damages citing the language of its Policy. Citizens asserted that the damage to the interior of the residence resulted "from wear, tear, and deterioration of the roof system." *Citizens Denial Letter, August 16, 2017.* Citizens also claimed that there was no evidence that a covered peril created an opening in the roof or wall allowing water to enter the property and damage the interior of the residence. While the letter was provided by Defendant as evidence of the denial of the claim, Defendant did not provide admissible evidence corroborating its claim that the roof, at the time of the loss, suffered from wear, tear, and deterioration. Accordingly, this Court did not consider Defendant's assertion that the roof contained evidence of "wear, tear, and deterioration" in rendering this decision

LEGAL ANALYSIS

The over-arching issue addressed by this Court is whether Plaintiffs can prove the existence of a peril-created opening in their roof which allowed water to enter causing damage to the interior of

their residence. Plaintiff contends that it is the Defendant burden to prove the nonexistence of a peril created opening. This Court disagrees.

Defendant's Policy "insures against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." *Citizens Homeowners 3—Special Form Policy, CIT HO-3 07 16, Section I, A, 1* at 12. The Policy, however, does not insure for a loss, caused by:

> Rain, snow, sleet, sand or dust to the interior of a building unless a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

Citizens Homeowners 3—Special Form Policy, CIT HO-3 07 16, Section I, A, 2(b)(7) at 12.

The burdens of proof applicable to insurance coverage disputes are well-established under Florida Law. There are three burdens of proof applicable to the claimed loss under Florida law. Initially, the burden is on the insured to prove "that the insurance policy covers a claim against it." *E. Florida Hauling, Inc. v. Lexington Ins. Co.,* 913 So. 2d 673, 678 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2257a]. Once a loss within the terms of the policy is established, the burden shifts to the insurer to prove that the loss falls within an exclusionary provision. *Id.* Finally, "[i]f there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *Id.*; *see also Florida Windstorm Underwriting v. Gajwani,* 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a] ("the insured has the burden to prove an exception to an exclusion contained within an insurance policy").

The burden in this case ultimately falls on Plaintiffs since they must provide evidence of an exception to an exclusion found in the Policy. The deposition testimony of Mr. Borges provides proof that the damage to the interior of his residence was caused by rain entering the property through the flat roof above the master bedroom. The Policy insuring his residence excludes coverage to the interior of a building if the loss is caused by rain. Defendant has therefore shown that Plaintiffs' loss falls within an exclusionary provision of the policy. *W. Best, Inc.,* 655 So. 2d at 1214. Plaintiffs must therefore prove that an exception to the exclusion exist, namely that a covered peril first damaged the building creating an opening in the roof allowing the rain to enter through the opening. *Florida Hauling,* 913 So. 2d at 678. Plaintiffs is unable to meet this burden. Not only did Mr. Borges testify that he did not see any holes or creases in the roof but he also testified that there was no hurricane, hail, or tornadoes on the day that he first noticed the leak coming from the roof. Plaintiff also failed to provide any admissible evidence indicating that a covered peril first damaged the property. Not only was Mr. Leyva's report inadmissible but it contained conclusions that this Court found to be conjecture and surmise. In addition, Mr. Leyva was never qualified as an expert to render an opinion in this case.

In Conclusion, Plaintiffs have failed to meet their burden of providing this Court with admissible evidence of an exception to the exclusion found in the Policy. Accordingly, this Court find that Defendant properly denied Plaintiffs' claim for coverage.

Therefore, it is ORDERED and ADJUDGED that:

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

2. Plaintiffs Yadira Borges and Ernesto Borges shall take nothing, and Defendant, Citizens Property Insurance Corporation, shall go hence without day.

3. This Court retains jurisdiction to award reasonable attorney fees and costs.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Medical provider is not entitled to amend complaint as matter of right where insurer has already filed responsive pleading and objects to amendment—Motion to amend complaint to add bad faith claim that provider attempted to raise in untimely reply is denied—Allowing amendment on eve of hearing on insurer's motion for summary judgment on exhaustion of benefits defense, two years after close of pleadings and six months after denial of leave to file reply would prejudice insurer—Provider's argument that it was unaware that it had to plead bad faith in its pleadings is not reasonable in light of long-standing appellate authority—Further, amendment to allege bad faith based on failure to produce PIP log would be futile because there is no statutory requirement to produce log—Motion to amend is denied

MANUEL V. FEIJOO, M.D., P.A., a/a/o Paul Faure, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-005840-SP-25, Section CG02. September 30, 2022. Elijah A. Levitt, Judge. Counsel: George A. David, George A. David, P.A., Coral Gables, for Plaintiff. Manuel Negron and Raul L. Tano, Shutts & Bowen, LLP, Miami, for Defendant.

AMENDED ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT (AMENDED TO CORRECT FORMATTING ERROR ONLY)

THIS CAUSE, having come before the Court on August 31, 2022, for hearing on Plaintiff's Motion for Leave to File Amended Complaint (the "Motion for Leave"), and, the Court, having heard argument of counsel, having reviewed the court file, written submissions of the parties, and legal authorities, and being otherwise fully advised in the premises, DENIES Plaintiff's Motion and makes the following findings of fact and conclusions of law:

Factual and Procedural Background

On March 24, 2020, Plaintiff filed this lawsuit for PIP benefits. On November 20, 2020, Allstate filed its Answer and Affirmative Defenses. Allstate alleged affirmative defenses regarding deficient demand letter, improper unbundling of CPT Code 95851, and exhaustion of benefits. Plaintiff did not assert any avoidances to any of Allstate's affirmative defenses by filing a Reply. On January 11, 2021, Allstate filed two motions for summary judgment, one for deficient demand and one for exhaustion of benefits [DE 65, 66]. Two weeks later, on January 25, 2021, Allstate filed the affidavit in support of those dispositive motions, attaching supporting documents therein [DE 71]. During the course of litigation, Plaintiff served, and Allstate responded to, multiple sets of written discovery requests [DE 5, 6, 7, 15, 16, 17, 18, 34, 36, 101].

On October 28, 2021, over ten months beyond the time prescribed by Rule 1.140, Plaintiff filed a Motion for Leave to File a Reply where, for the first time, Plaintiff sought to plead avoidances to Allstate's exhaustion defense [DE 108]. Specifically, Plaintiff sought to allege that (1) Allstate improperly did not account for some of Plaintiff's medical bills prior to exhausting benefits; (2) Allstate improperly paid other medical providers before Plaintiff's medical bills, thereby "leapfrogging" over Plaintiff's valid claims; (3) Allstate failed to inform Plaintiff of Allstate's exhaustion of benefits as required by statute; and (4) Allstate improperly handled the PIP claim, resulting in Allstate committing bad faith claims handling practices. Allstate objected to the amendment. On December 1, 2021, this Court entered a Uniform Case Management Order Setting Pretrial Deadlines and Related Requirements, wherein the Court ordered the parties to file any motions for summary judgment by August 1, 2022 [DE 121]. Plaintiff did not file any such motions.

Following a hearing on Plaintiff's Motion for Leave to File a Reply, this Court denied Plaintiff's Motion, expressing concern with Plaintiff's repeated failures to comply with court orders and violations

of the Florida Rules of Civil Procedure.[1] This Court found that Plaintiff's counsel failed to timely review its file and engaged in undue and unnecessary delays before allegedly discovering the need to file a Reply. This Court found Plaintiff's failure to timely file a Reply amounted to inexcusable neglect. [DE 138].

More than six months later, on August 22, 2022, Plaintiff moved to amend its Complaint. Plaintiff filed its Motion after the Court-ordered expiration of the summary judgment deadline and nearly two years after the pleadings had closed [DE 157]. The material allegations in the proposed Amended Complaint resembled the already-denied proposed Reply: (1) Allstate failed to inform Plaintiff of Allstate's exhaustion of benefits as required by statute; (2) Allstate "leap-frogged" over Plaintiff's medical bills; and (3) Allstate improperly handled the PIP claim, resulting in Allstate committing bad faith claims handling practices. Plaintiff's proposed Amended Complaint cited to section 624.155, Florida Statutes. Allstate objected and argued that allowing amendment would be prejudicial, that the amendment was futile, and that Plaintiff abused the privilege to amend. During the hearing, Plaintiff made an *ore tenus* argument that Plaintiff could amend its Complaint once as a matter of right.

Conclusions of Law—Amendment of Pleadings as a Matter of Right

First, the Court addresses Plaintiff's *ore tenus* contention that Plaintiff may amend its Complaint once as a matter of right. Florida Rule of Civil Procedure 1.190 governs the amendment of pleadings. The language of the Rule is plain and unambiguous:

> A party may amend a pleading once as a matter of course at any time **before a responsive pleading is served** or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend at any time within 20 days after it is served. Otherwise a party may amend a pleading **only by leave of court or by written consent of the adverse party.**

Fla. R. Civ. P. 1.190 (emphasis added). Because Allstate filed a responsive pleading, and because Allstate objects to the amendment, Plaintiff's *ore tenus* argument is incorrect. Plaintiff must seek leave of court to amend its Complaint.

Conclusions of Law—Leave to Amend Standard

Leave to amend may be denied if "allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Beanblossom v. Bay Dis. Schs.*, 265 So. 3d 657, 658 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D237a]. Establishment of any one of three factors requires denial of leave to amend. *See Toscano Condo. Ass'n v. DDA Eng'rs, P.A.*, 274 So. 3d 487, 490 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1389a]. The right to amend is not unlimited. *Id.* Amendments are not allowed if they would change the issue, introduce new issues, or materially vary the grounds for relief. *See Warfield v. Drawdy*, 41 So. 2d 877 (Fla. 1949). A compelling obligation on the trial court exists to ensure that the end of all litigation be finally reached. *Vella v. Salaues*, 290 So. 3d 946, 949 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2553a] (finding that prejudice is evident where Plaintiff moved for leave to amend after two years of litigation and on the eve of summary judgment). The rule of liberality of amendments gradually diminishes as the case progresses to judgment. *See Noble v. Martin Mem'l Hosp. Ass'n, Inc.*, 710 So. 2d 567 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]; *Marshall Bronstein, D.C. v. Allstate Ins. Co.*, 315 So. 3d 44 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D725b]. Leave to amend should not be granted where a party knew or should have known of the matter to be pled early in litigation but declined to do so. *See U.S. v. State*, 179 So. 2d 890 (Fla. 3d DCA 1965); *San Martin v. Dadeland Dodge, Inc.*, 508 So. 2d 497, 498 (Fla. 3d DCA 1987) (affirming denial of leave to amend because plaintiff should have been aware of the alleged basis for the new issue long before he sought to amend the complaint). A proposed amendment is futile if it is insufficiently pled. . . or is insufficient as a matter of law." *Quality Roof Servs., Inc. v. Intervest Nat'l Bank*, 21 So. 3d 883, 885 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2205d].

Conclusions of Law—Prejudice

The Court finds, based upon the facts and posture of this case, that allowing Plaintiff to amend at this stage of litigation would prejudice Allstate. *See Vella*, 290 So. 3d at 949. Plaintiff waited almost two years before moving for leave to amend its Complaint, including an additional six-month delay following the Court's denial of Plaintiff's Motion for Leave to File Reply. This Court previously found unjustified neglect in this case where Plaintiff sought to allege bad faith, finding, in part, it was too late in the litigation. Now, six months later, on the eve of Defendant's Summary Judgment hearing, Plaintiff again seeks to alter its pleadings to allege bad faith. Given the additional passage of time from the time Plaintiff should have discovered the allegations it again seeks to inject into this litigation, leave must be denied. Indeed, during this additional time, the parties attended a summary judgment hearing in this case.

Plaintiff's argument, that it was not aware it had to plead bad faith in its pleadings, is not reasonable. Florida's Appellate Courts have held, for close to fifteen years, that an insurer—after paying $10,000.00 in response to valid claims—has exhausted PIP policy limits and has no further liability without a finding of bad faith. *See Progressive Am. Ins. Co. v. Stand-Up MRI of Orlando*, 990 So. 2d 3, 4 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]; *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mutual Automobile Ins. Co.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]; *Geico Indem. Co. v. Gables Ins. Recovery, Inc.*, 159 So. 3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a] (*Geico*); *Progressive Select Ins. Co. v. Dr. Rahat Faderani, DO, MPH, P.A.*, 330 So. 3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a]. In *Geico*, the Third DCA held, in part, that the "[Provider] **did not allege bad faith** on the part of Geico. . . As such, we find that Geico cannot be liable to [Provider] for any additional PIP benefits." *Geico*, 159 So. 3d at 155 (emphasis added). Given the appellate authorities holding that bad faith is required to overcome an exhaustion defense, the Court finds that Plaintiff knew or should have known of the need to plead bad faith exhaustion from the moment Plaintiff decided to challenge the exhaustion in this claim.

Plaintiff's assertion, that it was unaware that it needed to plead bad faith in a Complaint until the Third District Court of Appeal's Opinion in *United Services Automobile Association v. Less Institute Physicians*, 2022 WL 2821505 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1556a] (*Less Institute*), is unpersuasive. First, the precedent for amending pleadings to allege bad faith exhaustion has existed since at least 2014. *See Northwoods*, 137 So. 3d at 1051, 1052 ("...Northwoods amended its complaint to allege that State Farm had reduced its bills improperly and in bad faith by relying on a fee schedule not permitted by law...Wellness amended its complaint to add allegations that USAA had reduced Wellness's bills in bad faith..."). Second, while the Third DCA pointed out that Less Institute failed to amend its complaint, its holding was not limited to a complaint, but rather on Less Institute's failure to plead bad faith **at all**: "Because PIP benefits were exhausted through payment of valid claims **and because Less neither pled bad faith**, nor did the trial court make a bad faith determination, USAA has no further liability on pending claims." 2022 WL 2821505, at *1 (emphasis added). The Court notes that Plaintiff's arguments regarding *Less Institute* are undermined by the fact that Plaintiff sought to plead bad faith in its Reply six months prior to the *Less Institute* Opinion.

Further, despite Plaintiff's claim of being unaware of the need to plead bad faith, Plaintiff's counsel was the Appellee's attorney in *Less Institute* through both the trial court and appellate proceedings and had the benefit of knowing that one of the issues in the pending appeal was whether *Less Institute* properly pled a bad faith exhaustion claim. *See* Appellant's Reply Br., *United Servs. Auto. Ass'n v. Less Institute Phys. a/a/o Amelia F. Stringer-Gowdy*, No. 3D21-157, 2021 WL 5868683, at *15 [47 Fla. L. Weekly D1556a]. Thus, Plaintiff's counsel, serving as Appellee's attorney in *Less Institute* for the entire course of that appeal, knew, or should have known, that the issue was before the Third DCA. Plaintiff, instead, did nothing, and the resulting delay causes evident prejudice to Allstate. *See Bronstein*, 315 So. 3d 44.

Conclusions of Law—Futility

"A proposed amendment is futile if it is insufficiently pled . . . or is insufficient as a matter of law." *Quality Roof Servs., Inc.*, 21 So. 3d at 885.

Plaintiff's attempt to pursue a cause of action for alleged failure "to inform Plaintiff of Defendant's exhaustion of benefits and produce a PIP payout log on Plaintiff [sic] required by FS §627.736" is futile. Florida Courts have expressly held that there is no statutory requirement to produce a PIP log. *Geico Gen. Ins. Co. v. Fla. Emergency Physicians*, 972 So. 2d 966 (Fla. 5th DCA 2007) [33 Fla. L. Weekly D35b]; *see also United Auto. Ins. v. A 1st Choice Healthcare Sys.*, 21 So. 3d 124 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2268a].

Further, a Renewed Motion for Summary Judgment on Deficient Demand Letter is pending hearing on before this Court.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion for Leave to File Amended Complaint is hereby **DENIED**.

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[1]*See* April 16, 2021 Order Denying Defendant's Motion to Strike Plaintiff's Pleadings and to Dismiss this Action as a Sanction for Plaintiff's Failure to Comply with a Court Order [DE 86] (". . .the Court is concerned about Plaintiff's failure to comply with a court order and the Florida Rules of Civil Procedure. . ."); *see also* August 30, 2021 Order Denying Defendant's Renewed Motion to Strike Pleadings [DE 94] (. . ."Plaintiff shall endeavor to better comply with court orders and the Florida Rules of Civil Procedure. . .").

* * *

Civil procedure—Dismissal—Failure to prosecute—Case is dismissed where plaintiff has had no contact with defendant's counsel during six-month period, there has been no record activity, and excusable neglect was not established

TD BANK USA, N.A., Plaintiff, v. SYLVIA A. WINGATE, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 41-2020-SC-001718-SCAXMA. October 7, 2022. Melissa Gould, Judge. Counsel: Drew Linen, RAS LaVrar, Plantation, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF PROSECUTION AND SUPPLEMENTS THERETO

THIS CAUSE, having come before the Court at a hearing on October 3, 2022, on Defendant's Motion to Dismiss and the supplements thereto, at which counsel for both parties appeared and presented argument, and the Court being fully informed in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Courts finds that good cause must include contact with the opposing party and some form of excusable conduct other than negligence or inattention to deadlines. *See*, *Norflor Constr. Corp. v. City of Gainesville,* 512 So.2d 266, 268 (Fla. 1st DCA 1987); *F.M.C. Corp. v. Chatman,* 368 So.2d 1307, 1308 (Fla. 4th DCA 1979); and *Smith v. Buffalo's Original Wings & Rings II of Tallahasee, Inc.*, 765 So.2d 983, 984 (Fla.1st DCA 2000) [25 Fla. L. Weekly D2181d], cited by Defendant in Defendant's Response in Opposition to Plaintiff's Showing of Good Cause.

2. At the hearing, counsel for the Plaintiff was asked by the Court whether there was contact with Defendant's counsel during the relevant time period and he responded that there was no such contact.

3. Also at the hearing, counsel for the Plaintiff was asked by the Court whether there was some form of excusable conduct other than negligence or inattention to deadlines and he responded that there was no such excusable conduct.

4. Based upon the responses provided by counsel for the Plaintiff and a review of Plaintiff's showing of good cause, the Court finds that Plaintiff has failed to show good cause for the 6-month gap with no record activity in this lawsuit.

5. Defendant's Motion to Dismiss based upon lack of prosecution is GRANTED.

6. This lawsuit is hereby dismissed.

7. This Court hereby retains jurisdiction for the purpose of determining Defendant's entitlement to prevailing party attorney fees and costs.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Plaintiff that refused or failed to participate in appraisal process mandated by policy failed to fulfill condition precedent to suit—Case dismissed without prejudice

NUVISION AUTO GLASS, LLC, a/a/o Norman Brown, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 22-CC-006109, Division M. August 12, 2022. Lisa Allen, Judge. Counsel: James Roger Collins, Jr., FL Legal Group, Tampa, for Plaintiff. Timothy Edward Jones, Goldstein Law Group, Plantation, for Defendant.

Order Granting Motion to Dismiss and Compelling Appraisal

This matter comes before the Court upon Defendant's Motion to Dismiss Complaint, or in the alternative, Motion to Compel Appraisal. Upon review of the pleadings, considering arguments of counsel and being otherwise fully advised in the premises, the Court finds that Defendant's motion should be granted.

Defendant argues that Plaintiff failed to fulfill a condition precedent to bringing the instant lawsuit by failing to participate in an appraisal as expressly required by the Policy. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of America*, 704 So.2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."), citing *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *see also Foster v. Jones*, 349 So.2d 795, 799-800 (Fla. 2d DCA 1977).

In Florida, a challenge of coverage is exclusively a judicial question. *See Cincinnati Ins.* at 143; *see also Midwest Mut. Ins. Co. v. Santiesteban*, 287 So.2d 665, 667 (Fla. 1973). "However, 'when the insurer admits that there *is* a covered loss,' any dispute on the amount of loss suffered is appropriate for appraisal." *Id*., citing *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a]. In *Cincinnati Ins.*, the Second DCA explains:

> Notably, in evaluating the amount of loss, an appraiser is necessarily tasked with determining both the *extent* of covered damage and the *amount* to be paid for repairs. *Id*. Thus, the question of what repairs are

> needed to restore a piece of covered property is a question relating to the amount of "loss" and not coverage. Ipso facto, the scope of damage to a property would necessarily dictate the amount and type of repairs needed to return the property to its original state, and an estimate on the value to be paid for those repairs would depend on the repair methods to be utilized. The method of repair required to return the covered property to its original state is thus an integral part of the appraisal, separate and apart from any *coverage* question. Because there is no dispute between the parties that the cause of the damage to Cannon Ranch's property is covered under the insurance policy, the remaining dispute concerning the scope of the necessary repairs is not exclusively a judicial decision. Instead, this dispute falls squarely within the scope of the appraisal process—a function of the insurance policy and not the judicial system. Therefore, Cincinnati Insurance acted within its rights when it demanded an appraisal, and the trial court erred in denying the motion on this basis.

Cincinnati Ins. at 143.

Likewise, in this case, it is clear that the issue in dispute is one of the amount of loss and not one of coverage. Defendant admits that there is a covered loss, thus any dispute on the amount of loss suffered is appropriate for appraisal. Defendant has made timely demand for appraisal and has not acted inconsistently with that right at any point relevant hereto. Pursuant to the Policy, upon demand by either party, the other party must participate in the appraisal process prior to filing a lawsuit. Since Plaintiff has refused or failed to participate in the appraisal process, Plaintiff has knowingly and willfully failed to fulfill a condition precedent to filing this action. The Policy provides express language dictating the appropriate appraisal process that should occur in the event one of the parties demands an appraisal. Plaintiff must fully comply with all the terms of the Policy before Plaintiff may sue Defendant for any matter related to the Policy. Thus, the amount of loss suffered should be determined by appraisal. Accordingly, this matter is not ripe for adjudication until both parties have complied with the appraisal process outlined in the Policy; therefore, this case should be dismissed without prejudice.[1]

For the reasons stated above, it is

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss Complaint, or in the alternative, Motion to Compel Appraisal is GRANTED.
2. This case is DISMISSED without prejudice.
3. The Clerk is directed to CLOSE this case.

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[1]Several trial courts have been reversed for denying motions to dismiss and/or motions to compel appraisals premised on an insured's failure to comply with the appraisal clause of an insurance policy; their respective appellate courts found that participation in the appraisal process was a condition precedent to bringing a lawsuit. *See e.g. United Community Insurance Company v. Lewis*, 642 So.2d 59 (Fla. 3d DCA 1994), *Utah Home Fire Insurance Co. v. Perez*, 644 So.2d 1040 (Fla. 3d DCA 1994), *State Farm Florida Insurance Company v. Unlimited Restoration Specialist, Inc.*, 84 So.3d 390 (Fla. 5th DCA 2010) [37 Fla. L. Weekly D712b], *Progressive American Insurance Company v. Glassmetics, LLC*, 2022 WL 1592154 (Fla. 2d DCA May 20, 2022) [47 Fla. L. Weekly D1106b] and *Mendota Insurance Company v. At Home Auto Glass, LLC*, 2022 WL 1434266 (Fla. 2d DCA May 6, 2022) [47 Fla. L. Weekly D1020a].

* * *

Insurance—Personal injury protection—Demand letter—Motion for protective order postponing depositions until after hearing on motion for summary judgment on insurer's demand letter defense is granted where basic facts regarding defense are not at issue

PHYSICIANS GROUP, L.L.C., a/a/o Ronnie Jordan, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 22-CC-000384 (Div L), Civil Division. September 10, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Kaleb El-Khatib, Progressive PIP House Counsel, Riverview, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS CAUSE came before the Court for hearing on September 7, 2022, on (1) Plaintiff's Motion to Compel Deposition(s) of Defendant's Corporate Representative, Pre-Litigation Adjuster, and Chief Underwriting Officer, and for Sanctions (C.O.S May 13, 2022) ("Plaintiff's Motion") and (2) Defendant's Motion for Protective Order (C.O.S. May 27, 2022) ("Defendant's Motion"). The Court, having reviewed and considered Plaintiff's Motion, Defendant's Motion, the arguments presented by the parties, and the applicable law, and being otherwise fully advised, finds as follows:

1. This is an action for PIP benefits under Fla. Stat. § 627.736. Defendant has denied the material allegations in Plaintiff's Complaint and has asserted an affirmative defense alleging that Plaintiff's purported pre-suit demand letter fails to comply with the requirements of Fla. Stat. § 627.736(10).

2. Defendant has filed a Motion for Summary Judgment (C.O.S. July 11, 2022), in which the sole issue to be resolved is a legal one, to wit, whether the Plaintiff's pre-suit demand letter complies with the requirements of Fla. Stat. § 627.736(10), a statutory condition precedent to bringing the instant cause of action.

3. Although, in general, parties are entitled to obtain discovery regarding any non-privileged matter so long as it is relevant, discovery is unnecessary when the basic facts are not at issue and the disputed matter involves a purely legal question to be determined by the Court. *Riverview Family Chiropractic Ctr., PA v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 470a (Fla. Hillsborough Cty. Ct. Nov. 3, 2014) (citing *Hurley v. Werly*, 203 So. 2d 530 (Fla. 2d DCA 1967) (holding that a party should not be involuntarily deposed when a "dispute involves an essentially legal question and where the basic facts are not at issue.")).

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

1. Defendant's Motion is hereby **GRANTED.**
2. All depositions in this matter shall be postponed until after such time as this Court has ruled on Defendant's Motion for Summary Judgment which is noticed for hearing on January 18, 2023.
3. Defendant stipulates to Plaintiff's entitlement to the deposition of Defendant's Corporate Representative should the Court deny Defendant's Motion for Summary Judgment.

* * *

Insurance—Discovery—Charging, contractual, or fraudulent lien—Protective order

SPINE AND ORTHOPAEDIC SPECIALIST, PLLC, a/a/o Edward Bodema, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 22-CC-026204, Division J. October 11, 2022. J. Logan Murphy, Judge. Counsel: Kelly Blum, FL Legal Group, Tampa, for Plaintiff. Kaleb El-Khatib, Progressive PIP House Counsel, Riverview, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

BEFORE THE COURT is Defendant's Motion for Protective Order Objections and/or Motion to Strike. The parties appeared for a hearing on October 11, 2022. For the reasons stated on the record at the hearing, the motion is GRANTED. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995) [20 Fla. L. Weekly S217a]; *State Farm Mut. Auto. Ins. Co. v. Athans Chiropractic, Inc.*, No. 2D21-1518, 2022 WL 5265045, at *1 (Fla. 2d DCA Oct. 7, 2022) [47 Fla. L. Weekly D2045a]; *Greenberg Traurig, P.A. v. Starling*, 238 So. 3d 862, 865 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D107a]; *Leonhardt v. Cammack*, 327 So. 2d 848, 849 (Fla. 4th DCA 1976).

A protective order is entered as to all discovery from Plaintiff to Defendant concerning a charging, contractual, or fraudulent lien, including Plaintiff's Request for Admissions to Defendant (July 6, 2022); Plaintiff's Request to Produce to Defendant (July 6, 2022); Plaintiff's Interrogatories to Defendant (July 6, 2022), and any deposition concerning the areas of inquiry listed in Plaintiff's July 8, 2022 correspondence to defense counsel.

This order is without prejudice to Plaintiff's right to seek reconsideration of the interlocutory order under changed circumstances in the case.

* * *

Insurance—Attorney's fees—Claim or defense not supported by material facts or applicable law—Plaintiff's attorney knew or should have known that, under applicable law, notice of voluntary dismissal of prior case with prejudice was adjudication on merits that barred refiling of same claim in present suit—Insurer entitled to award of attorney's fees and costs

CRESPO & ASSOCIATES, P.A., a/a/o Iraida Vargas, Plaintiff, v. INFINITY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-010132, Division L. August 31, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Anthony T. Prieto, Morgan & Morgan, P.A., Tampa; and David M. Caldevilla, de la Parte & Gilbert, P.A., for Plaintiff. Gladys Perez Villanueva, Miami Springs; and Kali Campbell, Law Offices of Gabriel O. Fundora & Associates, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S §57.105 MOTION FOR SANCTIONS

This matter came before the Court upon the Defendant, Infinity Insurance Company ("Infinity's"), Motion for § 57.105 Sanctions. Doc. 41. Plaintiff, Crespo & Associates, P.A., a/a/o Iraida Vargas ("Plaintiff"), was represented by David M. Caldevilla, Esq. of de la Parte & Gilbert, P.A. and Anthony T. Prieto, Esq. of Morgan & Morgan, and Defendant, Infinity Insurance Company, was represented by Gladys Perez Villanueva, Esq.; and Kali E. Campbell, Esq. of Law Offices of Gabriel O. Fundora & Associates. Doc. 64. The Court having heard argument of counsel on August 25, 2022, reviewed the court file, written submissions of the parties, legal authorities, and being otherwise duly advised in the matter, GRANTS Infinity's motion and makes the following findings of fact and conclusions of law:

Material Facts

The undisputed material facts of this case have been extensively set forth in this Court's order of July 29, 2021, granting Infinity's Motion for Summary Judgment and entering Final Judgment. Doc. 52 [30 Fla. L. Weekly Supp. 441a]. This Court found, *inter alia*, that when Plaintiff dismissed the Prior Action with prejudice, the dismissal acted as an adjudication on the merits and that the doctrine of *res judicata* barred the instant action. Doc. 52, pg. 12. The Court entered a final judgment for Infinity, reserving jurisdiction to determine entitlement and amount of attorney's fees and costs. Doc. 52, pgs. 15-16.

Section 57.105, Florida Statutes, Conclusions of Law

Section 57.105 provides in relevant part:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

A court's primary task in statutory construction is to give the statutory text its plain and obvious meaning. *See State Farm Fire & Cas. Ins. Co. v. Wilson*, 330 So. 3d 67, 72 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1183a]. Courts lack "power to construe an unambiguous statute in a way to extend, modify, or limit its express terms or reasonable and obvious implications. To do so would be an abrogation of legislative power." *Id.* (*quoting Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). The words of this statute are unambiguous.

Based upon the express language of Section 57.105(1)(b), Florida Statutes, this Court finds that Plaintiff's attorney knew or should have known that the notice of voluntary dismissal with prejudice, which did not include a reservation of rights, filed in Case No. 16-CC-014159, was an adjudication on the merits, which prevented the claim from being refiled in the instant lawsuit, under the law in effect at the time the instant lawsuit was filed.[1] *See W&W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc.*, 35 So. 3d 79, 83 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1065a]; *Pino v. Bank of New York*, 121 So. 3d 23, 35 (Fla. 2013) [38 Fla. L. Weekly S78a] (Noting that "a plaintiff who intentionally files a dismissal with prejudice to the commencement of another action. . .is adversely impacted by the dismissal—the plaintiff can no longer bring the same cause of action against the defendant because of *res judicata* principles.")(emphasis in original). Plaintiff's attorney knew or should have known that the declaratory action would not be supported by the application of then existing law to those material facts.

The standard to award 57.105 attorney's fees is not "bad faith." *See Pronman v. Styles*, 163 So. 3d 535 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D572a]. However, "[s]ection 57.105 must be applied with restraint to ensure that it serves its intended purpose of discouraging baseless claims without casting 'a chilling effect on use of the courts.' " *Schurr v. Silverio & Hall, P.A.*, 290 So. 3d 634, 637 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D367b] (internal quotations omitted). Nonetheless, the Florida Legislature amended the statute from previous versions of the statute to broaden the authority to award attorney's fees. *See Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 570 (Fla. 2005) [30 Fla. L. Weekly S649a].

"When the requirements of section 57.105 are met and no exception applies, the statute directs that 'the court shall award a reasonable attorney's fee.' " *Schurr*, 290 So. 3d at 637.(external quotations omitted). The Court finds that the requirements of section 57.105 have been meet and that Infinity is entitled to attorney's fees and costs. *See Americana Assocs. v. WHUD*, 846 So. 2d 1194 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1463a]; *see also Bay Fin. Sav. Bank v. Hook*, 648 So. 2d 305 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D139a] (under prior and more restrictive version of the statute—appellate court states that the filing of a lawsuit (barred by *res judicata*) that is nonjusticiable on its face offers an appropriate setting for 57.105)); *Olson v. Potter*, 650 So. 2d 65 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D271a] (under prior and more restrictive version of the statute—affirmative defense of *res judicata*, plaintiff was attempting to relitigate issue; no justiciable issue of either law or fact warranted reversal of order denying 57.105 attorney's fees)).

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's § 57.105 Motion for Sanctions is hereby GRANTED.

This Court reserves jurisdiction to determine the amount of attorney's fees and costs.

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[1]Though not expressly discussed at the hearing on August 25, 2022, the Court notes that in Defendant's motion for sanctions, Defendant attaches the "safe harbor" letter dated March 2, 2021, sent by Defendant to Plaintiff as an exhibit. Doc. 41, pgs. 7-9. In the letter, Defendant explains to Plaintiff that Plaintiff's claim is barred by *res judicata*. *Id.* at pg. 9. Additionally, Defendant explained to Plaintiff in the "safe harbor" letter that *Progressive Select Insurance Co. v. Florida Hospital Medical Center*, 260 So.3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a] had been decided by the Florida Supreme

Court, thus making the instant declaratory action moot. *Id*. Plaintiff was put on notice that the material facts of his case was not supported by then-existing law.

* * *

Insurance—Personal injury protection—Mootness—Confession of judgment—Medical provider's action against insurer is moot where insurer confessed judgment by tendering check for the $500 in damages alleged in medical provider's complaint plus interest—No merit to provider's argument that controversy remains regarding correctness of insurer's calculation of interest—Interest is category of damages that is necessarily included in provider's $500 claim—If interest is not an element of damages, calculation of interest is a ministerial task that would not impede entry of confessed judgment—Motion to amend complaint to allege higher amount of damages is denied—Allowing an amendment which was sought solely to escape insurer's confession of judgment would prejudice insurer

PHYSICIANS GROUP, LLC, a/a/o Ehab Korabi, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-066226, Division J. June 22, 2022. J. Logan Murphy, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Kaleb El-Khatib and Eric Hogrefe, Progressive PIP House Counsel, Riverview, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE CONFESSION OF JUDGMENT, DENYING PLAINTIFF'S MOTION TO STRIKE, AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

In this PIP case, Defendant Progressive Select Insurance Company moves to enforce its notice confessing judgment, asking the Court to enter a final judgment for Plaintiff Physicians Group, LLC in the amount of the confessed judgment. Physicians Group objects, moves to strike Progressive's answer and affirmative defenses, and moves for leave to amend its complaint to allege a higher amount in controversy. For the reasons below, Progressive's motion to enforce is granted, Physicians Group's motion to strike is denied, Physicians Group's motion for leave to amend is denied, and the Court will enter a separate final judgment for Physicians Group in the amount of the confessed judgment, finding Physicians Group entitled to attorney fees under the confession of judgment doctrine.

I. INTRODUCTION.

Assigned Ehab Korabi's rights under a Progressive policy, Physicians Group sued to recover unpaid PIP benefits. The first paragraph of the complaint states the nature of the case and the amount in controversy:

> 1. This is an action for damages in the amount of up to $500.00 dollars [*sic*], exclusive of interest, costs, and attorney's fees.

The *ad damnum* clause demands PIP benefits, "all statutory penalties and postage together with prejudgment interest thereon, all interest on any past benefits and penalties not timely paid, costs and attorney fees . . . ."

Two weeks after service, Progressive filed a notice "confess[ing] judgment in this case for the amount of benefits demanded in the complaint . . . , plus applicable interest for a total amount of $542.85." The notice attaches a check for the same amount. The parties agree Physicians Group received and deposited the check. Though Progressive confessed judgment and Physicians Group negotiated the check, Physicians Group continued to issue discovery and pursue litigation. Eventually, Progressive moved to enforce the confession of judgment.

In February 2022, Progressive filed its answer and affirmative defenses. Like the confession, the answer admits that Progressive is liable for the full amount of unpaid benefits, statutory interest, and costs alleged in the complaint. Most of the substantive defenses focus on the confession, but Progressive also alleges that Physicians Group failed to serve a valid pre-suit demand letter. Physicians Group moves to strike the answer as untimely.

After supplemental briefing, the parties appeared for a hearing on June 3, 2022. From the briefing and the hearing, it is apparent that the nature and amount of statutory interest is the main source of disagreement. *See* § 627.736(4)(d), Fla. Stat. Progressive argues that its confession check includes the proper amount of statutory interest and, in any event, any interest calculation is a ministerial task for the Court that does not affect the veracity of its confession. Physicians Group, on the other hand, argues that Progressive underpaid statutory interest, and it is therefore entitled to discovery on how Progressive calculated statutory interest before a judgment may be entered.

Before the hearing, Physicians Group moved to amend its complaint. The motion did not state any particular basis for doing so; only, "Plaintiff merely seeks to increase the jurisdictional amount." The attached proposed amended complaint raised the maximum damages to $2,500.00. Physicians Group filed the motion for leave to amend on April 13, 2022—one week before the original hearing set on Progressive's motion to enforce.[1] It came nearly two months after Progressive's answer, nearly six months after Progressive's motion to enforce, and nearly a year-and-a-half after Progressive's notice confessing judgment.

II. MOOTNESS & THE CONFESSION OF JUDGMENT DOCTRINE.

Generally, a case is moot "when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). In the insurance context, this occurs when an insurer agrees to fully pay a previously disputed claim, because it has "in effect, declined to defend its position in the pending suit." *Loscicco v. Aetna Cas. & Sur. Co.*, 588 So. 2d 681, 682 (Fla. 3d DCA 1991). Once the insurer drops its defense and agrees to an adverse judgment in the full amount of damages alleged, "the issue between the parties, as framed by the pleadings, becomes moot as the court can provide no further substantive relief." *Alliance Spine & Joint, III, LLC v. GEICO Gen. Ins. Co.*, 321 So. 3d 242, 244-45 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1149a].[2] Because the entire case is moot, the trial court must stop, enter judgment, and reserve jurisdiction to award attorney fees, costs, and interest. *Id*.

The result is a confession of judgment. *Id*. In Florida, it is now "well settled that the payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment." *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215 (Fla. 2016) [41 Fla. L. Weekly S415a]. *See Alliance Spine*, 321 So. 3d at 244-45 (An insurer's decision to abandon its defense operates as the "functional equivalent of a confession of judgment.") (citing *Wollard v. Lloyd's & Companies of Lloyd's*, 439 So. 2d 217 (Fla. 1983); *Amador v. Latin Am. Prop. & Cas. Ins. Co.*, 552 So. 2d 1132 (Fla. 3d DCA 1989)). The confession of judgment doctrine effectuates § 627.428 by discouraging insurers from contesting valid claims and reimbursing insureds for fees when they must sue to recover benefits owed to them. *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 397 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1791e]. The doctrine applies "where the insurer has denied benefits the insured was entitled to, forcing the insured to file suit, resulting in the insurer's change of heart and payment before judgment." *Id*. (citing *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a]; *Palmer v. Fortune Ins. Co.*, 776 So.2d 1019, 1021 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D278a]; *U.S. Sec. Ins. Co. v. LaPour*, 617 So.2d 347, 348 (Fla. 3d DCA 1993)). The purpose of the doctrine is to "discourage litigation and encourage prompt disposition of valid

insurance claims without litigation." *Gibson v. Walker*, 380 So. 2d 531, 533 (Fla. 5th DCA 1980).

III. PROGRESSIVE CONFESSED JUDGMENT.

This case is moot. Physicians Group alleged it is owed no more than $500 in damages, and Progressive agreed, tendering a check for that amount plus interest. Progressive has, in essence, thrown up its hands, admitted to liability, paid the contested damages, and confessed judgment. With that confession, there is "no actual controversy" for the Court to resolve. *Godwin*, 593 So. 2d at 212. *See Alliance Spine*, 321 So. 3d at 244-45.

Physicians Group contends that a controversy remains on the amount of statutory interest due, so the confession of judgment doctrine does not apply. It argues it is therefore entitled to conduct discovery on how Progressive calculated statutory interest and whether $42.85 was the correct amount.

That argument is contradicted by its own allegations and by the fundamental premise that a party can only recover what is alleged in the complaint. The complaint alleges that "damages" do not exceed $500.00. Paragraph 4 of Administrative Order S-2019-044 (in force when Physicians Group filed suit) required every complaint to state "either the exact total amount claimed" or one of six statements of damages, including "this claim exceeds $99.99, but does not exceed $500, exclusive of costs, interest and attorney's fees." Assuming Physicians Group is correct that statutory interest is a category of damages under § 627.736(4)(d),[3] that category is necessarily included in the claimed $500 in damages. If it were not, Physicians Group would need to allege a greater amount in controversy and pay a higher filing fee. *See Douglas Price, P.A. v. MGA Ins. Co., Inc.*, 21 Fla. L. Weekly Supp. 967a (Hillsborough Cnty., Fla. 2014); Fees and Fines, https://www.hillsclerk/com/about-us/fees-and-fines (last visted June 17, 2022).

"It is . . . elementary that damages will be awarded only to the extent supported by the well-pleaded allegations of the complaint." *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1233 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1272a]. And a party may rely upon these allegations when framing its response. *Id.* (citing Henry P. Trawick, Jr., *Fla. Prac. & Proc.* § 25-4, at 381 (1994)). *See Neumann v. Brigman*, 475 So. 2d 1247, 1249 (Fla. 2d DCA 1985) ("[T]he valuation fixed by the pleadings is to be accepted as true if made in good faith and not for the illusory purpose of conferring jurisdiction."). When "a party confesses judgment up to the maximum amount of damages alleged in the complaint, the confessing party has, in fact, agreed to the precise relief sought in the complaint." *Alliance Spine*, 321 So. 3d at 244-45.

Progressive has done just that, confessing judgment and tendering a check for $542.85—exceeding the full amount of damages claimed. So, the Court's authority is "limited only to entering the confessed judgment and awarding attorney's fees." *Id.* at 244-45. *See Godwin*, 593 So. 2d at 212; *Gathagan v. Rag Shop/Hollywood, Inc.*, No. 04-80520-CIV, 2005 WL 6504414, at *2 (S.D. Fla. Feb. 10, 2005) ("Defendant's tender of Plaintiff's maximum recoverable damages has rendered her case moot, and the motion to dismiss with prejudice is granted.") (citing *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Resources*, 532 U.S. 598, 601 (2001) [14 Fla. L. Weekly Fed. S287a]).

If Physicians Group were to contend that statutory interest is *not* included within the amount in controversy, a dispute over interest calculation still would not preclude judgment following the confession. In that case, Progressive has indisputably paid all benefits allegedly owed—the maximum recoverable damages. The only remaining task would be to calculate the amount of statutory and prejudgment interest due. That calculation is ministerial, derived arithmetically, and not an impediment to entry of a confessed judgment. *See Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985) ("There is no 'finding of fact' needed. Thus, it is a purely ministerial duty of the trial judge or clerk of the court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict."). Even when a dispute over interest requires additional evidence or a hearing, the trial court can "enter a final judgment that reserves jurisdiction to award prejudgment interest." *Westgate Miami Beach, LTD. v. Newport Operating Corp.*, 55 So. 3d 567, 577 (Fla. 2010) [35 Fla. L. Weekly S735a]. And Physicians Group's distinction between *statutory* interest and *prejudgment* interest does not change this procedure. Both are calculated in the same manner; both are considered an element of pecuniary damages; and both are designed to make the plaintiff whole from the date of loss. *See Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46, 47 (Fla. 1988); *Argonaut*, 474 So. 2d at 214-15; *Langsetmo v. Metza*, 335 So. 3d 708, 711 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D600a]; *Precision Diagnostic, Inc. v. Progressive Am. Ins. Co.*, 330 So. 3d 32, 34 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2282d].

And it cannot be overlooked that Physicians Group has provided no evidence or calculation to support its argument that interest has been underpaid because Progressive's methodology is inaccurate. Any way you slice it, Progressive paid the full amount of damages alleged in the complaint, which results in a confession of judgment. *Alliance Spine*, 321 So. 3d at 244-45.

Physicians Group seems to suggest that only effective way to confess judgment is tendering the exact amount of damages and interest—to the cent. And yes, the confession of judgment doctrine is ordinarily triggered by the insurer paying the full amount of a previously disputed claim before judgment. *Tampa Chiropractic, Inc. v. State Farm Mut. Auto. Ins. Co.*, 141 So. 3d 1256, 1258 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1441a]; *Lorenzo*, 969 So. 2d at 397-98. But the act of tendering the disputed benefits is not always what triggers a confession. *See Bretz Chiropractic Clinic v. GEICO Gen. Ins. Co.*, 26 Fla. L. Weekly Supp. 620a (12th Jud. Cir. App. Oct. 8, 2018) (rejecting argument that confession was not effective because payment was not tendered at the same time the carrier confessed judgment). A carrier may also confess judgment by agreeing to settle a disputed case or by taking another action consistent with abandoning its defenses and conceding the full amount of alleged damages. *See Tampa Chiropractic*, 141 So. 3d at 1258 (citing *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983)); *GEICO Cas. Co. v. Barber*, 147 So. 3d 109, 111-12 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a]. *See generally Johnson*, 200 So. 3d at 1219 ("Extensive case law further provides that an insurer's concession that the insured was entitled to benefits after a legal action has been initiated is the functional equivalent of a confession of judgment.").[4] It is the carrier's concession to the maximum amount of damages and coinciding abandonment of any defense that functionally confesses judgment, moots the case, and triggers the insured's entitlement to fees.

By waving a white flag, admitting liability, and tendering a check for more than $500.00, Progressive confessed judgment for the full amount of damages alleged in the complaint, rendering this case moot. *Alliance Spine*, 321 So. 3d at 245.

IV. PROGRESSIVE WOULD BE PREJUDICED BY ALLOWING PHYSICIANS GROUP TO AMEND ITS COMPLAINT.

Though Progressive has confessed judgment, this case is not over because Physicians Group has moved to amend its complaint. The Fourth District faced the same posture in *Alliance Spine*, recognizing that because the provider "sought to amend the complaint's maximum amount of damages allegation prior to entry of the confessed judgment . . . the controversy between the parties had not been so fully resolved that a judicial determination could have no actual effect." 321

So. 3d at 245. There, however, the trial court denied the motion for leave to amend on the basis of prejudice, allowing the confession to take effect. *Id*. I reach the same conclusion.

A plaintiff may amend its complaint once as a matter of course before an answer. Fla. R. Civ. P. 1.190(a). If an answer has been filed, a plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party." Fla. R. Civ. P. 1.190(a). Progressive does not consent to the amendment, so Physicians Group seeks leave.

"Leave of court shall be given freely when justice so requires." Fla. R. Civ. P. 1.190(a). So, all doubts on motions for leave to amend "should be resolved in favor of allowing amendments so that cases may be resolved on their merits." *Grover v. Karl*, 164 So. 3d 1285, 1287 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1388a] (quoting *Yun Enters., Ltd. v. Graziani*, 840 So. 2d 420, 422-23 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D781a]). "Thus, as a general rule, refusal to allow amendment constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Id*. (quoting *Yun Enters.*, 840 So. 2d at 422-23). Before denying a motion for leave to amend, the trial court must find that one of these three factors exists. *Id*. *See Geer v. Jacobsen*, 910 So. 2d 391, 393 Fla. 2d DCA 2005) [30 Fla. L. Weekly D2244a]. Physicians Group has not abused the privilege of amendment, and there has been no showing that amendment would be futile. This motion therefore turns on whether allowing the amendment would prejudice Progressive.

"[L]iberality in granting leave to amend diminishes as the case progresses to trial." *Lasar Mfg. Co. v. Bachanov*, 436 So. 2d 236, 237-38 (Fla. 3d DCA 1983). *Accord Ohio Cas. Ins. Co. v. MRK Constr., Inc.*, 602 So. 2d 976, 978 (Fla. 2d DCA 1992). And a trial court "may deny further amendments where a case has progressed to a point that liberality ordinarily to be indulged has diminished." *Alvarez v. DeAguirre*, 395 So. 2d 213, 216 (Fla. 3d DCA 1981). There comes a time in litigation when the liberality of amendment is trumped by "an equally compelling obligation on the court to see to it that the end of all litigation be finally reached." *Id*. (quoting *Brown v. Montgomery Ward & Co.*, 252 So. 2d 817, 819 (Fla. 1st DCA 1971)). From that obligation springs the Fourth District's admonition that, a "party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment." *Noble v. Martin Mem'l Hosp. Ass'n*, 710 So. 2d 567, 568 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]. The same holds true for Progressive's motion to enforce.

Physicians Group does not argue that the damages alleged must be increased because Progressive is, in fact, liable for a greater amount of damages. Instead, Physicians Group appears to seek an amendment solely to ensure that its current allegations "are not dispositive of the issue of damages" and to escape Progressive's confession. As in *Noble*, I find that basis insufficient and prejudicial when asserted at this point in the litigation. Physicians Group waited almost 18 months after the confession of judgment to amend its complaint, and then only on the eve of the hearing on Progressive's motion to enforce that confession. For the duration of the litigation, Progressive has adhered to its position that it confessed judgment two weeks after the case was filed. Allowing the amendment solely for the purpose of increasing the jurisdictional amount alleged—especially when Physicians Group long ago accepted and negotiated the confession check—would prejudice Progressive.[5] *Alliance Spine*, 321 So. 3d at 245; *Noble*, 710 So. 2d at 568.[6]

Accordingly,

1. Defendant's Motion to Dismiss, Motion to Enforce Confession of Judgment, and Motion for Entry of Final Judgment is GRANTED in part.

2. The Court ENFORCES Defendant's confession of judgment, and the Court finds Plaintiff Physicians Group, LLC entitled to a final judgment of $542.85. The Court will enter a final judgment in that amount, and Plaintiff may move to amend the amount of the final judgment if it believes interest is improperly calculated, and also to add the appropriate amount of prejudgment interest. Any such motion must be emailed to the Court in chambers after filing. **Progressive must respond in writing to any such motion within 14 days, or the Court will deem the motion unopposed and dispose of it without a hearing.**

3. Under the confession of judgment doctrine, the Court finds Plaintiff Physicians Group, LLC ENTITLED to attorney fees. § 627.428(1), Fla. Stat.

4. Plaintiff's Motion to Strike Defendant's Answer and Affirmative Defenses is DENIED. See Fla. R. Civ. P. 1.500(c) ("A party may plead or otherwise defend at any time before default is entered.").

5. Plaintiff's Motion for Leave to Amend Complaint is DENIED.

6. The Court retains jurisdiction over this case to award costs, attorney fees, and prejudgment interest. The Court further retains jurisdiction to amend the final judgment.

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[1]On Physicians Group's motion, the Court continued the April 20 hearing to allow supplemental briefing and additional hearing time.

[2]*See also Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1331 (Fed. Cir. 2005) ("[T]he tender of the entire amount of the damages claimed by a plaintiff moots the damages claim."); *Spencer-Lugo v. Immigration & Naturalization Serv.*, 548 F.2d 870, 870 (9th Cir. 1977); *Simmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986); *Wiskur v. Short Term Loans, LLC*, 94 F. Supp. 2d 937, 939 (N.D. Ill. 2000).

[3]*Compare S. Fla. Pain Rehab. of W. Dade v. Infinity Auto Ins. Co.*, 318 So. 3d 6, 11 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D915a] ("[I]f the Legislature intended penalty and postage to be a PIP 'benefit' for entitlement to attorney's fees . . . it would have provided for this in the statute."); *Sheldon v. United Servs. Auto. Ass'n*, 55 So. 3d 593, 595-96 (Fla. 1st DCA 2010) [36 Fla. L. Weekly D23a] (holding that statutory interest may not be independently recovered when benefits have exhausted because the PIP statute "does not allow for recovery of interest . . . unless benefits are first determined to be overdue"), *with Precision Diagnostic, Inc. v. Progressive Am. Ins. Co.*, 330 So. 3d 32, 33 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2282d] (reviewing trial on the sole issue of whether Progressive properly calculated statutory interest); *Orion Ins. Co. v. Magnetic Imaging Sys. I*, 696 So. 2d 475, 476 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1595c] (holding that a claim for unpaid statutory interest on late payments is a "claims dispute involving medical benefits"); *United Auto Ins. Co. v. Millennium Diagnostic Imaging Ctr., Inc.*, 12 So. 3d 242, 245 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D913c] (characterizing interest on overdue PIP payments as a "statutory penalt[y]"); *U.S. Sec. Ins. Co. v. Magnetic Imaging Systems, I, Ltd.*, 678 So. 2d 872, 873-74 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1852a] (same, and rejecting argument that amount of statutory interest due cannot be subject to arbitration). *Cf. Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214-15 (Fla. 1985) (holding that prejudgment interest is a form of "restitution" and "pecuniary damages").

[4]*Cf. Beatley v. Ayers*, 851 F. App'x 332, 336 (4th Cir. 2021) ("The district court concluded that Ayers' mid-litigation payment of the $134,000 (plus interest) mooted that portion of the breach of contract claim. We agree.") (citing *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986)); *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78, 80 (2d Cir. 2013) ("[I]f a defendant consents to judgment in the maximum amount for which the defendant could be held liable, 'there is no justification for taking the time of the court and the defendant in the pursuit of . . . claims which the defendant has more than satisfied.' . . . Consequently, we agree with the district court that Doyle's refusal to settle the case in return for Midland's offer of $1,011 (plus costs, disbursements, and attorney's fees), notwithstanding Doyle's acknowledgment that he could win no more, was sufficient grounds to dismiss this case for lack of subject matter jurisdiction.") (quoting *Abrams v. Interco Inc.*, 719 F.2d 23, 32 (2d Cir. 1983)); *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) ("By offering her $1,200 plus reasonable costs and attorney's fees, the bank thus was offering her more than her claim was worth to her in a pecuniary sense. Such an offer, by giving the plaintiff the equivalent of a default judgment . . . , eliminates a legal dispute upon which federal jurisdiction can be based.").

[5]Because I find Progressive would be prejudiced by amendment, I do not address Progressive's *ore tenus* argument that Physicians Group is equitably estopped from moving for leave to amend under *Florida Department of Health & Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002) [27 Fla. L. Weekly S980a].

[6]*See also State Farm Mut. Auto. Ins. Co. v. Baum Chiropractic Clinic PA*, 323 So. 3d 756, 757 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1548a] (affirming denial of motion for leave to allow an amendment that would "change the primary issues six days before trial").

* * *

Insurance—Personal injury protection—Jurisdiction—Non-residents—Minimum contacts—Complaint for PIP benefits fails to allege sufficient facts to bring action within ambit of Florida's long-arm statute and to demonstrate that insurer has sufficient minimum contacts with state to satisfy due process requirements where policy at issue originated in Michigan and insurer is not incorporated in Florida, does not have agents or business locations in Florida, does not transact business in Florida, and is not authorized to sell insurance in Florida—Motion to quash service and dismiss case is granted

ADVANCED DIAGNOSTIC GROUP, a/a/o Kristie Jordan, Plaintiff, v. ALLSTATE INSURANCE COMPANY and PROGRESSIVE MARATHON INSURANCE COMPANY, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-075239 (I), Civil Division. October 16, 2022. Leslie Schultz-Kin, Judge, Counsel: Todd Migacz, FL Legal Group, Tampa, for Plaintiff. Kaleb El-Khatib, Progressive PIP House Counsel, Riverview, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO QUASH SERVICE AND TO DISMISS FOR FAILURE TO ATTACH POLICY, LACK OF PERSONAL JURISDICTION AND TO DISMISS FOR IMPROPER VENUE FORUM NON CONVENIENS PURSUANT TO FLA. STAT. 48.193, 47.122 AND F.R.C.P. 1.140 (b)(3) AND FOR NON-COMPLIANCE WITH DIFFERENTIATED CASE MANAGEMENT ORDER

THIS CAUSE came before the Court for hearing on October 3, 2022, on Defendant's Motion to Quash Service and to Dismiss for Failure to Attach Policy, Lack of Personal Jurisdiction and to Dismiss for Improper Venue Forum Non Conveniens Pursuant to Fla. Stat. 48.193, 47.122 and F.R.C.P. 1.140 (b)(3) and for Non-Compliance with Differentiated Case Management Order, filed on July 28, 2022 ("Defendant's Motion"). Having reviewed and considered Defendant's Motion, Defendant's Declaration and Certification of Business Records in Support of Defendant's Motion, the arguments presented by the parties, the applicable law, and being otherwise fully advised, the Court finds:

1. On June 14, 2022, Plaintiff, ADVANCED DIAGNOSTIC GROUP, filed an Amended Complaint alleging breach of contract and seeking payment of Personal Injury Protection ("PIP") benefits for services rendered as a result of injuries sustained by KRISTIE JORDAN in an automobile accident on December 8, 2019.

2. On July 28, 2022, in response to Plaintiff's Amended Complaint, Defendant filed Defendant's Motion alleging, among other things, that this Court lacks the requisite personal jurisdiction to entertain the instant suit. Defendant contends that: (1) Defendant is an entity incorporated in and a resident of the state of Michigan; (2) Defendant does not have any agents in the state of Florida, nor does it transact or conduct bsuiness in the state of Florida; (3) Defendant is not authorized to sell insurance in the state of Florida; (4) Defendant does not have any business locations in the state of Florida; and (5) the operative policy of insurance between the insured and Defendant was originated in the state of Michigan. *See Defendant's Motion ¶ 2-6*. In support of Defendant's Motion, Defendant relies on the Declaration and Certification of Business Records of Dane Roach, filed on August 10, 2022.

3. "[A] court is permitted to consider evidence outside the four corners of the complaint where the motion to dismiss challenges subject matter jurisdiction or personal jurisdiction, or where the motion to dismiss is based upon *forum non conveniens* or improper venue." *Steiner Transocean Ltd. v. Efremova*, 109 So. 3d 871, 873 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D604c].

4. Under prevailing Florida law, "a defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file [sworn testimony] in support of his position. The burden is then placed upon the plaintiff to prove by [sworn testimony] the basis upon which jurisdiction may be obtained." *Id.*

5. In determining whether personal jurisdiction over a nonresident ("long-arm jurisdiction") is appropriate in a given case, "two inquiries must be made. First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the [long-arm statute]; and if it does, the next inquiry is whether sufficient 'minimum contacts' are demonstrated to satisfy due process requirements." *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989).

6. In the instant case, Plaintiff's Amended Complaint, filed on June 14, 2022, fails to allege sufficient facts to bring the action within the ambit of Florida's long-arm statute, Fla. Stat. 48.193. Furthermore, this Court finds that Plaintiff has failed to demonstrate that Defendant has sufficient minimum contacts with the state of Florida to satisfy due process requirements. A court may acquire personal jurisdiction over a nonresident only if the nonresident has "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

7. While Defendant filed a Declaration and Certification of Business Records in Support of Defendant's Motion on August 10, 2022, Plaintiff failed to put on the record or supply this Court with sworn testimony which would provide a basis upon which jurisdiction may be obtained under Florida's long-arm statute.

8. The only record evidence before the Court establishes that Defendant has no contacts with the state of Florida, therefore, this Court finds that Defendant had no reasonable anticipation of being subjected to defending a suit in Florida courts. *See Meyer v. Auto Club Ins. Ass'n*, 492 So. 2d 1314, 1316 (Fla. 1986). Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Motion to Quash Service and to Dismiss for Failure to Attach Policy, Lack of Personal Jurisdiction and to Dismiss for Improper Venue Forum Non Conveniens Pursuant to Fla. Stat. 48.193, 47.122 and F.R.C.P. 1.140 (b)(3) and for Non-Compliance with Differentiated Case Management Order is **GRANTED**.

2. This case is dismissed without prejudice, with each party to bear its own costs and attorney's fees and Defendant shall go hence without day.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Motion for protective order regarding unilaterally scheduled deposition pertaining to alleged existence and violation of notice of lien filed by medical provider's attorney is granted—Because complaint asserts breach of contract claim based on failure to properly pay PIP benefits, any discovery related to attorney's lien or lien violation is not warranted

STATMED QUICK QUALITY CLINIC OF NORTH PINELLAS, LLC, a/a/o Thomas Judge, Plaintiff, v. AUTO CLUB SOUTH INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-074605, Division H. July 25, 2022. James S. Giardina, Judge. Counsel: Kelly Blum, FL Legal Group, Tampa, for Plaintiff. Sarah Sorgie Hanson, Conroy Simberg, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER REGARDING UNILATERALLY SCHEDULED DEPOSITION & SUPPLEMENTAL LEGAL ARGUMENT AS TO OBJECTIONS RAISED IN DISCOVERY

THIS MATTER came before the Court on June 13, 2022, on Defendant's Motion for Protective Order Regarding Unilaterally Scheduled Deposition & Supplemental Legal Argument as to Objections Raised in Discovery filed April 28, 2022 ("Motion"). Having reviewed and considered Defendant's Motion, the arguments

presented by the parties, and the applicable law, the Court finds:

Background

1. On July 6, 2021, Plaintiff, as assignee of Thomas Judge, instituted this breach of contract action against Defendant seeking "unpaid and overdue PIP and possibly MPC coverage." *See* Compl. ¶¶ 1 & 8. After a motor vehicle crash, Mr. Judge sought medical treatment from Plaintiff—a diagnostic test/study—for which Plaintiff sought reimbursement by Defendant, and which Plaintiff alleges Defendant failed to properly pay in accordance with the policy of insurance. *See id.* at ¶¶ 12-30. Plaintiff also alleges entitlement to payment of statutory interest, postal costs, and attorneys fees and costs. *See id.* at ¶¶ 31, 35. No other cause of action is asserted.

2. In response to Plaintiff's Complaint, Defendant filed a "Motion to Dismiss Duplicate Suit" in which it alleged that this action is the second lawsuit by Plaintiff seeking PIP benefits for the same services rendered to Mr. Judge, and that the prior action had been dismissed with prejudice after settlement. *See* Def.'s Mot. to Dismiss (Aug. 30, 2021). The same day, Defendant also filed a Motion for Protective Order as to All Discovery Served Pending Hearing on Defendant's Motion to Dismiss.

3. Following Defendant's August 30, 2021, filings, Plaintiff filed additional discovery requests focused the alleged existence and violation of a Notice of Lien and settlement of the claim. *See* Pl.'s Req. for Admiss. to Def. (Nov. 15, 2021); Pl.'s Req. to Produc. to Def. (Nov. 15, 2021).[1] Although couched in the terms of Plaintiff's lien, it appears to allude to a lien of Plaintiff's counsel in this matter. *See* Pl.'s Req. for Admiss. to Def. (Nov. 15, 2021).

4. On December 15, 2021, Defendant filed its Motion for Protective Order as to All Discovery Served to Include Recently Filed Lien Discovery. In the Motion, Defendant reasserted its position regarding the prior action, and further indicated that the lien discovery is not related to an issue framed by the pleadings.

5. On February 15, 2022, Defendant's Motion to Dismiss and Motions for Protective Order were heard by the Court. The Order on the Motions was issued April 27, 2022. The Order denied the Motion to Dismiss Duplicate Suit, without elaboration, and granted the protective order with the exception of the "lien" discovery.

6. On March 14, 2022, Defendant filed its Answer and Affirmative Defenses in which it asserted, among other defenses, res judicata and that section 627.736(15) bars this action.

Defendant's Motion for Protective Order Regarding Unilaterally Scheduled Deposition & Supplemental Legal Argument as to Objections Raised in Discovery

7. On April 28, 2022, Defendant filed the Motion currently before the Court. In this Motion for Protective Order, Defendant asserts a unilaterally scheduled deposition with regard to an alleged lien is improper in this action. Defendant maintains its position that this is a breach of contract action and "any and all discovery specific to a lien is not appropriate or valid as no lien violation is alleged." Def.'s Mot. ¶¶ 7-8. Citing various cases, Defendant argues that discovery related to any alleged lien(s) or settlement of the prior action is not appropriate because the issues are not relevant to the litigation as framed in Plaintiff's Complaint. *See id.* at ¶¶ 9-10, 16-18. In addition, Defendant claims further discovery, generally, is inappropriate based on its position that this action is barred by a previously filed action for the same benefits claimed in this matter, which has been settled. *See id.* at ¶¶ 12-14.[2]

8. Plaintiff did not file a written response to Defendant's Motion.[3] In opposition to Defendant's Motion, Plaintiff maintains that it was unaware of the first filing, and the current litigation is maintained to establish a lien violation occurred. Plaintiff argues that depriving it of this discovery prior to dismissing on the jurisdictional issue would be error.

9. In addition, Plaintiff objected to argument by Defendant regarding standing and jurisdiction by asserting that the matters were previously raised in Defendant's Motion to Dismiss and had been resolved by the Court.

Analysis

10. Initially, the Court considers Plaintiff's argument that the determination on the Motion to Dismiss prevents Defendant presently raising argument on jurisdiction (standing/res judicata). The standard on a motion to dismiss limits the Court from considering matters outside the four corners of the Complaint. *See Brooke v. Shumaker, Loop & Kendrick, LLP*, 828 So. 2d 1078, 1080 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2323d]. Further, "[u]nless affirmative defenses appear on the face of the complaint, they may not be considered on a motion to dismiss." *LeGrande v. Emmanuel*, 889 So. 2d 991, 996 (Fla. 3d DCA 2004) [30 Fla. L. Weekly D33a]. As outlined by the Second District Court of Appeal:

> A motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact. . . . In considering a motion to dismiss, the trial court is required to confine itself to the allegations contained within the four corners of the complaint. . . . Res judicata is an affirmative defense, and although affirmative defenses can be raised in a motion to dismiss if the allegations of the complaint demonstrate their existence, ... the complaint in this case does not refer to the prior action. Since the court could not consider the pleading attached to State Farm's motion, the court erred in dismissing the action on the basis of res judicata.

Bolz v. State Farm Mut. Auto. Ins. Co., 679 So. 2d 836, 837 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2010c] (citations omitted).[4] Given the limited scope of review on a motion to dismiss, the Court does not find the unelaborated denial of Defendant's Motion to Dismiss in this matter established a ruling on the merits of Defendant's jurisdictional arguments.

11. Further, even were the denial of the Motion to Dismiss to be considered a ruling on the merits of the jurisdictional argument, the Court notes its inherent authority to reconsider its interlocutory rulings until final judgment is entered. *See LoBello v. State Farm Florida Ins. Co.*, 152 So. 3d 595, 600 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1273c] (noting that " '[i]t is well established that a trial court may reconsider and modify interlocutory orders at any time until final judgment is entered' " (citation omitted)); *Seigler v. Bell*, 148 So. 3d 473, 478-479 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2012c]; *Helmich v. Wells Fargo Bank, N.A.*, 136 So. 3d 763, 765-766 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D882a].

12. The Court now turns to the arguments relative to Defendant's Motion and the discovery sought by Plaintiff from Defendant in this matter.

13. Florida Rule of Civil Procedure 1.280 "General Provisions Governing Discovery" provides the guidelines for the Court's review of this matter. Rule 1.280(b)(1) provides that generally "[p]arties may obtain discovery regarding **any matter, not privileged, that is relevant to the subject matter of the pending action**" and that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the **information sought appears reasonably calculated to lead to the discovery of admissible evidence**." (emphasis added). Rule 1.280(c) provides for the issuance of a protective order upon a showing of good cause

14. "Discovery is limited to those matters relevant to the litigation **as framed by the parties' pleadings**." *Rousso v. Hannon*, 146 So. 3d 66, 69 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1663a] (emphasis in original) (citations omitted); *see Diaz-Verson v. Walbridge Aldinger Co.*, 54 So. 3d 1007 (Fla. 2d DCA 2010) [36 Fla. L. Weekly D26b] (finding "the trial court departed from the essential requirements of law in denying" a motion for protective order where the information sought was "not relevant to any issue raised by the pleadings"). "A

protective order should be granted when the pleadings indicate that the documents requested are not related to any pending claim or defense and are not reasonably calculated to lead to the discovery or admissible evidence." *Richard Mulholland and Assocs. v. Polverari*, 698 So. 2d 1269, 1270 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1883a] (citations omitted).

15. With regard to the discovery requests related to a lien, the Court agrees with Defendant that, based on the allegations and issues as framed by Plaintiff's Complaint, any and all discovery specific to a lien or lien violation is not warranted.

16. Plaintiff's Complaint repeatedly asserts this action is a breach of contract claim based on the failure to properly pay PIP benefits, and MPC (if applicable), for services Plaintiff rendered to Mr. Judge. Notably, however, the Complaint does not contain any allegations with regard to any type of lien, violation of a lien, or any cause of action based on a lien. The defenses asserted in this case likewise to not implicate any issues related to the existence of a lien.

17. In support of its opposition to Defendant's Motion, Plaintiff filed a Notice of Filing Authority on the morning of the June 13, 2022 hearing. The Court finds these cases distinguishable as the cases involve discovery relevant to the issues in the case, or "reasonably calculated to lead to the discovery of admissible evidence." For example, in *Hepco Data, LLC v. Hepco Medical, LLC*, in finding the trial court's order on discovery departed from the essential requirements of law, the materiality of the sought depositions was proffered and unrebutted. 301 So. 3d 406, 410-411 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D843b]. Further "the trial court did not address the materiality" of the deponents. 301 So. 3d at 411. Here, the discovery sought relative to a lien is not material to the issues framed by Plaintiff's Complaint, and is not reasonably calculated to lead to admissible evidence related to those issues.

18. In addition, Plaintiff also cited to *Heller v. Held*, 817 So. 2d 1023 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1323b], and *Miller v. Scobie*, 152 Fla. 328 (Fla. 1943). While the cases cited by Plaintiff illustrate that the issue of a charging lien is one that can potentially be pursued—in *Heller* by separate action[5] or in *Miller* by continuation of the original action in which settlement had occurred without payment of the attorney's fee—this action is not either. This action, as framed by Plaintiff, is a breach of contract for Defendant's alleged failure to properly pay benefits under its insurance policy. While Plaintiff now argues the current litigation is maintained to establish a lien violation occurred, the Complaint does not reflect such a cause of action, and there has been no indication that this action settled and must be maintained to protect the attorney's lien.

19. As noted in *American Medical Systems, Inc. v. Osborne*, "there must be a connection between the discovery sought and the injury claimed[,] [o]therwise, it is an improper fishing expedition." 651 So. 2d 209, 211 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D576b]. In this case, no connection has been established between the lien discovery sought and the injury claimed in Plaintiff's Complaint—breach of contract damages as a result of Defendant's alleged failure to properly pay PIP benefits to the medical provider Plaintiff. While Plaintiff now argues the current litigation is maintained to establish a lien violation occurred, the Complaint does not reflect such a cause of action.

20. Because the lien discovery is not "relevant to the subject matter of the pending action" or "reasonably calculated to lead to the discovery of admissible evidence" related to the issues framed by the Complaint, good cause exists to grant a protective order as to the lien discovery.

21. With regard to the remaining, non-lien discovery, the Court notes Defendant filed its Motion for Final Summary Judgment with regard to the issue of the existence of a prior, duplicate suit on June 13, 2022.[6] As such, the Court reserves on the issue of "all" other discovery pending resolution of Defendant's Motion for Final Summary Judgment.

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

A. Defendant's Motion for Protective Order Regarding Unilaterally Scheduled Deposition & Supplemental Legal Argument as to Objections Raised in Discovery filed April 28, 2022, is hereby **GRANTED** as to discovery related to the alleged lien as that material is neither relevant to the issues as framed by the Complaint, nor reasonably calculated to lead to the discovery of admissible evidence related to the issues as framed by the Complaint.

B. This determination is without prejudice to the issue of entitlement to such lien discovery being raised in the future, pending resolution of Defendant's Motion for Final Summary Judgment and upon appropriate showing the discovery sought is relevant to or reasonably likely to lead to discovery of admissible evidence related to the issues presented in the pending action.

C. The Court reserves as to the issue of entitlement to a protective order as to all other discovery and the objections to discovery raised in Defendant's Motion pending resolution of Defendant's Motion for Final Summary Judgment.

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[1]Plaintiff also filed a Notice of Service of Plaintiff's Interrogatories to Defendant on November 15, 2021.

[2]The Court notes Defendant's defenses relative to whether or not this action is barred by the previously filed action is not properly before the Court for determination on the present Motion. As such, the Court makes no findings related to on those issues at this time. However, as noted below, Defendant has filed a Motion for Final Summary Judgment.

[3]The morning of the hearing on Defendant's Motion, Plaintiff did file a Notice of Filing Authority it intended to rely upon in opposition to Defendant's Motion.

[4]The Court notes, in its opposition to Defendant's Motion to Dismiss, Plaintiff cited the *Bolz* case.

[5]In *Heller*, after establishing a charging lien in the original action and obtaining judgment against the client, which he was unable to collect, the attorney filed a separate action against the defendants from the prior action claiming they were jointly liable on the charging lien. *See* 817 So. 2d at 1024-1025.

[6]The Court also notes Defendant's Motion for Final Summary Judgment has been noticed for hearing by Defendant to occur on July 28, 2022. *See* Notice of Hearing (June 13, 2022).

* * *

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Discovery—Medical provider's motion for continuance of hearing on insurer's motion for summary judgment on exhaustion defense to allow provider time to depose person who signed declaration in support of summary judgment is denied—Motion to continue was not accompanied by affidavit or declaration, provider has not shown that it could not present facts essential to justify its opposition to summary judgment without additional discovery, and provider made no effort to depose declarant during seven months that summary judgment motion has been pending—Summary judgment is entered in favor of insurer where unopposed facts established in declaration and business records demonstrate that there is no genuine dispute that policy limits have been exhausted—Allegation of bad faith, unsupported by any evidence, is not sufficient to create factual issue

HESS SPINAL & MEDICAL CENTERS OF SPRING HILL, LLC, a/a/o Beatrice Fraco, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-031275, Division J. September 30, 2022. J. Logan Murphy, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Kaleb El-Khatib, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR CONTINUANCE, GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT, AND ENTERING FINAL JUDGMENT FOR DEFENDANT

BEFORE THE COURT are Defendant's Amended Motion for Final Summary Judgment (Nov. 5, 2021), and Plaintiff's Emergency

Motion for Continuance (Mar. 8, 2022). The parties appeared for a hearing on June 2, 2022. Upon consideration, the Motion for Continuance is denied, and the Amended Motion for Final Summary Judgment is granted.

I. INTRODUCTION.

This is a PIP action brought by Hess Spinal as the assignee of benefits from Progressive's insured, Beatrice Fraco. After Hess Spinal filed the complaint, Progressive asserted exhaustion of benefits as an affirmative defense. In pursuit of that defense, Progressive filed its amended motion for summary judgment, arguing it had exhausted the PIP benefits available under Fraco's policy. In support, Progressive filed Jessica Nagy's declaration, which authenticated and certified Progressive's business records, including the policy at issue and the PIP log. Hess Spinal did not respond to the motion.

On March 8, 2022, Hess Spinal filed an "emergency" motion for a continuance. The motion argued that Hess Spinal "will be prejudiced if it is not allowed to depose" Nagy before the hearing on the motion for summary judgment. The motion is not verified, is not accompanied by affidavit or declaration, and does not attach any evidence supporting its argument. Before filing the motion, Hess Spinal had not noticed Nagy's deposition, nor had it filed a motion to compel.

II. MOTION FOR CONTINUANCE.

Hess Spinal requests that the Court continue the summary judgment hearing until it can take Nagy's deposition. Under Florida's new summary judgment rule, a court may allow the nonmovant additional time to take discovery "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fla. R. Civ. P. 1.510(d). Hess Spinal has not filed an affidavit or declaration, and on that basis alone, the motion may be denied.

The lack of sworn statement is not the only basis for denying the motion. Hess Spinal has not shown that it could not "present facts essential to justify its opposition," and it did make any effort to depose Nagy or file a motion to compel during the seven months between Progressive filing the motion for summary judgment and the hearing. Under those circumstances, a trial court is within its discretion to deny a motion to continue a summary judgment hearing. *Martins v. PNC Bank, Nat'l Ass'n*, 170 So. 3d 932, 936-37 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1813a]. *See also Teague v. Pepsi Co.-Frito Lay*, 270 So.3d 528, 529 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1175b]; *Kjellander v. Abbott*, 199 So. 3d 1129, 1131 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2155b]; *Harper v. Wal-Mart Stores East, L.P.*, 134 So.3d 557, 558 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D556a]; *Congress Park Office Condos II, LLC. v. First-Citizens Bank & Trust Co.*, 105 So. 3d 602, 608 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D145a]; *Leviton v. Philly Steak-Out, Inc.*, 533 So. 2d 905, 906 (Fla. 3d DCA 1988). Hess Spinal failed to act diligently in pursuit of discovery, so the continuance is denied.

III. MOTION FOR SUMMARY JUDGMENT.

A. Standard.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). An issue of fact is "genuine" only if "the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1050 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C981a]. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). And a fact is "material" only if it might affect the out-come of the case under the applicable substantive law. *Anderson*, 477 U.S. at 248.

To determine whether there is a genuine dispute, the trial court must decide whether the parties' evidence "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251-52. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id*. at 248-49. Under Florida's new summary judgment standard, it is no longer "plausible to maintain that 'the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75-76 (Fla. 2021) [46 Fla. L. Weekly S95a] (quoting and citing Bruce J. Berman & Peter D. Webster, *Berman's Civil Procedure* § 1.510:5 (2020 ed.)). The "correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d at 75 (quoting *Anderson*, 477 U.S. at 248).

If the nonmovant's evidence is "merely colorable" or "not significantly probative" on the issue, summary judgment should be granted. *Anderson*, 477 U.S. at 249-50. A mere "scintilla of evidence in support of the [nonmovant's] position," or a showing of "some metaphysical doubt as to the material facts," is insufficient to defeat a motion for summary judgment. *Id*. at 252; *Matsushita*, 475 U.S. at 586. Instead, "there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 252. When parties tell two different stories, "one of which is bla-tantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of a ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a].

When evaluating the facts presented in the motion for summary judgment, "the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor." *Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1314 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C987a]. That said, inferences based upon mere speculation are not reasonable. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1301 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1556a]. A court "need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the nonmovant relies, are implausible." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (citing *Matsushita*, 475 U.S. at 587) (internal quotations omitted).

If a reasonable fact-finder evaluating the evidence could draw more than one inference from the facts, and if the inferences drawn introduce a genuine dispute over a material fact, the court should not grant summary judgment. *Doe v. Sch. Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1254 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C715a]. If, however, the nonmovant's response consists of nothing "more than a repetition of his conclusional allegations," summary judgment is not only proper, but required. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982).

Florida's summary judgment rule *requires* the nonmovant to file a response. Fla. R. Civ. P. 1.510(c)(5); *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1135 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a]. When there is no response, the trial court may consider the movant's characterization of facts undisputed and grant summary judgment if those facts show the movant is entitled to it. Fla. R. Civ. P. 1.510(e)(2), 1.510(e)(3).

B. Discussion.

Exhaustion of benefits is a complete defense to a PIP claim. *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut.*

Auto. Ins. Co., 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]. Absent a showing of bad faith or gratuitous payments, "once PIP benefits are exhausted through the payment of valid claims, an insurer has no further liability on unresolved, pending claims." *Id. See also GEICO Indem. Co. v. Gables Ins. Recovery, Inc.*, 159 So. 3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a] (adopting *Northwoods* and holding that "a showing of bad faith is required before the insurer can be liable for benefits above the statutory limit"); *Sheldon v. United Servs. Auto. Ass'n*, 55 So. 3d 593, 595 (Fla. 1st DCA 2010) [36 Fla. L. Weekly D23a] ("Florida courts have established that, once an insurer has paid out the policy limits to the insured (or to various providers as assignees), it is not liable to pay any further PIP benefits, even those that are in dispute."); *Progressive Am. Ins. Co. v. Stand-Up MRI of Orlando*, 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a] ("In the absence of a showing of bad faith, a PIP insurer is not liable for benefits once benefits have been exhausted.").

Progressive argues it has exhausted all PIP benefits available under Fraco's policy. In support, Progressive filed the declaration of Jessica Nagy, who avers that Progressive exhausted the PIP limits on August 6, 2020. (Nagy Decl. ¶ 11.) The Medical Payments Details chart attached to the declaration supports exhaustion.

Hess Spinal has not filed a response, so the Court treats the facts established in Progressive's motion and Nagy's declaration as undisputed. Fla. R. Civ. P. 1.510(e)(3). Trying to avoid its failure to file a response, Hess Spinal argued at the hearing that Nagy's declaration is hearsay and the attached documents are inadmissible. This argument is unpersuasive for two reasons. First, Hess Spinal did not file a written response or a motion to strike Nagy's declaration. That tactic—raising an unknown argument in opposition to summary judgment for the first time at the hearing—is no longer permitted under the new summary judgment standard. Second, the declaration establishes that the records (1) were made at or near the time of the event; (2) were made by or from information transmitted by a person with knowledge; (3) were kept in the ordinary course of a regularly conducted business activity; and (4) were made as part of a regular practice of the business. *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008) [33 Fla. L. Weekly S577a]. *See* §§ 90.803(6)(c), 90.902(11), Fla. Stat. Even if Nagy did not create the records, "it is not necessary to call the individual who prepared the document," as long as the elements of admissibility are established. *Mazine v. M&I Bank,* 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1579a].

Hess Spinal also argued at the hearing that Progressive paid benefits in bad faith. But aside from a generic mention in the complaint, Hess Spinal has provided no evidence of bad faith. The mere possibility of creating an issue of fact is no longer sufficient. Hess Spinal was required to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Under the unopposed facts established in Nagy's declaration and the attached business records, there is no genuine dispute over the material fact that Progressive exhausted its PIP benefits under Fraco's policy. Progressive is therefore entitled to judgment as a matter of law on its exhaustion defense.

Accordingly,

1. Plaintiff's Emergency Motion for Continuance is DENIED.

2. Defendant's Amended Motion for Final Summary Judgment is GRANTED.

3. The Court enters FINAL JUDGMENT in favor of Defendant Progressive American Insurance Company and against Plaintiff Hess Spinal & Medical Centers of Spring Hill, LLC a/a/o Beatrice Fraco, Plaintiff shall take nothing and Defendant shall go hence without day.

4. The Court reserves jurisdiction to award costs and fees under proper application.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Medical provider's submission of ex parte proposed order granting its motion for leave to amend complaint to add count for bad faith was improper and in violation of court's administrative order—Sanctions of dismissal with prejudice and award of attorney's fees and costs are appropriate

PHYSICIANS GROUP, LLC, a/a/o Michael Goodman, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-012063, Division L. October 11, 2022. Michael C. Baggé-Hernández, Judge. Counsel: C. Spencer Petty, Irvin & Petty, Tampa, for Plaintiff. Catherine V. Arpen, Dutton Law Group, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SANCTIONS

THIS CAUSE, having come before the Court on Defendant's Motion for Sanctions, and the Court having heard argument from counsel and otherwise being fully advised in the premises, the Court makes the following findings of fact:

I. Background

Plaintiff is medical provider who had received an assignment of benefits for insurance proceeds from the insured for medical treatment rendered after the insured had been involved in a motor vehicle accident. Doc. 3. Defendant is an insurance company that had issued personal injury protection (PIP) coverage to the insured, which was active at the time of the underlying accident. *Id.*

On February 7, 2021, Plaintiff filed a complaint alleging, *inter alia,* that Defendant violated the terms of the policy contract when it did not issue payment to the Plaintiff after the Plaintiff had treated the insured for injuries suffered because of the motor vehicle accident, which is a covered loss. *Id.*

On March 8, 2022, Defendant filed a notice stating that the Plaintiff had confessed judgment in the instant case. Doc. 32. On March 14th, 2022, Plaintiff filed a motion for leave to amend its complaint to include a count for bad faith/ "[v]iolations of Florida Statute § 624.155." Doc. 34. Plaintiff never requested a hearing for the motion to be heard. On March 14, 2022, Defendant filed a response in opposition, objection to, and motion to strike Plaintiff's motion for leave to amend complaint. Doc. 41. On March 15, 2022, Plaintiff submitted a proposed order for the Court's consideration through the statewide e-portal system and the Court signed the order on that day at 12:13 p.m. Doc. 40. Defendant filed another opposition to Plaintiff's motion and motion to strike Plaintiff's motion on March 15, 2022, at 1:47p.m. Doc. 39.

On March 17, 2022, Defendant filed a motion requesting that the Court set aside the order in Doc. 40, arguing, *inter alia,* that the Defendant was not granted an adequate opportunity to be heard on the motion. Doc. 44, pgs. 1-2. The Court granted Defendant's motion to set aside its order filed in Doc. 42, on March 22, 2022. Doc. 47.

On April 11, 2022, Defendant filed its motion for sanctions. Doc. 53. In its motion, Defendant argues that its due process rights were violated when Plaintiff submitted the *ex parte* order to the Court without an opportunity to be heard. *Id.* at 1. Defendant further argues that Plaintiff never submitted its proposed order to Defendant before submitting the order to the statewide e-portal system for the Court's consideration. Defendant further submits that the law does not support Plaintiff filing its order *ex parte. Id.* at pg. 2-3. Defendant further supports its argument that Plaintiff should be sanctioned by identifying eleven (11)[1] cases where Plaintiff has submitted similar *ex parte* orders without the opposing party having an opportunity to be heard. *Id.* at 5. Plaintiff did not file any response to Defendant's motion for

sanctions.

II. Discussion

A. Amending Complaint to Include Bad Faith

Under Florida Statute § 624.155, "[a]ny person may bring a civil action against an insurer when such person is damaged" when the insurer does not attempt "in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests." Fla. Stat. § 624.155(1)(a)-(b).

The Florida Supreme Court has held "that a determination of liability and the full extent of damages is a prerequisite to a bad faith cause of action." *Fridman v. Safeco Ins. Co. of Ill.,* 185 So. 3d 1214, 1216 (Fla. 2016) [41 Fla. L. Weekly S62a]. Thus, a bad-faith claim under § 624.155 is ripe "when there has been (1) a determination of the insurer's liability for coverage; (2) a determination of the extent of the insured's damages; and (3) the required notice is filed pursuant to section 624.155(3)(a)." *Demase v. State Farm Fla. Ins. Co.,* 239 So. 3d 218, 221 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D679a]. To state a claim for bad faith under § 624.155, a plaintiff "must allege that there has been a determination of the existence of liability on the part of the insurer and the extent of the plaintiff's damages." *Heritage Corp. of S. Fla. v. Nat'l Union Fire Ins. Co. of Pittsburg,* 255 F. App'x 478, 481 (11th Cir. 2007) (citing *Blanchard v. State Farm Mut. Auto. Ins. Co.,* 575 So. 2d 1289, 1291 (Fla. 1991)); *see also Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.,* 100 So. 3d 1155, 1157 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2139b] ("It is well settled that a statutory first-party bad faith action is premature until two conditions have been satisfied: (1) the insurer raises no defense which would defeat coverage, or any such defense has been adjudicated adversely to the insurer; and (2) the actual extent of the insured's loss must have been determined."). *Id.* The purpose of the allegation concerning a determination of damages is to demonstrate that the plaintiff has a valid claim. *Vest v. Travelers Ins. Co.,* 753 So. 2d 1270, 1273 (Fla. 2000) [25 Fla. L. Weekly S242b].

In order for Plaintiff to amend properly the complaint to add a bad faith claim, Plaintiff must seek leave of court. *See* Fla. R. Civ. P. 1.190(a) & (e); *see also Explorer Ins. Co. v. Van Bockel,* 948 So. 2d 845, 846 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D359b] (Plaintiff's motion for leave of court to amend complaint to include a bad faith action against defendant insurance company pursuant to section 624.155 was a legal nullity without actual leave of court). Florida courts applying rule 1.190(e) long ago established that the "public policy favor[s] the liberal amendment of pleadings and courts should resolve all doubts in favor of allowing the amendment of pleadings to allow cases to be decided on their merit." *Newberry Square Fla. Laundromat, LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.,* 296 So. 3d 584, 588 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1376a] (internal quotations omitted). Leave to amend should be denied on the ground of futility only when the proposed amendment is clearly insufficient or frivolous on its face. *Davis v. Piper Aircraft Corp.,* 615 F.2d 606, 613 (4th Cir. 1980).

B. Administrative Order

Hillsborough County Administrative Order S-2022-003 ("Admin. Order") provides for motion and order without hearing for one situation only—a motion to compel discovery pursuant to Fla. R. Civ. P. 1.380. *See* Admin. Order S-2022-003, ¶ 15(A)-(B). The Administrative Order provides that other orders may be submitted to the Judge for the court's consideration only after a hearing, but before doing so, counsel must submit the proposed order to the opposing counsel prior to its submission to the court. *See* Admin. Order S-2022-003, ¶ 23(A) & (C). Plaintiff's submission of its *Ex-Parte Order Granting Plaintiffs Motion for Leave to Amend Complaint to Add Bad Faith* was improper and in violation of the Administrative Order because (1) the matter was not relating to compelling discovery, (2) there had been no hearing, (3) there is no avenue for this submission in the Administrative Order, and (4) the proposed order was not provided to opposing counsel prior to its submission to the Judge.

Plaintiff's argument that this Court's procedures and preferences supersede the Administrative Order is without merit. This Court accepts "proposed" orders that are electronically submitted via the statewide e-portal, but nowhere in the Court's procedures and preferences does it suggest that administrative orders are superseded by the Court's procedures and preferences. Thus, the Administrative Order remains the authority.

The term ***ex parte order*** is defined as "an order made by the court upon the application of one party to any action without notice to the other." Black's Law Dictionary, Ninth Ed., Garner. *See also In re Inquiry Concerning a Judge: Clayton,* 504 So.2d 394, 395 (Fla.1987)("Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties.") Alternatively, a ***proposed order*** is an order drafted after hearing and after presenting a copy to opposing counsel for review. *See* Admin. Order S-2022-003, ¶ 23(A) & (C). The circumstances before the Court today do not comply with either of these definitions.

C. Procedural Due Process

The entry of the *ex parte* order in the instant case would be a violation of Defendant's procedural due process rights under the Florida Constitution, Article I, Section 9, which states "No person shall be deprived of life, liberty or property without due process of law . . . ." Art. I, § 9, Fla. Const. "Procedural due process requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Shlishey the Best, Inc. v. CitiFinancial Equity Services,* 14 So. 3d 1271, 1274 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1393b] *(quoting Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]).

In case similar to the case *sub judice, McCrea v. Deutsche Bank National Trust Co.,* 993 So. 2d 1057 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D852a], the trial court had dismissed a foreclosure action brought by Deutsche Bank. Eleven days after the final order of dismissal was entered, Deutsche Bank faxed a cover sheet, unsigned letter, and proposed order to the trial court. *Id.* at 1058. In the letter, Deutsche Bank asserted that the dismissal order had been "wrongfully" entered based on the McCreas' alleged fraud. *Id.* A copy of the letter was also faxed to the McCreas. The day after the fax was sent and before the McCreas could respond, the trial court signed the order vacating the dismissal and reinstating the case. *Id.*

On appeal, the McCreas argued that the order vacating the dismissal order was improperly entered when the court had no jurisdiction to do so. Deutsche Bank asserted that the order was properly entered pursuant to Florida Rule of Civil Procedure 1.540(b), and it submitted documents in its appendix that purportedly supported the trial court's ruling. However, the appellate court reversed, stating:

> It may well be that the earlier order was the product of mistake, as opposed to judicial error, and was properly corrected by the trial court under rule 1.540(b). However, the McCreas were precluded from establishing the misapplication of rule 1.540(b) by the ex parte procedure that led to entry of the order. For this reason, we reverse and remand with directions for the court to hold a hearing on the matter.

Id. at 1058-59. "While the [appellate court] did not specifically reference 'due process' in its ruling, the reversal due to lack of notice and opportunity to be heard is clearly a determination that entry of the order ex-parte violated the McCreas' due process rights." *Shlishey the*

Best, Inc. v. CitiFinancial Equity Services, Inc., 14 So. 3d at 1274 (citing *McCrea,* 993 So.2d at 1059).

The Court thus finds that entering an ex-parte order filed by Plaintiff violates Defendant's right to procedural due process.

D. Sanctions

After hearing evidence, the Court turned its attention to sanctions for the award of attorneys' fees and costs, and to the most severe sanction—that of involuntary dismissal with prejudice. The Court finds both are warranted.

"Dismissal is appropriate only where it is established by clear and convincing evidence 'that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Hair v. Morton,* 36 So. 3d 766, 769 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1076a] (quoting *Cox v. Burke,* 706 So. 2d 43, 46 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D299a]). The dismissal of a lawsuit is a severe sanction and should only be used in extreme circumstances. *Id.* The burden of proving that a party's conduct warrants dismissal rests with the party alleging the fraudulent conduct. *See Villasenor v. Martinez,* 991 So. 2d 433 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2298a]; *Cross v. Pumpco, Inc.,* 910 So. 2d 324, 327 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2180a]. The sanction of attorneys' fees is authorized per *Moakley v. Smallwood,* 826 So. 2d 221, 224-25 (Fla. 2002) [27 Fla. L. Weekly S357b]. *See also, Parrish v. RL Regi Fin., LLC,* 194 So. 3d 571 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1537a].

The sanction of dismissal where counsel is involved in the conduct to be sanctioned is authorized per *Ballard v. Bank of Am., N.A.* 310 So. 3d 999, 1001 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1795a]. In doing so, the factors identified in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) must be considered. *Ballard v. Bank of Am., N.A.* 310 So. 3d at 1001. Failure to utilize the *Kozel* factors in the court's analysis creates a basis for remand for application of the correct standard. *Id.* Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative. *Id.*

This Court hereby states that the factors identified in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) were considered, and in light of the evidence and arguments presented by counsel, this Court hereby adopts the factor findings as recited on the record as follows:

i. Factor #1: Attorneys' conduct willful, deliberate, or contumacious.

The first factor that the Court must analyze is whether the conduct was willful, deliberate, or contumacious. There is no doubt that Plaintiff's conduct is willful and deliberate. Plaintiff repeatedly filed ex parte orders, and once they were granted,used those signed ex parte orders as persuasive authority for other cases.

Plaintiff's counsel's actions were contumacious as well. As noted previously, Defendant identified eleven different instances that Plaintiff's counsel had filed ex parte orders without allowing hearings for matters that were outside of the administrative order. Each time Plaintiff's counsel filed an ex parte order not permitted by the Administrative Order, requested that the Court signed that order, and used that order as an example as persuasive authority, those actions were stubbornly disobedient from the administrative order.

ii. Factor #2. Previously sanctioned.

It is unknown to the Court if Plaintiff has previously been sanctioned for this type of conduct.

iii. Factor #3. Client personally involved in the act of disobedience.

It is unknown to the Court if the client was involved in the act of disobedience.[2]

iv. Factor #4. Delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion.

Plaintiff's counsel's conduct caused Defendant to suffer prejudice by causing Defendant to have its procedural due process rights violated. Plaintiff's counsel's actions forced the Defendant to take swift action to inform the Court that Defendant did not agree with Plaintiff's motion. This swift action caused Defendant to spend more money in attorney's fees.

v. Factor #5. Attorney offered reasonable justification for noncompliance.

Plaintiff did not offer any reasonable justification for not complying with the administrative order.

vi. Factor #6. Delay created significant problems of judicial administration.

Plaintiff's counsel's actions caused delays which created significant problems of judicial administration. The statewide e-portal system has created a significant benefit for attorneys, pro se, and judges alike. No longer does a party have to wait for the courthouse to be open in order to submit a proposed order to the court. Additionally, parties are relieved of some of the cost of having to submit that paperwork to the court because they can submit that proposed order electronically. This Court receives a large amount of proposed orders daily. By submitting orders to the e-portal system that should not have been submitted with opposing party approval, Plaintiff has cause the Court to issue additional orders reserving the orders that were previously signed, and then forcing to the Court to have hearing to address the matter. These actions have cause significant delays in the judicial administration.

The Court finds that there is no less-severe sanction. Since Defendant confessed of judgment and tendered payment to Plaintiff provider, which Plaintiff provider's deposited the benefits and interest check, Plaintiff provider is not harmed by this sanction. Rather, this is a ***true sanction*** against Plaintiff's counsel for Plaintiff's counsel's willful, deliberate, and contumacious conduct to opposing counsel and this court.

THEREFORE, it is hereby ORDERED AND ADJUDGED:

1. Defendant's Motion for Sanctions is GRANTED.

2. Defendant's motion for involuntary dismissal with prejudice pursuant to *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) is GRANTED.

3. This case is hereby dismissed with prejudice.

4. Defendant is entitled to reasonable attorneys' fees and costs pursuant to *Moakley v. Smallwood,* 826 So. 2d 221, 224-25 (Fla. 2002) [27 Fla. L. Weekly S357b].

5. Defendant has filed its Affidavit of Attorneys' Fees with the Court and is hereby requested to supplement with a fee expert affidavit.

6. This court retains jurisdiction for the award of attorneys' fee and costs to be paid to Defendant by Plaintiff's counsel.

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[1]a. 21-CC-004322; *Physicians Group, LLC, as assignee of Ishak Aoudi v. Metropolitan Casualty Insurance Company*

b. 21-CC-070357; *Physicians Group, LLC a/a/o Quann Sapp v. Metropolitan Casualty Insurance Company*

c. 21-CC-081176; *Physicians Group, LLC, as assignee of Shikla Holmes v. Metropolitan Casualty Insurance Company*

d. 21-CC-093851; *Physicians Group, LLC as assignee of Rishun Williams vs. Metropolitan Casualty Insurance Company*

e. 21-CC-003543; *Hess Spinal & Medical Centers of Lutz, LLC, as assignee of Lisa Winn v. Metropolitan Casualty Insurance Company*

f. 20-CC-016569; *Tampa Bay Orthopedic Surgery Group, LLC D/B/A Tampa Bay Orthopedic & Spine Group a/a/o Lillian Almodovar v. Metropolitan Casualty Insurance Company*

g. 20-CC-084093; *Hess Spinal & Medical Centers of Brandon, LLC, as assignee of Mario Cueto v. Metropolitan General Insurance Company*

h. 20-CC-085848; *Hess Spinal & Medical Centers of Lutz, LLC, as assignee of*

John Heimbach v. Metropolitan General Insurance Company

i. 20-CC-033727; *Tampa Bay Orthopedic Surgery Group, LLC a/a/o Steve Brantley v. Metropolitan General Insurance Company*

j. 20-CC-009909; *Baywest Health & Rehab, LLC a/a/ Cynthia Petchulis v. Metropolitan Casualty Insurance Company*

k. 20-CC-078437; *Hess Spinal & Medical Centers Inc., as assignee of Julia Pirkl v. Metropolitan Casualty Insurance Company*

[2]*See Ham v. Dunmire*, 891 So. 2d 492, 497 (Fla. 2004) [30 Fla. L. Weekly S6a] ("[T]he litigant's involvement in discovery violations or other misconduct is not the exclusive factor but is just one of the factors to be weighed in assessing whether dismissal is the appropriate sanction. Indeed, the fact that the *Kozel* Court articulated six factors to weigh in the sanction determination, including but not limited to the litigant's misconduct, belies the conclusion that litigant malfeasance is the exclusive and deciding factor.").

* * *

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Conditions precedent to collection action—Consumer collection agency failed to satisfy condition precedent to suit where agency failed to register with Office of Financial Regulation before filing debt collection action—Deficiency was not cured by registering with OFR after suit was filed

PERSOLVE RECOVERIES, LLC, Plaintiff, v. ALLECIA SINKFIELD, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division "RJ". Case No. 50-2020-CC-012457-XXXX-MB. September 27, 2022. James Sherman, Judge. Counsel: Michael A. Gold, Walters, Levine DeGrave, Tampa, for Plaintiff. Willie J. Brice, Loan Lawyers, LLC, Fort Lauderdale, for Defendant.

ORDER GRANTING FINAL SUMMARY JUDGMENT TO DEFENDANT

THIS CAUSE came before the Court for hearing on Defendant's Amended Motion for Summary Judgment. Based upon the Amended Motion, the Response, the arguments and representations of counsel, and the Court, being otherwise advised in the premises, finds as follows:

1. This is a debt collection matter by Persolve Recoveries, LLC ("Persolve") against Allecia Sinkfield. It is undisputed that Persolve is a consumer collection agency as defined in section 559.553, Florida Statutes, and is subject to the provisions of the Florida Consumer Collection Practices Act. The deposition of Gregory Straub, Persolve's corporate representative, filed in support of the Motion for Summary Judgment, further establishes that Persolve is a consumer collection agency and was required to be registered with the Office of Financial Regulation at the time suit was filed. *See Dep. of Straub*, at 16-19.

2. Defendant moved for summary judgment arguing that by failing to register with the state prior to filing suit, Persolve failed to satisfy a condition precedent and, therefore, the action should not proceed. Specifically, Defendant argues that section 559.553(1), Florida Statutes, prohibits debt collection practices without first registering with the state:

A person may not engage in business in this state as a consumer collection agency or continue to do business in this state as a consumer collection agency without **first** registering in accordance with this part, and thereafter maintaining a valid registration (emphasis added).

3. Defendant cites to *LeBlanc v. Unifund CCR Partners,* 601 F. 3d 1185, 1198 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C647a] in support of that proposition. In *LeBlanc,* the Eleventh Circuit found that the registration requirement "is a reasonable condition precedent to filing a claim." *Id.* at 1198. According to Defendant, the failure to have registered with the state at the time the suit was instituted bars the present litigation from proceeding.

4. At the hearing on the Motion for Summary Judgment, Persolve conceded that section 559.553(1) sets a condition precedent to filing suit, but argues that it cured the deficiency by properly registering with the state after suit was filed. Plaintiff cites to mechanic's lien cases to support its proposition that a condition precedent can be cured after suit was filed to avoid dismissal. *See Holding Elec., Inc. v. Roberts*, 530 So. 2d 301, 301 (Fla. 1988); *Pierson D. Constr., v. Yudell*, 863 So. 2d 413, 416 (Fla. 4th DCA 2003) [29 Fla. L. Weekly D98e]. The Court finds these cases unpersuasive as they concern a specific statutory scheme and provisions not implicated here.

5. Plaintiff also cites to *Suarez v. Wells Fargo Bank, N.A.*, 201 So. 3d 694 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1981a] which Plaintiff claims suggests conditions precedent can be cured. *See Response in Opposition*, pg 4 ("The purpose of [Rule 1.120(c)] is 'to put the burden on the defendant to identify the specific condition that the plaintiff failed to perform—so that the plaintiff may be prepared to produce proof or cure the omission, if it can be cured.' "). Nothing in that case indicates a party may cure failure to meet a condition precedent once suit has been filed. Instead, it appears to the court the language cited refers to curing a defect in the pleadings regarding conditions precedent.

6. The Court finds that the plain language of the statute at issue in the present case is clear and prohibits a consumer collection agency from debt collection practices in the state without "first" registering. Here, Plaintiff first instituted this suit, then registered. It is beyond the purview of this Court to craft into the statute an exception, much less one that is contrary to the plain language of the provision at issue. *See Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313-14 (Fla. 2016) [41 Fla. L. Weekly S331a] ("The judiciary . . . is without power to rewrite a plainly written statute . . ."); *Municipal Auto Sales, Inc. v. Ferry Street Motor Sales, Inc.*, 143 So. 2d 323 (Fla. 1962).

It is, therefore, **ORDERED AND ADJUDGED** that the Motion for Summary Judgment is **GRANTED** based upon Plaintiff's failure to "first register[ ]" with the state before instituting this suit. The Plaintiff shall take nothing from this action and the Defendant shall go hence without day.

* * *

Insurance—Personal injury protection—Demand letter—Demand letters that listed total amounts billed but failed to provide exact amount for which insurer will be sued if it does not pay claims did not satisfy requirements of section 627.736(10)—Language in letters instructing insurer that it should advise provider if total amounts due are different than that noted in demand letters does not establish waiver of condition precedent or shift to insurer the provider's statutory burden of putting insurer on notice of actual amount that provider is seeking

GREENACRES INJURY CENTER, INC., a/a/o Guilder Palacios, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502021SC005940XXXXMB (RJ). April 11, 2022. John J. Parnofiello, Judge. Counsel: Jenna Levy, Florida Litigators, PLLC, Wellington, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION WITH DIRECTIONS TO CLERK TO CLOSE THE FILE

THIS CAUSE came before the Court on April 5, 2022 at 2:30pm at a special set hearing on the parties' competing Motions for Summary Judgment. Prior to the hearing, the Court reviewed the Amended Complaint (DE #7); the Answer and Affirmative Defenses (DE #17); the Plaintiff's Motion for Summary Judgment RE: Underpayment of PIP Benefits at 80% of the Submitted Charge (DE #63); The Defendant's Motion for Summary Judgment or Disposition As to Plaintiff's Deficient Pre-Suit Demand (DE #64); the Affidavit of [Plaintiff's witness] Katie Karp (DE #67); and the Plaintiff's Memorandum in

Opposition to Defendant's Motion for Summary Judgment or Disposition as to Plaintiff's Deficient Pre-Suit Demand (DE #68). Following the hearing, the Court reviewed the Plaintiff's Amended Memorandum in Opposition to Defendant's Motion for Summary Judgment or Disposition as to Plaintiff's Deficient Pre-Suit Demand (DE #69) and the Defendant's Notice of Filing Supplemental Authority in Support of Allstate's Motion for Summary Judgment or Disposition as to Plaintiff's Deficient Pre-Suit Demand and In Opposition to Plaintiff's Motion for Summary Disposition RE: Underpayment of PIP Benefits at 80% of the Submitted Charge (DE #70). The Court, having reviewed the filings, having heard argument of counsel, and being otherwise advised in the premise finds as follows:

Findings of Fact

Between March 10, 2015 and May 13, 2015, Allstate received and paid four sets of bills from Plaintiff. *See Exh. 2B appended to the Defendant's Motion for Summary Judgment*. The first set of bills, in the total amount of $4,545, was reimbursed by Allstate in the amount of $2,500, on March 23, 2015. *Id.* The second set, in the total amount of $3,114, was reimbursed by Allstate in the amount of $2,310.85, on April 23, 2015. *Id.* The third set, in the total amount of $1,573, was reimbursed by Allstate in the amount of $782.93, on April 23, 2015. *Id.* The fourth set, in the total amount of $345, was reimbursed by Allstate in the amount of $226.90, on May 13, 2015. *Id.* By May 13, 2015, the total amount paid by Allstate was $5,820.68. The parties agree that the Defendant made, and the Plaintiff received, all of these payments. All of Allstate's payments to Plaintiff were accompanied by Explanations of Benefits ("EOBs"), explaining the rates at which each individual medical service was reimbursed and the reason for the amount of each individual reimbursement.

Plaintiff sent Allstate three demand letters. The first demand letter, dated May 21, 2015, demanded that Allstate pay $7,835.60, calculated at 80% of the total combined amount billed for all medical services rendered from February 10, 2015 through March 30, 2015. (DE #68 Pgs. 32-33). The first demand letter does not contain an accounting for any payments received by Plaintiff for these dates of service. *Id.* The second demand letter, dated June 23, 2015, demanded that Allstate pay $276, calculated at 80% of the total amount billed for dates of service April 1, 2015 through April 7, 2015. (DE #68 Pgs. 40-41). The second demand letter also does not contain an accounting for any payments received by Plaintiff for these dates of service. A third demand letter, dated August 31, 2018, demanded that Allstate pay $7,661.60, calculated at 80% of the total amount billed for dates of service February 10, 2015 through April 7, 2015 (DE #68 Pgs. 48-50). The third demand letter also does not contain an accounting for any payments received by Plaintiff for these dates of service. *Id.*

On or about March 13, 2020, Plaintiff filed suit, claiming in its original Complaint that Allstate owed Plaintiff less than $100 in benefits, instead of the $7,661.60 that it sought in its most recent demand letter. On January 7, 2021, Plaintiff filed an Amended Complaint, now claiming Allstate owed less than $5,000; more specifically $87.19, resulting from the alleged underpayment of only the medical services billed as codes 97014 and 97018.

There were no pre-suit demands demanding either $87.19 or $59.89, an amount the parties indicated at the special set hearing that the Plaintiff indicated it was seeking in response to an interrogatory, or specifying any underpayments with reference to codes 97104 or 97018. All of the demand letters, in essence, demanded the Defendant to pay a fixed amount that included amounts both parties knew the Defendant had paid or else the Plaintiff would file suit and risk an award of costs and attorneys' fees.

Conclusions of Law

The purpose of Florida's PIP statutory scheme is to provide swift and virtually automatic payments so that the injured insured may get on with their life without undue financial interruption. *Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 683-84 (Fla. 2000) [25 Fla. L. Weekly S1103a] (*quoting Gov't Emps. Ins. Co. v. Gonzalez*, 512 So. 2d 269, 271 (Fla. 3d DCA 1987)). In 2001, the legislature amended the PIP statutory scheme to require the insured to provide a pre-suit notice of intent to initiate litigation. *Rivera v. State Farm Mut. Auto Ins. Co.*, 317 So. 3d 197, 203 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]. The pre-suit demand letter is a condition precedent to filing a lawsuit to recover PIP benefits. 627.736(10) *Fla. Stat.* 627.736(10) *Fla. Stat.* sets forth numerous parameters necessary to satisfy this condition precedent. At issue in this case, 627.736(10)(b)(3) requires the demand letter to state ". . .services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." In *MRI Assoc. of America, LLC. v. State Farm Fire and Casualty Co.,* 61 So. 3d 462, 645 (Fla 4th DCA 2011) [36 Fla. L. Weekly D960b], the Fourth District Court of Appeal stated:

> The language of subsection 627.736(10)(b)3. requires precision in a demand letter by its requirement of an "itemized statement specifying each exact amount"; it also allows a subsection 627.736(5)(d) health insurance claim form to be "used as the itemized statement." A necessary conclusion of this language is that the statute requires the same precision in a subsection 627.736(5)(d) health insurance claim form as it does in a subsection 627.736(11)(b)3. demand letter. This requirement makes sense. The statute seeks to encourage "the speedy payment of medical bills arising out of an auto accident by subjecting an insurer who pays late to penalties and imposing attorney's fees if suit is required." *Fountain Imaging*, 14 Fla. L. Weekly Supp. at 614. The statute mandates that the amount at issue for a bill be specified early in the claims process. This requirement of precision in medical bills discourages gamesmanship on the part of those who might benefit from confusion and delay. The statutory requirements surrounding a demand letter are significant, substantive preconditions to bringing a cause of action for PIP benefits. *See Menendez v. Progressive Express Ins. Co*., 35 So.3d 873, 879-80 (Fla. 2010) [35 Fla. L. Weekly S222b]

As stated by the Third District Court of Appeal in *Rivera*,

> [T]he purpose of the demand letter is not just notice of intent to sue. The demand letter also notifies the insurer as to the exact amount for which it will be sued if the insurer does not pay the claim[. . .]
> If the intent of § 627.736(10) is to reduce the burden on the courts by encouraging the quick resolution of PIP claims, it makes sense to require the claimant to make a precise demand so that the insurer can pay and end the dispute before wasting the courts and the parties' time and resources. If the provider simply includes in its demand letter a statement of all the charges incurred—as Venus did here—without even deducting the amount the insurer already paid then it is not stating an exact amount that the insurer owes. If the PIP insurer must guess at the correct amount and is wrong, then the provider sues and exposes the insurer to attorneys' fees. Before being subject to suit and attorney's fees, the insurer is entitled to know the exact amount due as fully as the provider's information allows. *Rivera*, 317 So. 3d at 204

Analysis

The three demand letters simply do not satisfy the requirements of 627.736(10)(b)3. The first demand letter, dated May 21, 2015 states in pertinent part: "Amount Owed: $7, 385.60 = $9,232 x 80% minus $0.00, plus any interest that is due and owing[. . .]."The second demand letter, dated June 23, 2015, states "Amount Owed: $, 276.00 = $345.00 x 80% minus $0.00, plus any interest that is due and

owing. . . if all sums, including applicable benefits, interest, penalty and postage, are not paid within thirty (30) days, a lawsuit will be initiated against your company as permitted by Florida law." The final demand letter, dated August 31, 2018, states that "the total amount billed for dates of service February 10, 2015 to April 7, 2015, inclusive, is $9,577.00. [Plaintiff] demands payment for each and every CPT code billed at 80% the amount billed [. . .] the outstanding amount hereby demanded is $7,661.60 (80% of $9,577.00 less $0.00)." Appended to the final demand letter is a list of CPT codes and billed amounts. None of these three letters provides "the exact amount for which it will be sued if the insurer does not pay the claim." Instead, as in *Rivera*, the provider lists the total amount billed and tells the Defendant to guess at the amount that will actually be sued upon which is, in this case, approximately $58 dollars.

The language that Plaintiff relies upon in its demand letters "If the total amount due is different than noted above, please provide a written response advising us as much and please reflect the total amount you believe was billed to your company and the total amount paid by your company. Plaintiff will then resubmit a new demand letter, if requested, in order to avoid a demand letter defense[. . .]" does not suffice to establish waiver of the condition precedent. Neither does that language serve to shift the statutory burden of putting the insurer on notice of the actual amount the Plaintiff is seeking upon onto the insurer itself. Only the Plaintiff can know the amount that it intends to seek in a lawsuit. Only the Plaintiff can notify the Defendant of the exact amount the Defendant must pay the Plaintiff to avoid a lawsuit that carries with it the certainty of additional expense through costs and attorney's fees.

Florida Statute 627.736(10)(b)3 does not require either the provider or the insurer to determine a correct calculation of the amount actually due to the Plaintiff under the PIP Statute. The statute requires the Plaintiff to provide adequate notice of the exact amount that the insurer can choose to pay to forestall a lawsuit and the resulting exposure to costs and attorney's fees. Because these demand letters did not do that, the Plaintiff has failed to establish a necessary condition precedent to maintaining this lawsuit.

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

1. Defendant's Motion for Summary Judgment as to Plaintiff's Pre-Suit Demand is **GRANTED**.

2. As the Court's ruling is that the instant suit was defective *ab initio,* Plaintiff's Motion for Summary Disposition Re: Underpayment of PIP Benefits at 80% of the Submitted Charge is **DENIED**.

3. Judgment is entered in favor of Allstate.

4. Plaintiff shall take nothing by this action and Allstate shall go hence without day.

5. The Clerk of Court is directed to close this file pending further requests for judicial intervention.

6. The Court reserves jurisdiction to determine Allstate's entitlement to and amount of reasonable attorney's fees and costs.

* * *

Criminal law—Traffic infractions—Operating commercial vehicle without commercial driver's license—Deferred prosecution—Masking convictions—Federal regulation that prohibits masking convictions for offenses committed by "CDL holders" when charged with a criminal offense when operating a commercial motor vehicle does not prohibit state attorney from offering deferred prosecution agreement to defendant who was charged with operating commercial motor vehicle without a CDL

STATE OF FLORIDA, Plaintiff, v. JOHN CASTANO NORENA, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2022CT007641. October 17, 2022. Sherri L. Collins, Judge. Counsel: Ryan Berger, Assistant State Attorney for Palm Beach County, West Palm Beach, for Plaintiff. Joel L. Mumford and Cory Hauser, Ted L. Hollander & Associates d/b/a The Ticket Clinic, a Law Firm, West Palm Beach, for Defendant.

AMENDED ORDER ON DEFENDANT'S MOTION FOR COURT TO ALLOW DEFENDANT TO ENTER INTO A DEFERRED PROSECUTION AGREEMENT

On or about October 6th, 2022, this Court was asked to decide the following question: Is it considered masking under 49 CFR § 384.226 to allow a Defendant, who does not hold a commercial driver's license, but is charged with an offense related to the operation of a commercial motor vehicle, to enter a deferred prosecution agreement?

GENERAL ALLEGED FACTS

On May 4, 2022, Trooper Gomez initiated a traffic stop on the Defendant's vehicle southbound on the Florida Turnpike near Boynton Beach Boulevard in Palm Beach County. Subsequent to the traffic stop, the Defendant was charged with the criminal offense of operating a commercial motor vehicle without possessing a commercial driver's license, in violation of Florida Statute 322.53(1), and a civil traffic infraction for driving with an expired registration, in violation of Florida Statute 320.07(3)(a).

The Assistant State Attorney assigned to the case was willing to offer a deferred prosecution agreement ("DPA") to resolve the criminal offense. The DPA would have allowed the Defendant to complete certain conditions to have his case dismissed. However, the State Attorney indicated that the Court previously opined these facts to be masking under 49 CFR § 384.226 to offer a DPA when the charge relates to a commercial motor vehicle offense. As such, the State Attorney would not allow the Defendant to enter into the DPA unless the Court determined that said DPA would not constitute masking under 49 CFR § 384.226 .

LEGAL ANALYSIS

Previously, this Court indicated that the regulation pertaining to masking convictions under 49 CFR § 384.226 applies to all offenses by operators of a commercial motor vehicle regardless of whether the driver is a commercial driver's license holder ("CDL holder"), a commercial learner permit holder ("CLP holder"), or a driver without a commercial driver's license (a "person required to have a CDL"). This Court finds, after considering the following legal argument, that 49 CFR §384.226 does not apply to persons operating a commercial motor vehicle that do not have a CDL or CLP.

One of the regulations passed by the Department of Transportation ("Agency"), is 49 CFR § 384.226 (Masking Regulation), which pertains to masking certain convictions related to a CLP or CDL holder. The Masking Regulation under 49 CFR § 384.226 states,

> "The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or **CDL *holder's*** conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State." ***[emphasis added].***

When the language of a statute is clear and unambiguous and conveys a clear and definite meaning the statute must be given its plain and obvious meaning. *Davila v. State*, 75 So. 3d 192 (Fla. 2011) [36 Fla. L. Weekly S579a]; *citing Velez v. Miami-Dade Cnty. Police Dep't*, 934 So. 2d 1162, 1164 (Fla. 2006) [31 Fla. L. Weekly S641a]. The Court is without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. *Velez v. Miami-Dade Cnty. Police Dep't*, 934 So. 2d 1162, 1164-65; *citing McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998) [23 Fla. L. Weekly S631a]). To determine legislative intent behind a statute, the Court need only look to the plain language of the statute. *McNeil v. State*, 215 So. 3d 55 (Fla.

2017) [42 Fla. L. Weekly S453a]. The Court is not allowed to use its own interpretation of what the legislature meant if the language of the statute is clear.

The language of 49 CFR § 384.226, indicates that it should apply to a CLP or CDL holder. However, the term CDL holder is not defined under 49 CFR § 383.5[1]. As such, it is appropriate for the Court to use and refer to dictionary definitions to ascertain the plain and ordinary meaning of the word holder. *School Bd. of Palm Beach County v. Survivors Charter Schs. Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009) [34 Fla. L. Weekly S251a]. A holder is someone who has possession or ownership of something[2]. A CDL holder would be someone who has possession or ownership of a CDL license. As such, the plain meaning of the term CDL holder in the masking regulation demonstrates that the law only applies to those drivers issued or legally possessing a CDL or CLP.

This Court determines that the terms CDL driver, CDL holder, and a person required to have a CDL, cannot be used interchangeably. The definition of CDL driver under 49 CFR § 383.5 is, "a person holding a CDL or a person required to hold a CDL". A CDL holder is not the same classification as a "person who is required to hold a CDL" and the regulations treat the two differently. The definition of CDL driver in Part 383 contains two separate classifications of drivers: (1) CDL holders and (2) non-CDL holders who are required to hold a CDL. A CDL holder actually owns or possess a CDL license; A "person required to have a CDL" license may not necessarily possess a CDL license. If the Agency wanted the masking regulation to apply to both CDL holders and persons required to have a CDL, it would have instead used the term CDL driver since the term is defined to encompass both categories of drivers instead of CDL holder when drafting the regulation. Alternatively, the term CDL holder could have been defined in 49 CFR §383.5 to include other classes of drivers.

There are countless parts of 49 CFR § 383 and § 384 where the term CDL holder is used to specifically refer to those who possess a CDL license[3]. This is in contrast to the term driver, used in the same regulations to refer to both CDL holders and persons who are required to have a CDL. As one of many examples, the Court cites to Table 1 of 49 CFR § 383.51. Said table sets forth the length of disqualification for various major offenses while driving a commercial motor vehicle. Column 2 and column 5 of the Table show the disqualification period for CDL holders who commit certain major offenses. In direct contrast, columns 1, 3 and 4 specify the length of disqualification for CDL holders and persons required to have a CDL. This demonstrates that the term CDL holder is a specific term used to describe a person who already possesses a CDL license.

In sum, the language of 49 CFR § 384.226 is plain and unambiguous and its meaning cannot be extended to cover drivers who do not hold a CDL license. The Office of the State Attorney can exercise their discretion to resolve this case as they deem appropriate.

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[1]Per 49 CFR § 384.105, the definitions in 49 CFR § 383 apply to part 384 except where otherwise specifically noted.

[2]See "Hold." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/hold. Accessed 2 Oct. 2022. "Holder." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/holder. Accessed 2 Oct. 2022

[3].See additional examples: 49 CFR 383.51, 383.73, 383.25, 383.153, 384.217, 384.208, 384.204.

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Florida Consumer Collection Practices Act—Vehicle predelivery service charges—Costs and profit disclosure—Civil procedure—Summary judgment—Supporting affidavits—Deposition testimony and affidavit of vehicle dealer's corporate representative regarding clerical/computer mapping error claimed to be responsible for failure to include mandatory costs and profit disclosure in vehicle lease is stricken and given no weight where representative lacks personal knowledge of alleged error—Affidavit of dealer's finance and insurance director is also stricken where affidavit is not based on personal knowledge, fails to set forth facts that would be admissible, and was made by person not competent to testify upon matters asserted

JONATHAN PEREZ, an Individual, Plaintiff, v. RICK CASE CARS, INC., d/b/a RICK CASE HONDA, A Florida Company, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO-20-012763. October 21, 2022. Allison Gilman, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood; and Darren Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiff. Kenneth L. Paretti, Quinton & Paretti, P.A., Miami, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE TESTIMONY AND AFFIDAVITS

THIS CAUSE having come to be heard by the Court on September 02, 2022, on the Plaintiff, JONATHAN PEREZ's Motion to Strike Testimony and Affidavits. Darren Newhart of Newhart Legal, P.A. and Joshua Feygin, Esq. of Joshua Feygin P.L.L.C. represented Plaintiff at the hearing. Kenneth Paretti, Esq. of Quinton and Paretti, P.A. represented Defendant, Rick Case Cars, Inc. ("Defendant"). Having reviewed the relevant legal authority, and being otherwise fully advised in the Plaintiff's motion and Defendant's response, for the reasons below, it is hereby **ORDERED AND ADJUDGED**:

Plaintiff's Motion to Strike Testimony and Affidavits is hereby **GRANTED**.

A. BACKGROUND

Florida statute § 501.976(18) requires car dealers such as the Defendant to notify consumers of predelivery service charges by displaying the following disclosure "on *all* documents that include a line item" for such predelivery service fee: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." If car dealers charge consumers predelivery service fees without the disclosure, then they have committed an "unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act. . . ." Fla. Stat. § 501.976. The Florida legislature intended this disclosure to protect consumers by requiring car dealers to give complete and transparent information about the predelivery service fees being charged. As a result, including the disclosure on *all* documents that have a line item for a predelivery service fee is an absolute condition precedent that must be satisfied before car dealers may charge consumers the fee.

Plaintiff has alleged Defendant violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and the Florida Consumer Collection Practices Act ("FCCPA"). Defendant is a car dealership that must comply with § 501.976(18). Defendant leased a car to Plaintiff. Even though Defendant charged Plaintiff predelivery services fees, a $741 "3rd PARTY TAG AGENCY/DEALER FEE" and a $132.95 "ELECT FILING," that appeared on the Motor Vehicle Lease Agreement ("Lease")—the most important financial document in the transaction—Defendant knowingly omitted § 501.976(18)'s disclosure from the Lease. By omitting the disclosure from the Lease, and then charging and collecting the predelivery service fees from Plaintiff, Defendant has committed a *per se* unfair and deceptive act that caused Plaintiff actual damages. Said *per se* violation of FDUTPA is the predicate act giving rise to the Plaintiff's claim under section 559.72(9) of the FCCPA which prohibits the collection of debts through the assertion of a legal right that does not exist.

Defendant, in turn, has attempted to assert a "clerical/computer programming mapping error" to excuse its non-compliance with Florida law. In support of its Motion for Summary Judgment ("Motion"), Defendant has relied on self-serving testimony by and through its corporate representative, Marc Riley (Mr. Riley") along with conclusory affidavits from Mr. Riley and Defendant's Finance

and Insurance Director, Michael Bushman ("Mr. Bushman"). Mr. Riley's testimony and affidavit as well as Mr. Bushman's affidavit are stricken by the Court for the reasons set forth below.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Mr. Riley's testimony lacks personal knowledge.

The Court finds that Mr. Riley's testimony is inadmissible since he lacks personal knowledge of the alleged mapping error, and his testimony is otherwise hearsay. A motion to strike testimony is appropriate when testimony is inadmissible, irrelevant, or immaterial. *See Fla. E. Coast Ry. Co. v. Lassiter,* 59 Fla. 246 (1910). "The purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for summary judgment . . . and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." *Florida Dept. of Financial Services,* 868 So. 2d at 602 *quoting*
Pawlik v. Barnett Bank of Columbia County, 528 So. 2d 965, 966 (Fla. 1st Dist. App. 1988). Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fla. Stat. § 90.801. Florida courts have routinely recognized that affidavits which contain inadmissible hearsay cannot be used to support a summary judgment. *See Glarum v. Lasalle Bank National Association,* 83 So. 3d at 780 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2526a].

It has been made clear that Defendant relies on a clerical computer mapping error in defense of the claims asserted by the Plaintiff. Mr. Riley's testimony in support of the "clerical/computer programming mapping error" in paragraph 14 of the Motion is as follows:

> THE WITNESS: Mr. Newhart, I—I mentioned earlier, and I want to be clear on this. I mean, you know, we consider the lease order and the lease agreement one and the same. They're presenting to the customer at the exact same time. So—and it's even referred to on the lease order or referring to the lease agreement. So, I just want to be clear. Yes, I see that there was a programming error on our part where the—where the pre-delivery service charge on page two of the lease agreement is there, but it's clearly a programming error that we missed, so—

Riley Dep. 50:15-25.

> THE WITNESS: I'll answer it. I'll answer it. Because on page two, there is a line item for pre-delivery service charge with the—with the proper disclaimer.

Riley Dep. 51:19-22.

> THE WITNESS: Like I said, how it was fixed was a mapping programming issue. It was strictly a programming error.

Riley Dep. 54:1-3.

> A. I did say that. And I want to—I want to clarify one thing because I know that I've been referencing the lease order and you have not. But if you—if you would reference it, we do disclose both of those fees on there. And that's truly the true error in the programming issue on the—on the contract itself, on the lease agreement. The 132.95 and the 699 should be in item ten disclosed like they are disclosed on the 1 lease order. The $42 is strictly a pass through. That's strictly just a hard cost, and that could stay on line in—in itemized five, I believe. But the actual 699 and the 132.95, how they're disclosed on the lease order, they should be properly disclosed on—in the—on the lease agreement.

Riley Dep. 79:17-80:1-7

> A. And we want to make sure that everybody understands so there's no confusion there. So, yes, 132.95 and the 699 should be in item—should be in section ten.
>
> Q. Okay. And so you'll agree then that both of those fees should appear with the disclosure that's in section ten, correct?
>
> A. Do I believe they should? Yes. Do I believe they have to? I don't believe so. But I believe that—because we do disclose it that way, then yes. We would like to keep it consistent.

Riley Dep. 80:18-81:1-3.

Upon the Court's careful review of Mr. Riley's deposition testimony, Mr. Riley testified that a "mapping error" occurred, which caused the violation of § 501.976(18). However, his testimony likewise makes clear that he has no experience with uploading/mapping contracts in the dealer management system. Riley Dep. 90:22-24. His testimony also seems to shift blame upon "CDK," Defendant's dealer management system provider. However, it is apparent that Mr. Riley did not speak with a representative of CDK on whether, in fact, an error occurred during the "mapping" of the lease form. Instead, Mr. Riley testified that he reviewed the lease agreement, the lease order and spoke with the Defendant's attorney—and nothing more. Riley Dep. 95:16-19. The Court also notes that Mr. Riley only learned that the alleged error occurred after meeting with the Defendant's attorney, Mr. Paretti, to prepare for the corporate representative deposition and at no time before. Riley Dep. 85:14-20. In fact, Mr. Riley readily admitted he knew nothing about the error being asserted by the Defendant other than through Defendant's attorney. Riley Dep. 88:1-12. Throughout his deposition, Mr. Riley could not answer who discovered the error. Riley Dep. 85:14-86:2; 87:8-88:17. Nor did he know how the error was fixed, when the error was fixed (if at all), or who even fixed the error. *Id.* 52:25-53:4; 53:24-54:3.

> Q. Do you know who corrected this error?
>
> A. I'm not a hundred percent sure of that either.
>
> Q. Do you know who would know?
>
> A. I'm not sure who would know, but I can—I can assure you that it was corrected.

Riley Dep. 52:25-53:4.

In sum, the Defendant asks the Court to consider Mr. Riley's testimony in support of a defense based on a purported clerical error. In doing so, Defendant asks the Court to disregard that Mr. Riley knows nothing about: (1) the nature of the error; (2) how the error was rectified; (3) when the error was rectified; (4) who rectified the error; and (4) the fact that he had only come to known of the existence of the error in the first place by preparing for his deposition with Defendant's attorney. The Court notes that the only thing Mr. Riley seems to have known was that a mapping error occurred in the first place and that it was rectified.

In light of the above, the Court finds that Mr. Riley's testimony lacks credibility and personal knowledge, is largely hearsay and the Defendant's reliance on the same is improper.

Thus, this Court strikes the same, *in toto,* and shall give it no weight.

II. Mr. Riley's affidavit in support of the alleged "clerical/computer programming mapping error" is likewise lacking personal knowledge.

Affidavits are the weakest form or evidence, not typically admitted in a trial, and whose purpose are merely to show that the affiant has some competent testimony to present at trial when attached to a Motion for Summary Judgment. Authors' Comment to Fla. R. Civ. P. 1.510. An affidavit filed by the movant of a summary judgment must be viewed strictly by the Court as a matter of practice yet an affidavit filed by the opponent of a summary judgment would be viewed more liberally. *Id.*

Fla. R. Civ. P. 1.510(c)(4) requires that affidavits submitted in support of summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ." *Fla. Dept. of Fin. Services v. Associated Industries Ins. Co., Inc.,* 868 So. 2d 600,602 (Fla. 1st Dist. App. 2004) [29 Fla. L. Weekly D1847a].

An affidavit "may not be based on factual conclusions or conclusions of law." *Jones Const. Co. of C. Fla., Inc. v. Fla. Workers'*

Compen. Jua, Inc., 793 So. 2d 978, 979 (Fla. 2d Dist. App. 2001) [26 Fla. L. Weekly D356c]. It is fundamental that affidavits filed in connection with summary judgment proceedings "shall be made on personal knowledge[1], shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify as to the matters stated therein." *Harrison v. Consumers Mortg. Co.,* 154 So. 2d 194, 195 (Fla. 1st Dist. App. 1963).

Here, Defendant has submitted an affidavit from Mr. Riley to support an alleged "clerical/computer programming mapping error" which lacks any personal knowledge by the affiant. Upon review of Mr. Riley's affidavit, it is apparent that he knew nothing about the mapping error as he says as much: "As the General Manager of Rick Case Honda, *I had no knowledge of this mapping error* at the time of the Perez transaction or at any time prior thereto." Riley Affidavit, ¶ 10. (emphasis supplied). Mr. Riley's testimony reveals that he wasn't even assigned to the Rick Case Honda location at the time of the subject transaction. Riley Affidavit, ¶ 1.

Moreover, Mr. Riley's affidavit makes clear that a third party, Mr. Bushman, discovered and corrected the purported mapping error. *Id.* Mr. Riley's declaration fails to identify how he came to learn that Mr. Bushman discovered the mapping error or how Mr. Bushman corrected any such error or when exactly he learned of the error from Mr. Bushman. *Id.* Nor does the affidavit set forth any facts to support the Defendant's position pertaining to a clerical error, such as what sort of policies and procedures were used by the Defendant to catch and correct the error. *Id.*

This absence of personal knowledge and factual support highlights the self-serving nature of the affidavit. Even when taken in the light most favorable to the Defendant, Mr. Riley's personal knowledge is limited to his conclusory declaration that he personally confirmed that the mapping error had been corrected—and nothing more. *Id.* Even so, Mr. Riley fails to set forth how he confirmed that the error had been corrected. *Id.*

Given that Mr. Riley has not set forth any personal knowledge of the error nor any facts that would be admissible in evidence, the Court finds that he is not competent to testify upon the matters asserted within the affidavit.

For these reasons, Mr. Riley's affidavit is also stricken, *in toto.*

III. Mr. Bushman's Affidavit lacks personal knowledge as well.

In support of its Motion, Defendant also relies on the affidavit of Michael Bushman to try and prop up its inadvertent error defense. But, Mr. Bushman's deposition testimony largely minors that of Mr. Riley in almost every respect. Just like Mr. Riley's testimony, Mr. Bushman's testimony makes it clear that he lacks any personal knowledge of the purported error.

For one, Mr. Bushman assumes that a mapping error on CDK's behalf simply because the violation of Florida law occurred. Bushman Dep. 24:9-16. When pressed by the Plaintiff on the cause of the mapping error, the Court notes that Mr. Bushman could not expand with any sort of certainty and his testimony was littered with suppositions and conjecture. Bushman Dep. 24:25-25:10.

Despite asserting that an error had occurred due to an unknown potential issue on CDK's end, Mr. Bushman directly contradicted his own testimony by admitting he knew nothing about what caused the mapping error at the time of the transaction or at the time of his deposition.

> Q. Okay, but you don't know what caused the alleged mapping error in this case then, correct?
>
> A. At that time, no, sir.
>
> Q. And as we sit here today, you still don't know what caused the error, correct?
>
> MR. PARETTI: Object to the form.
>
> A. No.

Bushman Dep. 25:11-17.

Mr. Bushman also lacked any personal knowledge of who caused the error, who brought the error to his attention, when it was brought to his attention, much less how the error occurred. Bushman Dep. 27:5-20. Underscoring the lack of personal knowledge, Mr. Bushman didn't even know how long the error occurred for. Bushman Dep. 29:4-24. Notwithstanding Mr. Bushman's absence of any personal knowledge about the purported error, Defendant nevertheless relied upon an affidavit executed by Mr. Bushman in which he testifies in a conclusory fashion that:

> As a result of a computer mapping error the predelivery service charge and Electronic Registration Filing Fee were inadvertently misplaced on lines 5(A)(9) and 5(A)(8), respectively instead of lines 10(F) and 10(I)(with an asterisk). This error was inadvertent and not knowing and intentional. I learned of the mapping error regarding the Closed End Motor Vehicle Lease Agreement after the Perez transaction. I had no knowledge of this mapping error at the time of the Perez transaction or at any time prior thereto. The mapping error was discovered and upon discovery I was personally responsible for immediate communication with CDK and working with CDK programmers to correct such mapping errors. The errors have been corrected.

Bushman Affidavit, ¶ 10.

As is evident from the significant gaps in Mr. Bushman's affidavit and contradictions on the record, this Court cannot find Mr. Bushman's affidavit to be credible. Rather, the Court finds that Mr. Bushman's affidavit: (1) was made by an affiant without personal knowledge; (2) failed to set forth any facts that would be admissible as evidence; and (3) was made by an individual not competent to testify upon the matters asserted.

As a result, the Court strikes Mr. Bushman's affidavit, *in toto,* and gives it no weight.

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[1]Black's Law Dictionary (9th ed.2009), defines *personal knowledge* as "knowledge gained through first hand observation or experience, as distinguished from a belief based on what someone else has said."

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Florida Consumer Collection Practices Act—Vehicle predelivery service charges—Costs and profit disclosure—Dealer committed per se violation of FDUTPA where mandatory cost and profit disclosure appeared on vehicle lease order but did not appear on vehicle lease—No merit to argument that inclusion of statutory disclosure on lease without specifying precise fees to which it applies satisfies requirements of FDUTPA—Affirmative defenses arguing substantial compliance and contemporaneous instrument rule are not legally sustainable where clear and unambiguous language of statute requires that disclosure appear on all documents—Application of absurdity doctrine to abrogate clear and unambiguous statutory language is not permissible—Plaintiff who paid illegal fee suffered actual damages and is not required to show actual reliance on omission of disclosure—Fact that dealer is authorized by statute to charge electronic filing system fee does not immunize its conduct under safe harbor provision of FDUTPA where statute does not authorize dealer to charge EFS fee in unfair and deceptive manner—Voluntary payment defense fails because plaintiff's ignorance or mistake of law in paying pre-delivery service fees is irrelevant in context of per se FDUTPA violation—Dealer that knowingly collected illegitimate debt and asserted right it knew did not exist violated FCCPA—Dealer has not established bona fide error defense to FCCPA claim where it had no policies and procedures in place to prevent alleged error and cannot produce evidence proving alleged programming error occurred—No merit to claim that plaintiff has failed to join indispensable party

JONATHAN PEREZ, an Individual, Plaintiff, v. RICK CASE CARS, INC. d/b/a RICK CASE HONDA, A Florida Company, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO-20-012763. October 21, 2022. Allison

Gilman, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood; and Darren Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiff. Kenneth L. Paretti, Quinton & Paretti, P.A., Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come to be heard by the Court on September 02, 2022, on the Defendant, RICK CASE CARS, Inc.'s ("Defendant") Motion for Summary Judgment and Plaintiff, JONATHAN PEREZ's ("Plaintiff') Response in Opposition. Darren Newhart of Newhart Legal, P.A. and Joshua Feygin, Esq. of Joshua Feygin P.L.L.C. represented Plaintiff at the hearing. Kenneth Paretti, Esq. of Quinton and Paretti, P.A. represented Defendant, Rick Case Cars, Inc. Having reviewed the record evidence, relevant legal authority, and being otherwise fully advised in the motion and response, for the reasons below, it is hereby **ORDERED AND ADJUDGED**:

Defendant's Motion for Summary Judgment is **DENIED**.

BACKGROUND

Florida statute § 501.976(18) requires car dealers such as the Defendant to notify consumers of predelivery service charges by displaying the following disclosure "on *all* documents that include a line item" for such predelivery service fee: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." If car dealers charge consumers predelivery service fees without the disclosure, then they have committed an "unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act. . . ." Fla. Stat. § 501.976. The Florida legislature intended this disclosure to protect consumers by requiring car dealers to give complete and transparent information about the predelivery service fees being charged. As a result, including the disclosure on *all* documents that have a line item for a predelivery service fee is an absolute condition precedent that must be satisfied before car dealers may charge consumers the fee.

Plaintiff has alleged Defendant violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and the Florida Consumer Collection Practices Act ("FCCPA"). Defendant is a car dealership that must comply with § 501.976(18). Defendant leased a car to Plaintiff. Even though Defendant charged Plaintiff predelivery services fees, a $741 "3rd PARTY TAG AGENCY/DEALER FEE" and a $132.95 "ELECT FILING," that appeared on the Motor Vehicle Lease Agreement ("Lease")—the most important financial document in the transaction—Defendant knowingly omitted § 501.976(18)'s disclosure from the Lease. By omitting the disclosure from the Lease, and then charging and collecting the predelivery service fees from Plaintiff, Defendant has committed a *per se* unfair and deceptive act that caused Plaintiff actual damages. Said *per se* violation of FDUTPA is the predicate act giving rise to the Plaintiff's claim under section 559.72(9) of the FCCPA which prohibits the collection of debts through the assertion of a legal right that does not exist.

FINDINGS OF FACT

1. Defendant is a car dealership licensed by the State of Florida. Riley Deposition 3:24-25, 9:1.

2. Defendant agrees that car dealerships have a responsibility to know the laws that govern car dealers. Riley Deposition 3:7-9.

3. Defendant agrees that it was knowledgeable about the laws governing its operations. Riley Deposition 11:4-8,

4. Defendant agrees that car dealerships such as itself have no legal right to use deceptive and unfair conduct in the course of lease transactions. Riley Deposition 11:11-15.

5. Defendant agrees that its employees cannot use deceptive conduct in the course of lease transactions with consumers. Riley Deposition 11:16-21.

6. Defendant agrees that in 2018 the Defendants and its employees knew that they couldn't use deceptive and unfair conduct in lease transactions. Riley Deposition 16:25, 17:1-10.

7. Defendant has been in business since at least 2009. State of Florida, Detail by Entity Name, Florida Department of State- Division of Corporations, July 09, 2022 9:15 a.m., https://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=RICKCASECARS%20P000000697870&aggregateId=domp-p00000069787-497e0a1e-ddec-49c8-8273-20a809f36fbe&searchTerm=RICK%20CASE%20CARS%2C%201NC&listNameOrder=RICKCASECARS%20P000000697870

8. In 2018, Defendant completed between 2,000-5,000 lease transactions. Riley Deposition. 41:5-16.

9. Plaintiff leased a 2019 Honda HRV with a VIN of 3CZRU5H15KG706777 ("Vehicle") from Defendant on December 29, 2018. Riley Deposition. 35:1-8; Perez Deposition. 71: 20-24

10. Defendant prepared a Motor Vehicle Lease Agreement for Plaintiff's execution ("Lease") in furtherance of the lease transaction for the Vehicle. Lease, Exhibit "A."

11. The initial complaint in this action was filed on December 29, 2020. See D.E. Nos. 1-3. Riley Deposition. 93: 21-15.

12. Defendant admits it has no written training policies or procedures to train employees on form Lease agreements. Riley Deposition 15:12-25, 15:1-2.

13. Defendant admits it has no written policies directed at how often lease agreements should be reviewed for compliance with Florida law. Riley Deposition 33:3-8.

14. In 2018 Defendant had policies and procedure in place to ensure that its lease agreements complied with Fla. Stat. 501.976 (18). Riley Deposition 32:7-12.

15. Defendant is familiar with Florida Statute § 501.976(18). Riley Deposition 19:22-25, 20:1-14.

16. Defendant agrees that its employees were familiar with the disclosure requirements of § 501.976(18) in 2018. *Id.*

17. Defendant undertakes compliance audits of new forms put into its form bank for use with consumers. Riley Deposition 21:21-25, 22:1-15.

18. Defendant's CFO and financing director were the parties to complete such audits in 2018. *Id.*

19. The lease form at issue in the instant action was put into use by Defendant in August of 2016. Riley Deposition. 37:24-25, 38:1-8.

20. Defendant reviewed the lease form for compliance with Florida law prior to putting it into rotation. Riley Deposition. 38:11-17.

21. Defendant does not know who completed the compliance review of the lease form. Riley Deposition.38:19-24.

22. In 2018, Defendant was a licensed electronic filing agent ("EFS Agent") for the State of Florida. Riley Deposition 24:11-13.

23. As an EFS Agent, Defendant is allowed to process title and registration electronically on behalf of the state. Riley Deposition 26:8-11.

24. The e-filing process is simple and takes little time. Riley Deposition 26:20-25, 27:1-6.

25. In 2018, Defendant was not obligated to electronically file registration and title paperwork with the state. Riley Deposition 27:7-10.

26. Defendant admits that as an EFS Agent, it is not able to charge electronic filing fees in an unfair or deceptive manner. Riley Deposition. 82:4-16.

27. Defendant charges a flat fee of $132.95 on each transaction for e-filing. Riley Deposition 28:24-25, 29:1-3.

28. The $132.95 flat fee charge contains a profit component to Rick Case. Riley Deposition 30:18-25,31:1-25, 32:1-4.

29. Defendant admits that the EFS fee is a fee for pre-delivery

services it provides to consumers. Riley Deposition 28:24-25, 29:1-3.

30. The Lease contains a line-item entry for an e-filing fee in the amount of $132.95. Riley Deposition 46:15-17.

31. Defendant charged Plaintiff a $132.95 elect filing fee. Riley Deposition 47:11-14.

32. Defendant charged a $999.50 pre-delivery service fee as a single line-item entry labelled "3RD PARTY TAG AGENCY/ DEALER FEE." Riley Deposition 46:18-21; 47:15-17.

33. Every consumer in 2018 was charged a $132.95 elect filing fee and a $999.50 3RD PARTY TAG AGENCY/DEALER FEE. Riley Deposition 56:4-9.

34. The Lease fails to contain the following statutory disclosure for the elect filing fee and the 3RD PARTY TAG AGENCY/DEALER FEE: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." *Fla. Stat* § 501.976(18). Lease Agreement, Exhibit A. Riley Deposition. 64:24-25, 65:1-3.

35. Defendant agrees that every document that contains a pre-delivery service charge must provide a disclosure for such line-item charges. Riley Deposition. 66:7-25, 67:1-10.

36. Defendant agrees that the Lease is a document with pre-delivery service charges. Riley Deposition. 66:12-15.

37. Defendant agrees that the statutory disclosure provided on the Lease was not applicable to that agreement. Riley Deposition 69:3-17.

38. The Lease agreement contains a merger provision. Riley Deposition. 71:14-18.

39. The Lease agreement fails to reference the lease order form executed by the Plaintiff. Riley Deposition. 72: 14-24.

40. Defendant asserts that a programming error prevented the disclosure required by § 501.976(18) to appear on the Lease for the for the elect filing fee and the 3RD PARTY TAG AGENCY/DEALER FEE. Riley Deposition. 50:15-25, 51: 3-7.

41. Defendant doesn't know when the mapping error was corrected. Riley Deposition. 52:18-21.

42. Defendant doesn't know who would know when the error was corrected. Riley Deposition. 52:22-24.

43. Defendant doesn't know who corrected the mapping error. Riley Deposition. 52:25, 53:1.

44. Defendant doesn't know who would know who corrected the mapping error. Riley Deposition 53:2-4.

45. Defendant doesn't know how many lease agreements contain said mapping error. Riley Deposition. 53:19-22.

46. Defendant doesn't know how the mapping error was fixed. Riley Deposition. 53:24-25, 54: 1-3.

47. Defendant discovered the error prior to the filing of this lawsuit but doesn't know exactly when. Riley Deposition. 84:15-23.

48. Prior to preparing for his deposition, Mr. Riley didn't know that a mapping error ever occurred. Riley Deposition 85:24-25, 86:1-2, 88:1-6.

49. Defendant for the first time raised the mapping error defense during Mr. Riley's deposition. Riley Deposition. 59:11-25, 60:1-4.

50. Mr. Riley testified that he had no personal knowledge that an error occurred with respect to the form lease agreement at issue in these proceedings. Riley Deposition. 88:7-12.

51. Mr. Bushman is the national director of finance and insurance of Rick Case Automotive Group. Bushman deposition. 8:5-12.

52. Among his current job duties, Mr. Bushman is responsible for legal compliance and "looking over forms to ensure that they're correct. Doing audits to make sure that we're in compliance." Bushman deposition. 8:13-20.

53. Mr. Bushman didn't know what was the cause of the mapping error asserted by the Defendant. Bushman deposition. 25:11-17.

54. Mr. Bushman didn't know who caused the mapping error alleged by Defendant. Bushman deposition 27:5-7.

55. Mr. Bushman didn't know how the error occurred. Bushman deposition 27:19-20.

56. Mr. Bushman didn't know how long the error was present in lease agreements issued by Defendant. Bushman deposition. 29:4-7;25-24.

57. Mr. Bushman didn't know how many lease contracts were affected by the error. Bushman deposition. 31:2-4.

58. Mr. Bushman didn't know who brought the mapping error to his attention. Bushman deposition. 35:20-25.

59. Mr. Bushman only learned of the error by virtue of the Plaintiff's filing of this lawsuit. Bushman deposition. 36:14-16.

60. It is undisputed that in excess of 30 days prior to filing suit, Plaintiff issued and Defendant received a demand letter. Riley Deposition. 91:24-25, 92:1-11.

61. In 2018, Defendant was familiar with FDUTPA. Riley Dep. 18:2-9.

62. In 2018, Defendant specifically knew of Florida Statute § 501.976(18). Riley Dep. 18:24-19:4.

63. In 2018, Defendant knew the disclosure required by Florida Statute § 501.976(18) had to be associated with predelivery service fees on the Lease. Riley Dep. 19:6-10.

64. Defendant agrees that in 2018 it had to comply with Florida Statute § 501.976(18). Riley Dep. 19:12-14.

65. In 2018, Defendant's finance mangers were "absolutely" aware of Florida Statute § 501.976(18) and the disclosure had to appear associated with line-item predelivery service fees on lease agreements. Riley Dep. 19:24-20:14.

66. Defendant was previously sued in 2014 by a consumer for *inter-alia* failing to properly disclose pre-delivery service fees. *ANA MILENA GONZALEZ v. RICK CASE CARS, INC.,* CACE-14-021819.

LEGAL ANALYSIS

I. The new summary judgment standard.

The Florida legislature recently changed the summary judgment standard under the Florida Rules of Civil Procedure. Under the new standard, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Courts must construe and apply this standard "in accordance with the federal summary judgment standard." *Id.*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "An issue is genuine if 'a reasonable trier of fact could return judgment for the non-moving party.' " *Frank v. AGA Enterprises, LLC,* 17-CV-61373, 2021 WL 1960453, at *2 (S.D. Fla. May 17, 2021) *quoting Miccosukee Tribe of Indians of Fla. v. U.S.,* 516 F.3d 1235, 1243 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C401a]. "The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case." *Chapman v. AI Transport,* 229 F.3d 1012, 1023 (11th Cir. 2000). Thus, "[a] court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the non-movant relies, are 'implausible.' " *Mize v. Jefferson City Bd. of Educ.,* 93 F.3d 739, 743 (11th Cir. 1996) (citations omitted.)

After the movant has met their burden on summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir. 1990). "If the evidence advanced by the non-moving party

'is merely colorable, or is not significantly probative, then summary judgment may be granted." *Branch Banking and Tr. Co. v. Hamilton Greens, LLC,* 942 F. Supp. 2d 1290, 1297 (S.D. Fla. 2013) (citations omitted).

II. Defendant is not entitled to judgment as a matter of law on Plaintiff's FDUTPA claim.

Section 501.976(18) prohibits car dealerships from charging customers "for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." Fla. Stat. §501.976(18).

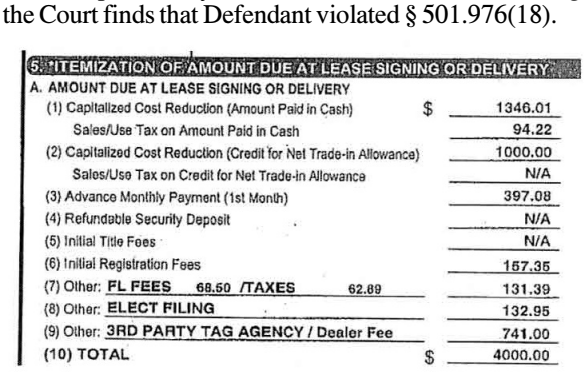
The Court's analysis on whether Defendant is liable under this statute begins and ends with its plain language. If a statute's language is "clear and unambiguous," then courts cannot "resort to rules of statutory (or contract) construction to ascertain intent." *Daniels v. Fla. Dept. of Health,* 898 So. 2d 61, 64 (Fla. 2005) [30 Fla. L. Weekly S143a]. In such instance, courts "must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.' " *Daniels,* 898 So. 2d at 65 (quoting *Nicoll v. Baker,* 668 So. 2d 989, 990-91 (Fla. 1996) [21 Fla. L. Weekly S96a]).

Section 501.976(18) states:

> It is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act, for a dealer to:
>
> ...
>
> Charge a customer for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."

The Court finds the language in § 501.976(18) to be clear and unambiguous. The statute's language is concrete, not abstract. The singular qualification "all" in front of "documents" makes plain that every document with line item predelivery service fees must bear the requisite disclosure for the pertinent line item. *See Martinez v. Iturbe,* 823 So. 2d 266, 267 (Fla. 3d Dist. App. 2002) [27 Fla. L. Weekly D1793a] (explaining that "all" is defined as 'every member or individual component of,' *see* Webster's New International Dictionary 54 (3d ed. 1986), and 'the total entity or extent of,' *see* The American Heritage Dictionary 94 (2d ed. 1982)). Each document with line item predelivery service fees is a "member of" the documents requiring the disclosure. *See Martinez,* 823 So. 2d at 267; *see also City of Clearwater v. BayEsplanade.com, LLC,* 251 So. 3d 249, 255 (Fla. 2d Dist. App. 2018) [43 Fla. L. Weekly D1414b].

Thus, the question the Court must answer is whether the Lease is included within "all documents" on which the disclosure had to appear. The answer is yes. The statute's plain language makes this conclusion inescapable. Because the disclosure did not appear on the Lease with the predelivery service fees, where Defendant charged the fees, the Court finds that Defendant violated § 501.976(18).



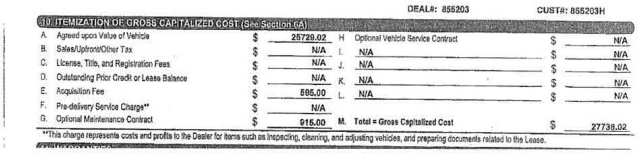
5. ITEMIZATION OF AMOUNT DUE AT LEASE SIGNING OR DELIVERY	
A. AMOUNT DUE AT LEASE SIGNING OR DELIVERY	
(1) Capitalized Cost Reduction (Amount Paid in Cash)	$ 1346.01
Sales/Use Tax on Amount Paid in Cash	94.22
(2) Capitalized Cost Reduction (Credit for Net Trade-in Allowance)	1000.00
Sales/Use Tax on Credit for Net Trade-in Allowance	N/A
(3) Advance Monthly Payment (1st Month)	397.08
(4) Refundable Security Deposit	N/A
(5) Initial Title Fees	N/A
(6) Initial Registration Fees	157.35
(7) Other: FL FEES 68.50 /TAXES 62.89	131.39
(8) Other: ELECT FILING	132.95
(9) Other: 3RD PARTY TAG AGENCY / Dealer Fee	741.00
(10) TOTAL	$ 4000.00

For that reason, Defendant committed a *per se* unfair and deceptive act actionable under FDUTPA. *See Cabrera,* 288 F. Supp. 3d at 1324 ("Because Defendant charged Plaintiff a $47.95 fee for the handling and shipping of the title and registration of the 2015 Infiniti, but failed to include the required disclosure in the line item for the fee in the [contract], Defendant has violated Fla. Stat. § 501.976(18) *as a matter of law.*")

Defendant asks the Court to accept the flawed premise that the inclusion of the statutory disclosure on the 1st page of the Lease without tying it to the fees it applies to—all of which are found on the 1st page—satisfies the requirements of the statute. Put another way. Defendant asserts that simply placing the disclosure anywhere on the Lease. so long as it appears somewhere, is sufficient.

Defendant's position is not well taken. Defendant fails to give intent to the remedial purpose underpinning the statute which is to level the playing field by providing consumers with a precise disclosure that certain fees being assessed by a dealership are comprised of cost and profit that can be negotiated. It stands to reason that the only way such a disclosure can be provided to a consumer such as Mr. Perez is to specifically identify the precise fees that constitute pre-delivery service charges and provide a disclosure for said fees which is not tucked away. far removed from the fees at issue.

Upon review of the Lease, it is evident that the Defendant clearly understood that the Legislature intended dealerships to specifically demarcate pre-delivery services fees and tie the charges with a statutory disclosure as that is exactly how the Defendant drafted the second page of the Lease:



DEAL#: 855203 CUST#: 855203H

10. ITEMIZATION OF GROSS CAPITALIZED COST (See Section GA)

A.	Agreed upon Value of Vehicle	$ 25729.02	H.	Optional Vehicle Service Contract	$ N/A
B.	Sales/Upfront/Other Tax	$ N/A	I.	N/A	$ N/A
C.	License, Title, and Registration Fees	$ N/A	J.	N/A	$ N/A
D.	Outstanding Prior Credit or Lease Balance	$ N/A	K.	N/A	$ N/A
E.	Acquisition Fee	$ 895.00	L.	N/A	$ N/A
F.	Pre-delivery Service Charge**	$ N/A			
G.	Optional Maintenance Contract	$ 915.00	M.	Total = Gross Capitalized Cost	$ 27738.02

**This charge represents costs and profits to the Dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the Lease.

Had the Defendant truly believed placing the disclosure anywhere on the Lease without the need for specifying the precise fees it applied to, it would have never gone to the extent it did to populate its form to mirror the "pre-delivery service charge" wording in the statute and apply asterisks beside the line item that also appear before the requisite statutory disclosure directly underneath the charge to draw attention to the disclosure.

Defendant's position also glosses over the fact that the line-item entries on the second page of the Lease where the requisite statutory disclosure appears contain a "N/A" line item entry. By doing so, Defendant signified that pre-delivery service fees were not being charged to the consumer and the disclosure associated with such charge is inapplicable. Instead, the Defendant charged pre-delivery service fees on page one of the Lease and completely altered the verbiage to reflect a "THIRD PARTY TAG AGENCY FEE/ Dealer Fee" which does not comport with the "pre-delivery service charge" language[1] on the second page where the disclosure appears. This is the exact sort of deceptive conduct the Legislature sough to proscribe.

In summation, Defendant asks the Court to accept an illogical argument that simply providing the statutory disclosure anywhere is sufficient to comply with Fla. Stat. 501.976(18). Defendant's argument runs contrary to the remedial nature of the statute and will not be condoned by this Court. This Court finds that Defendant is not entitled to judgment as a matter of law on Plaintiffs FDUTPA claim.

a. Defendant's eighth affirmative defense—substantial compliance—is legally unsustainable.

Although not identified, Defendant moves for summary judgment on its eighth affirmative defense: "Substantial Compliance" with § 501.976(18).[2] According to Defendant, section 501.976(18) was "technically" complied with because the required disclosure appears

in the Lease Order despite not appearing in the Lease.[3] This affirmative defense asks the Court to impermissibly ignore the plain and unambiguous language of the statute.

First, courts cannot ignore the clear and unambiguous language of a statute. *Hous. Opportunities Project v. SPV Realty, LC,* 212 So. 3d 419, 421 (Fla. 3d Dist. App. 2016) [42 Fla. L. Weekly D44a] *quoting Gough v. State ex rel. Sauls,* 55 So. 2d 111, 116 (Fla. 1951). It must apply the statute to the facts at hand. *See Daniels v. Fla. Dept. of Health,* 898 So. 2d 61, 64 (Fla. 2005) [30 Fla. L. Weekly S143a].

The Court cannot ignore that § 501.976(18) requires the disclosure to appear with the line item predelivery service fees "on *all* documents. . . ." Fla. Stat. §501.976(18) (emphasis added). But by arguing substantial compliance, as Judge Harris found in *Simon* when granting summary judgment to plaintiff on this exact argument, Defendant has asked "the Court to do the opposite." Simon Order pg. 4 ¶ a, Exhibit "B". Simply put, the Court should not "harm consumers by allowing unscrupulous car dealers to bury statutory disclosures in a mountain of documents, leaving consumers uninformed and financially harmed" by ignoring the plain language of the statute. Simon Order pg. 4.

Second, Florida law prohibits courts from "judicially modifying" a statute "by adding words not included by the legislature, nor can [they] limit the express terms of an unambiguous statute." *State v. Estime,* 259 So. 3d 884, 888 (Fla. 4th Dist. App. 2018) [44 Fla. L. Weekly D46a]; *Hayes v. State,* 750 So. 2d 1, 4 (Fla. 1999) [24 Fla. L. Weekly S467a]; *Therlonge v. State,* 184 So. 3d 1120, 1121 (Fla. 4th Dist. App. 2015) [40 Fla. L. Weekly D1646b] (courts "cannot add words [to a statute] which were not placed there by the Legislature.")

Substantial compliance violates this black letter law. Had the legislature wanted to give car dealers a substantial compliance affirmative defense in § 501.976—it could have drafted that language into the statute—but it didn't. *See, e.g.,* Fla. Stat. §832.07(1)(a) (allowing "notice in a *substantially similar form* to that provided above shall be immune from civil liability for the giving of such notice and for proceeding under the forms of such notice.") (emphasis added).

Judge Harris followed this law and reached a predictable result. She found that the court could not "add language into a statute that does not exist[,]" and "[n]owhere does § 501.976(18) allow car dealers to substantially comply with its disclosure requirement." Simon Order pg. 4. She reasoned, "Had the legislature wanted to add such language, it could have, but clearly did not." *Id.* The result should be no different here. Substantial compliance therefore does not allow Defendant to escape FDUTA liability.

Defendant relies heavily on *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, Inc.,* 94 So. 3d 541, 545 (Fla. 2012) [37 Fla. L. Weekly S407a]. But that case has no application here.

The main issue in *Chalfonte* was whether an implied remedy existed in an insurance statute that had no express remedy. In dealing with that issue, the Florida Supreme Court did not consider the important consumer protection issues at play here. *See* Simon Order pg. 4. Unlike *Chalfonte,* the issue here is whether Defendant can escape liability when an express remedy *does* exist. Fla. Stat. § 501.976 ("It is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act. . .") *c.f.* Fla. Stat. § 501.211(1)-(2). Judge Harris distinguished *Chalfonte* in identical manner and found the case had no precedential value. Simon Order pg. 4.

The substantial compliance discussion in *Chalfonte* also played little role in its holding. While the issue was discussed it was not in the same context as here. The driving factor in the Supreme Court's decision, which found that the insurance contract was void and unenforceable, was that "the Legislature has not provided for this penalty." *QBE Ins. Corp.,* 94 So. 3d at 554. In that way, *Chalfonte* supports Mr. Perez's argument. Defendant cannot avoid FDUTPA liability based on substantial compliance because the legislature did not provide for that defense in the statute. At bottom, the Supreme Court in *Chalfonte* did not announce a broad sweeping rule that substantial compliance—in any context—renders the plain language of a consumer protection statute meaningless.

In sum, the Court "cannot abrogate § 501.976(18)'s plain and unambiguous language." Simon Order pg. 4. Summary judgment is not warranted as Defendant's affirmative defense is legally insufficient.

b. The Court cannot look to legislative intent because § 501.976(18)'s language is clear and unambiguous.

Contrary to Florida Rule of Civil Procedure 1.510(a), Defendant's "Legislative Intent" argument does not identify the affirmative defense on which it seeks summary judgment. Fla. R. Civ. P. 1.510 ("A party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense-on which summary judgment is sought.")

That said, the Court can reject the argument because it cannot rely on legislative intent to interpret § 501.976(18). When a statute's language is clear and unambiguous, "courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Daniels,* 898 So. 2d at 64. This Court has concluded that § 501.976(18)'s language is clear and unambiguous. Perez Order pg. 3 (§ 501.976(18)'s language is "clear" and requires the disclosure to appear "on all of the documents."). *See* Simon Order pg. 4 (same). Because § 501.976(18)'s language, as found by the Court, is clear and unambiguous, legislative intent cannot be relied on. The Court must follow Florida Supreme Court precedent and apply the plain language to the facts at hand. As such, this affirmative defense is legally insufficient.

c. Defendant's first affirmative defense—contemporaneous instrument rule—is not a defense to liability because §501.976(18)'s language is clear and unambiguous.

Defendant relies on the "contemporaneous instrument" rule, a contract interpretation tool, for its first affirmative defense. This affirmative defense is legally insufficient because courts cannot use contract or statutory interpretation rules when a statute's language is plain and unambiguous. *Courtesy Auto Group, Inc. v. Garcia,* 874 So. 2d 1220, 1222 (Fla. 5th Dist. App. 2004) [29 Fla. L. Weekly D1225a] ("When the language of a statute is clear and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction.")

First, as argued above, when a statute's language is clear and unambiguous, "courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Daniels,* 898 So. 2d at 64.

This Court has concluded that § 501.976(18)'s language is clear and unambiguous. Perez Order pg. 3 (§ 501.976(18)'s language is "clear" and requires the disclosure to appear "on all of the documents."). *See* Simon Order pg. 4 (same). Because § 501.976(18)'s language, as found by the Court, is clear and unambiguous, the Court cannot resort to a rule of contract interpretation. *Daniels,* 898 So. 2d at 64.

The cases cited by Defendant are therefore inapplicable. The contemporaneous instrument rule, as explained in Defendant's cases, "is primarily a rule of construction or interpretation with regard to contracts." *Popwell v. Abel,* 226 So. 2d 418, 421 (Fla. 4th Dist. App. 1969). But the Court cannot resort to rules of construction or interpretation. Nor has Mr. Perez sued for breach of contract—Mr. Perez sued because Defendant used unfair and deceptive conduct and violated FDUTPA. The issues in the two causes of action aren't the same.

Relying on this precedent, Judge Harris granted summary judgment—under identical circumstances as here—and held that this

affirmative defense was legally insufficient. Simon Order pg. 5. She found that § 501.976(18)'s plain language prohibited car dealers from charging predelivery service fees unless the required disclosure appeared with the line item predelivery service fees on "*all* documents" *Id.* (emphasis original). For that reason, car dealers like Defendant:

> Cannot avoid liability based on the contemporaneous instrument rule as such a conclusion would allow dealers to only place the required disclosure in a single instrument, contrary to the requirement of the statute, which would operate as a waiver of FDUTPA protections and go against public policy.

Simon Order pg. 5 *citing Coastal Caisson Drill Co.,* 523 So. 2d at 793 ("[A]n individual cannot waive the protection of a statute that is designed to protect both the public and the individual.")

Because § 501.976(18)'s language is "clear" and unambiguous, the Court cannot use the contemporaneous instrument rule to create an end-run around § 501.976(18)'s plain language. Such a result would conflict with Florida Supreme Court precedent. The Court "must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.' " *Id. quoting Nicoll v. Baker,* 668 So. 2d 989, 990-91 (Fla. 1996) [21 Fla. L. Weekly S96a]. The contemporaneous instrument rule invites the Court to do the exact opposite.

Second, the contemporaneous instrument rule does not apply to a violation of a consumer protection statutes. Mr. Perez has sued Defendant for violating FDUTPA, a consumer protection statute, not for a breach of contract. The legislature enacted FDUTPA, and more specifically, § 501.976(18) to provide "additional protections to consumers who purchase motor vehicles from motor vehicle dealers." Florida Staff Analysis, S.B. 1956, 4/8/2001. This defense would not only ignore the plain language of § 501.976(18) but would also harm consumers by allowing unscrupulous car dealers to bury statutory disclosures in a mountain of documents, leaving consumers uninformed and financially harmed.

The disclosure required by § 501.976(18) must appear with the line item predelivery service fees "on all documents that include a line item for predelivery service. . . ." The singular qualification "all" in front of "documents" makes plain that each document—that gives information about the lease and that has a line item for predelivery service fees—is a member of the overall universe of documents that must bear the requisite disclosure for the pertinent line item. See *Martinez v. Iturbe,* 823 So. 2d 266, 267 (Fla. 3d Dist. App. 2002) [27 Fla. L. Weekly D1793a].[4]

If the Court applies the contemporaneous instrument rule as Defendant suggests—and construes the Retail Lease Order and Lease together—the result will be that the words "all documents" mean nothing. The disclosure could be omitted from a document that has line item predelivery service fees. In other words, the requirement that the disclosure appear on "all documents" would disappear. That result flouts black letter law on statutory interpretation in Florida. As such, this affirmative defense is legally insufficient and summary judgment is inappropriate.

d. Applying the absurdity doctrine here—which is Defendant's tenth affirmative defense—would be absurd.

The absurdity doctrine is rarely used because courts cannot "substitute their judgment of how legislation should read, rather than how it does read, in violation of the separation of powers." *Nassau County v. Willis,* 41 So. 3d 270, 279 (Fla. 1st Dist. App. 2010) [35 Fla. L. Weekly D1249b]. The absurdity doctrine has no application here because § 501.976(18)'s language is clear and unambiguous.

When a statute's language is clear and unambiguous courts cannot apply the absurdity doctrine to abrogate the language. *See Wright v. City of Miami Gardens,* 200 So. 3d 765, 772 (Fla. 2016) [41 Fla. L. Weekly S387a] (rejecting application of absurdity doctrine because statute's language was clear and unambiguous). Because § 501.976(18)'s language is plain and unambiguous, the absurdity doctrine is inapplicable. *See Courtesy Auto Group, Inc. v. Garcia,* 874 So. 2d 1220, 1222 (Fla. 5th Dist. App. 2004) [29 Fla. L. Weekly D1225a] ("When the language of a statute is clear and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction.")

The absurdity doctrine also has no role in construing a statute when a rational scenario exists that the statute was meant to govern. *Lewars v. State,* 277 So. 3d 143, 149 (Fla. 2d Dist. App. 2017) [42 Fla. L. Weekly D1098b], *approved,* 259 So. 3d 793 (Fla. 2018) [43 Fla. L. Weekly S612a], *approved,* 259 So. 3d 793 (Fla. 2018) (finding that the absurdity doctrine inappropriate when "multiple rational explanations exist for excluding offenders like Lewars from PRR sentencing.") The following is a reasonable scenario for why car dealers must include § 501.976(18)'s disclosure with the line-item predelivery service fees on *all* documents like the Lease:

> Car dealer has consumer sign ten long, complex documents. The line item predelivery service fees with the disclosure are hidden—buried in fine print in the middle of page five surrounded by a mountain of other terms and conditions. But on the most important document, like the Lease here, the dealer fees appear without the disclosure.

To adopt Defendant's argument would allow an unscrupulous car dealer to escape FDUTPA liability in the above scenario. Such a result conflicts with FDUTPA and § 501.976(18)'s remedial consumer protection purpose. Once more, this affirmative defense is legally insufficient and summary judgment is not warranted.

e. There is no dispute of material fact that Defendant's unfair and deceptive conduct caused Mr. Perez actual damages.

On summary judgment, Defendant cannot reasonably dispute that paying an illegal fee is actual damages under FDUTPA. Defendant, though, moves for summary judgment arguing no actual damages. The argument fails.

Actual damages are present when a defendant's unfair and deceptive conduct results in a consumer paying illegal fees. *See Harrison v. Lee Auto Holdings, Inc.,* 295 So. 3d 857, 864 (Fla. 1st Dist. App. 2020) [45 Fla. L. Weekly D1038a], *reh'g denied* (June 5, 2020); *Waste Pro USA v. Vision Constr. ENT, Inc.,* 282 So. 3d 911, 920 (Fla. 1st Dist. App. 2019) [44 Fla. L. Weekly D2331a]; *Morgan v. Pub. Storage,* 1:14-CV-21559-UU, 2015 WL 11233111, at *1 (S.D. Fla. Aug. 17, 2015). *See also Latman v. Costa Cruise Lines, N.V.,* 758 So. 2d 699, 703 (Fla. 3d Dist. App. 2000) [25 Fla. L. Weekly D309a] ("[D]amages are sufficiently shown by the fact that the passenger parted with money for what should have been a 'pass through' port charge, but the cruise line kept the money.") This Court has already found that Mr. Perez suffered actual damages. Perez Order pg. 3 ("And even though the damages may be very small, but I think it's clear there was damage.") The Court's conclusion falls in line with Florida law on this issue.

On summary judgment, Defendant has provided no evidence to contradict the conclusion that Mr. Perez suffered actual damages. Nor has Defendant shown or explained how paying illegal fees would be "consequential damages." Defendant's arguments on these issues are a copy and paste from its previously denied motion to dismiss. Because Defendant has not provided any new evidence (nor could it) the arguments fail.

On causation, Defendant makes no substantive argument. Nowhere has Defendant cited the standard for causation in FDUPTA claims. Defendant argues about Mr. Perez's knowledge of the fees. But that's not the law under FDUTPA. Under Florida law, courts use an objective test when analyzing FDUTPA claims. *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) [26 Fla. L. Weekly

Fed. C305a]. That is, "[a] party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." *Id. quoting Davis v. Powertel, Inc.,* 776 So. 2d 971, 973 (Fla. 1st Dist. App. 2000) [26 Fla. L. Weekly D146a]; *Vazquez v. Gen. Motors, LLC,* 17-22209-CIV, 2018 WL 447644, at *7 (S.D. Fla. Jan. 16, 2018) (Because the FDUTPA requires only an objective inquiry, it is immaterial whether plaintiff relied on defendant's deceptive act or unfair practice). For that important reason, the Court holds that knowledge plays no part when analyzing causation and damages under FDUTPA.

The district court in *State Farm Mut. Automobile Ins. Co. v. Performance Orthapaedics & Neurosurgery, LLC,* 315 F. Supp. 3d 1291, 1309-10 (S.D. Fla. 2018) applied this well-known rule and rejected the same argument Defendant makes here. There, as here, defendants argued lack of causation and damages. The plaintiff, according to defendants, "*knew*" of the unfair and deceptive conduct and "adjusted its claims accordingly." *State Farm Mutual Automobile Insurance Company,* 315 F. Supp. 3d at 1309. FDUTPA, the district court reasoned, requires only "an objective inquiry" because a plaintiff's claim *does not* hinge on the plaintiffs subjective reliance on the omission or inaccuracy. *State Farm Mutual Automobile Insurance Company,* 315 F. Supp. 3d at 1309 (internal quotation marks omitted). As a result, the plaintiff didn't have to "show actual reliance on the representation or omission at issue." *State Farm Mutual Automobile Insurance Company,* 315 F. Supp. 3d at 1310. For that reason, the district court held: "knowledge has no bearing on the FDUTPA claim." *State Farm Mutual Automobile Insurance Company,* 315 F. Supp. 3d at 1310.

The result is no different here. Despite Defendant's attempt to inject knowledge into the FDUTPA analysis, no matter what Plaintiff knew or didn't know, or what the Lease Order did or didn't have, "knowledge has no bearing on the FDUTPA claim." *State Farm Mutual Automobile Insurance Company,* 315 F. Supp. 3d at 1310.

The decision in *Chicken Unlimited, Inc. v. Bockover,* 374 So. 2d 96, 97 (Fla. 2d Dist. App. 1979) relied on by Defendant clashes with established Florida law on causation and damages under FDUTPA—especially in the Third District Court of Appeal. Specifically, *Latman v. Costa Cruise Lines, N.V.,* 758 So. 2d 699, 702 (Fla. 3d Dist, App. 2000) [25 Fla. L. Weekly D309a] is the seminal case on the measure of damages in FDUTPA cases like this one. In *Latman,* the District Court of Appeals for the Third District rejected defendant's reading of FDUTPA as requiring subjective reliance and damages. *Latman,* 758 So. 2d at 703 (finding defendants read FDUTPA "too narrowly.") The District Court reasoned that the hypothetical defendant—who had used unfair and deceptive conduct—had to repay overcharged consumers even though they "clearly were willing to pay the price charged. . . ." *Latman,* 758 So. 2d at 703. Nor did the consumer's knowledge matter to the FDUTPA inquiry because "damages are sufficiently shown by the fact that the passenger parted with money for what should have been a "pass-through" port charge, but the cruise line kept the money." *Latman,* 758 So. 2d at 703. Defendant's subjective knowledge argument—like defendants argued in *Latman* and *State Farm*—is simply unsupported by Florida law.

Contrary to Defendant's argument, reliance and damages are sufficiently shown here. Engaging in a deceptive or unfair trade practice is a legal cause of actual damages if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage so that it can reasonably be said that, but for the violation, the loss or damage would not have occurred. Defendant's failure to include the required disclosure with the line item predelivery service fees on the Lease, and charging and collecting those fees even without the disclosure, caused Mr. Perez to pay illegal dealer fees. Had Defendant included the disclosure with the line item predelivery service fees on the Lease, then the act of charging and collecting those fees would have been legal. Accordingly, the Court finds causation and actual damages under FDUTPA and summary judgment to be inappropriate.

f. Defendant's fourth affirmative defense is legally insufficient because it had no right to charge EFS fees in an unfair and deceptive manner.

Defendant claims that as an Electronic Filing System Agent under § 320, Florida Statutes, it may charge a fee for use of the electronic filing system and thus it is immunized, *in toto,* by FDUTPA's "safe harbor" provision. Fla. Stat. §501.212(1).

The safe harbor is an exception to FDUTPA liability and therefore must be "narrowly and strictly construed." *Samara Dev. Corp. v. Marlow,* 556 So. 2d 1097, 1100 01 (Fla. 1990). Defendant bears the burden of "establishing the applicability of the safe harbor provision." *Marty v. Anheuser-Busch Companies, LLC,* 43 F. Supp. 3d 1333, 1343 (S.D. Fla. 2014). Defendant has not met that burden. To show the safe harbor applies, Defendant must prove that a "specific federal or state law affirmatively authorized it to engage in the conduct alleged. . . ." *State of Fla., Off. of Atty. Gen., Dept. of Leg. State of Fla., Off. of Atty. Gen., Dept. of Leg. Affairs v. Tenet Healthcare Corp.,* 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005).

But Defendant cannot prove that it may charge EFS fees in an unfair and deceptive manner. Section 320.03(10)(d) states: "An authorized electronic filing system agent may charge a fee to the customer for use of the electronic filing system." So, § 320.03(10)(d) does authorize car dealers to charge a fee for use of the EFS system, but nowhere does that provision give car dealers carte blanche authority to charge the fee in an unfair or deceptive manner. Defendant even admits that it cannot charge the fee in an unfair and deceptive manner.

In *Degutis v. Fin. Freedom, LLC,* 978 F. Supp. 2d 1243, 1264 65 (M.D. Fla. 2013), the
district court for the middle district of Florida dealt with FDUTPA's safe harbor provision under similar circumstances involving force-placed insurance. While charging forced-placed insurance was permissible under federal law, which the district court noted, the safe harbor did not apply because the defendant charged and collected the premiums in an unfair manner.

The district court reasoned: "Even though Defendants may force place flood insurance in an amount determined to be necessary by the lender, Plaintiff has alleged that Defendants also engaged in unfair business practices in doing so . . . ." *Degutis,* 978 F. Supp. 2d at 1264 65.

Applying *Degutis,* the issue is not whether Defendant may charge the fee, but whether Defendant may charge the fee in an unfair and deceptive manner. Because Defendant has not shown that it was allowed to charge the fee in an unfair and deceptive manner, the argument is legally insufficient.

g. Defendant's eleventh affirmative defense—voluntary payment—fails because Mr. Perez was never told he was paying illegal fees.

The essence of the voluntary payment doctrine is "money voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party, at the time of payment, was ignorant, or mistook the law, as to his liability." *Jefferson County v. Hawkins,* 23 Fla. 223, 365 (1887). As before. Defendant tries to interject principles of reliance and knowledge where such a subjective analysis is irrelevant. FDUTPA requires only an objective inquiry since a plaintiff's claim does not hinge the subjective reliance of the omission or inaccuracy. *State Farm Mutual Automobile Insurance Company.* 315 F. Supp. 3d at 1309.

As explained above, the law is clear—*all* documents that include a line item for predelivery service must contain the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." Fla. Stat. § 501.976(18). The undisputed facts reveal that the Lease on which Defendant charged pre-delivery service fees to Plaintiff failed to include statutory disclosure with the line-item predelivery service fees. As a result, Defendant violated FDUTPA. Whether or not the Plaintiff was ignorant or mistook the law when he paid Defendant the pre-delivery service fees is irrelevant in the context of the Defendant's *per-se* FDUTPA violation, particularly when juxtaposed against the remedial nature of FDUTPA.

For the voluntary payment doctrine to apply, the paying party must have full knowledge of the facts. There is no evidence that Defendant told Mr. Perez that he was paying illegal predelivery service fees. Mr. Perez has testified that he did not know the fees were illegal. As above, so below—Defendant's position lacks legal support and is insufficient to warrant summary judgment.

h. Defendant knowingly collected an illegitimate debt and asserted a right it knew did not exist in violation of the FCCPA.

The FCCPA prohibits a person from collecting a debt when such person knows that the debt is not legitimate or asserting the existence of some other legal right when such person knows that the right does not exist. Fla. Stat. §559.72(9).

Defendant violated the FCCPA by violating FDUTPA and § 501.976(18). Defendant argues that an FCCPA claim cannot be based on a violation of a separate statute. The Court finds the position unavailing and unsupported by the weight of law.

For one, a car dealer violates the FCCPA by charging and collecting dealer fees in violation of § 501.976(18). *Cabrera,* 288 F. Supp. 3d at 1326 (FCCPA violated as a result of violating § 501.976(18)). Moreover, "a plaintiff may establish a violation of section 559.72(9) by showing that the debt collector garnished wages in violation of the statutory requirements for garnishment. . . ." *Read v. MFP, Inc.,* 85 So. 3d 1151, 1155 (Fla. 2d Dist. App. 2012) [37 Fla. L. Weekly D769a]. A defendant can violate the FCCPA by attempting to collect a debt in contravention of the bankruptcy code, *Id.* cf. *Bacelli v. MFP, Inc.,* 729 F. Supp. 2d 1328, 1337 (M.D. Fla. 2010) [23 Fla. L. Weekly Fed. D83a], "or attempted to collect postjudgment interest in an amount greater than the statutory rate. . . ." *Id.* cf. *N. Star Capital Acquisitions, LLC v. Krig,* 611 F. Supp. 2d 1324, 1336-37 (M.D. Fla. 2009) [21 Fla. L. Weekly Fed. D687a].

In each case above, the defendant "asserted specific legal right[ ] concerning the collection of the debt at issue when it did not legally possess those rights." *Read.* 85 So. 3d at 1155. Defendant's argument to the contrary is inaccurate.

Defendant argues that Mr. Perez cannot prove actual knowledge. The evidence proves Defendant is wrong.

In 2018, Defendant was familiar with FDUTPA and agreed it had to comply with the statute. Riley Dep. 18:2-9; 19:12-14. At that time, it specifically knew of Florida Statute § 501.976(18). Riler Dep. 18:24-19:4. It also that knew the disclosure required by Florida Statute § 501.976(18) had to be associated with line item predelivery service fees on the Lease. Riley Dep. 19:6-10. More importantly, in 2018, Defendant's finance mangers were "absolutely" aware of Florida Statute § 501.976(18) and that the disclosure had to appear associated with line-item predelivery service fees on lease agreements. Riley Dep. 19:24-20:14.

Section 501.976(18) defined the legal rights between the parties concerning predelivery service fees. As a condition precedent to charging predelivery service fees. Defendant knew it had to comply with § 501.976(18). Despite having this knowledge. Defendant charged and collected the fees in contravention of § 501.976(18)'s clear and unambiguous prohibition. This evidence unequivocally establishes that Defendant knowingly used unfair and deceptive conduct when collecting a consumer debt from Mr. Perez. *Cabrera,* 288 F. Supp. 3d at 1326 (FCCPA violated as a result of knowingly violating § 501.976(18)).

Further, knowledge may be established by previous lawsuits for similar conduct. Fla. Stat. § 90.404(2)(a) ("Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent. preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.")

In 2014, plaintiff Ana Milena Gonzales sued Defendant, alleging *inter*-alia, violations of FDUTPA arising from the Defendant's failure to properly disclose pre-delivery service fees. Like Mr. Perez. Ms. Gonzales alleged that Defendant violated FDUTPA's dealer statute because it failed to disclose pre-delivery service fees such as the ones at issue in this action, constituting a *per se* violation of FDUTPA. (Compl. ¶¶ 16-17). This information is sufficient to show Defendant knew that it had no legal right to use unfair and deceptive conduct when charging predelivery service fees. *Cabrera v. Haims Motors, Inc.,* 288 F. Supp. 3d 1315, 1326 (S.D. Fla. 2017) (finding actual knowledge where a complaint demonstrated that, "at a minimum," defendant "was aware of the same exact provisions and statutes of which the Court has now found it to be in violation.") Despite being sued in 2014 for the exact same conduct at issue herein and being on notice of its impropriety and overreach in asserting a right to pre-delivery service fees, Defendant refused to alter its business practices. Ms. Gonzales' lawsuit is certainly probative to prove that Defendant knew that it had no legal right to collect the pre-delivery service fees unless it complied with FDUTPA's disclosure requirements. Defendant violated the FCCPA, knowingly.

i. Defendant has not and cannot sustain a bona-fide error affirmative defense to Plaintiff's FCCPA Claim.

To prove the bona-fide error defense to an FCCPA claim, a defendant must show by a preponderance of the evidence that its violation of the FCCPA: (1) was not intentional; (2) was a bona fide error; and (3) occurred despite the maintenance of procedures reasonably adapted to avoid any such error. Fla. Stat. §559.77(3). *See Bacelli v. MFP, Inc.,* 729 F. Supp. 2d 1328, 1332-33 (M.D. Fla. 2010) [23 Fla. L. Weekly Fed. D83a]. "In applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act." Fla. Stat. § 559.552.

To establish the defense, the defendant must explain how the procedures were reasonably adapted to avoid the error. *Bacelli*, 729 F. Supp. 2d at 1333. Conclusory declarations in support of this affirmative defense are insufficient. *Id. See Reichert*, 531 F.3d at 1007 ("If the bona fide error defense is to have any meaning . . . a showing of 'procedures reasonably adapted to avoid any such error' must require more than a mere assertion to that effect. The procedures themselves must be explained, along with the manner in which they were adapted to avoid the error.")

Defendant has not established the bona fide error defense. It has not produced or cited or even argued that it had policies and procedures in place to prevent the alleged error. Even during deposition, Defendant's corporate representative admitted it has no written training policies or procedures to train employees. Riley Deposition 15:12-25, 15:1-2. For this reason alone, the defense fails.

Defendant also cannot establish the bona-fide error affirmative

defense because it cannot produce evidence showing the alleged error occurred. As argued in Mr. Perez's motion to strike, the witnesses whose testimony on which Defendant relies lack personal knowledge. *Fl. Dept. of Fin. v. Assoc. Indus,* 868 So. 2d 600, 602 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D568a] *quoting Pawlik v. Barnett Bank of Columbia County*, 528 So.2d 965, 966 (Fla. 1st DCA 1988). There testimony is also hearsay and inadmissible. Fla. Stat. § 90.801; *Glarum v. Lasalle Bank National Association* 83 So. 3d 780 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2526a]. Defendant's bona fide error affirmative defense fails as a matter of law.

j. Ms. Perez is not an indispensable party.

Florida case law has defined "indispensable parties" as "one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interest or the interests of another party in the action." *Biden v. Lord,* 147 So. 3d 632, 637 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1980a] (*quoting Fla. Dep't of Revenue v. Cummings,* 930 So. 2d 604, 607 (Fla. 2006) [31 Fla. L. Weekly S275c]). "While at common law the general rule was that all parties having a joint interest in the subject of a contract action had to be joined as plaintiffs, see 39 Fla. Jur.2d Parties § 13, it is not now always the case." *Phillips v. Choate,* 456 So.2d 556, 558 (Fla. 4th DCA 1984. Thus the question to be asked by the Court is not whether the lawsuit *should* proceed without the missing parties, but rather whether the lawsuit *can* proceed without them.
Glancy v. First W. Bank, 802 So. 2d 498, 500 (Fla. Dist. Ct. App. 2001) [27 Fla. L. Weekly D70a].

Here, Ms. Jasmine Perez's absence from this action is hardly 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." *Phillips,* 456 So. 2d at 557.

Faced with similar circumstances in *Glancy v. First W. Bank,* the Fourth District Court of Appeals held that the threat that the defendant "may have to face subsequent litigation by [Plaintiff] on substantially the same claim" was an insufficient basis to invoke the indispensable party defense. The *Glancy* Court further opined that:

The result should be no different here and the Defendant's Indispensable Party Affirmative Defense fails as a matter of law.

III. CONCLUSION

For these reasons, Defendant's Motion for Summary Judgment is denied.

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[1]Nor the charges that appear on the Lease Order itself.

[2]In its summary judgment motion, Defendant failed to identify the specific affirmative defense being argued. It appears as if Defendant is arguing the eighth affirmative defense. In arguing this affirmative defense, Defendant has addressed only the 501.976(18) claim.

[3]The Court notes that the Plaintiff was charged two line item charges in the Lease—a $132.95 "ELECT FILING FEE" and a single line item charge of $999.50 for a "3RD PARTY TAG AGENCY/DEALER FEE." Riley Deposition 47:11-14; 46:18-21; 47:15-17. However, the Lease Order contains three distinct line item charges with different amounts and labels—a "Predelivery Service Charge" in the amount of $699; a Electronic Registration Filing Fee" charge in the amount of $132.95 and a separate "3RD PARTY TAG AGENCY" charge in the amount of $42.00. Ex. A. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment.

[4]Undefined words are "construed in their plain and ordinary sense[]" by "reference to a dictionary." *Estime,* 259 So. 3d at 888. "All" is defined as "every member or individual component of." *See* Webster's New International Dictionary 54 (3d ed. 1986). And a "document" is a paper that gives information about something.

* * *

Insurance—Attorney's fees—Plaintiff who prevailed at appraisal is not entitled to award of attorney's fees and costs where undisputed facts demonstrate that same result could have been obtained without filing suit

EAST COAST ROOF TARPING, INC., Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21051914, Division 53. October 14, 2022. Robert W. Lee, Judge.

FINAL ORDER OF DISMISSAL UPON HEARING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on Defendant's Motion for Final Summary Judgment, and the Court's having heard argument of counsel on October 11, 2022, and being sufficiently advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that this case is DISMISSED with prejudice. The Plaintiff concedes that an appraisal award has been made, and the only issue remaining is whether the Plaintiff is entitled to an award of attorney's fees and costs for filing this lawsuit. However, the undisputed facts at the hearing demonstrated that even though the insureds prevailed at appraisal, the same result could have been obtained without suit being filed. As a result, the insureds are not entitled to a fee award. *See People's Trust Ins. Co. v. Farinato*, 315 So.3d 724, 730 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D787a]. *See also Synergy Contracting Group, Inc. v. Fednat Ins. Co.*, 332 So.3d 62, 67 n.3 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2625b] (attorney's fees should not be awarded in a "race to the courthouse" scenario); *Citizens Prop. Ins. Corp. v. Delgado*, 337 So.3d 475 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D773a] (insurer's payment of appraisal award during suit operated as a confession of judgment, entitling plaintiff to an award of fees when the suit was a ***necessary catalyst to resolve the case***); *Taylor v. State Farm Fla. Ins. Co.*, 29 Fla. L. Weekly Supp. 583a (5th Cir. Ct. Oct. 8, 2021) (when insureds demanded payment in the amount of $46,000, but filed lawsuit only 8 days later before the insurer could investigate and respond to this information, the insureds were not entitled to an award of attorney's fees when the insurer paid the appraisal award made during suit).

* * *

Arbitration—Scheduling—Parties may schedule initial arbitration conference at any time so long as decision is filed with court by 120-day deadline set in court order

MIDLYNE VALLON, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21042019, Division 53. October 20, 2022. Robert W. Lee, Judge.

ORDER ON PLAINTIFF'S MOTION TO EXTEND TIME TO COMPLETE ARBITRATION

This cause came before the Court for consideration of the Plaintiff's Motion to Extend Time to Complete Arbitration. Having reviewed the Motion and Court file, the Motion is GRANTED as follows. So long as the Court has the arbitrator's decision no later than the 120-day deadline forth in the Court's Order referring the matter to arbitration, the parties and arbitrator may schedule the initial arbitration conference at any time.

The Court notes that the initial arbitration hearing referred to in the arbitration order need be no more than a brief discussion to address scheduling and potential issues with the arbitrator. This can certainly be done by a brief zoom conference, which all parties should be able to readily accommodate.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Medical provider is entitled to reimbursement for both units of CPT 97150 administered to insured where provider established that two units were related, reasonable, and necessary—Insurer's argument that second unit is not compensable under Medicare Part B fails—Application of Medicare utilization limit is prohibited by PIP statute, and affidavit regarding payment limit is not based on personal knowledge— Further, even if denial is based on Medicare and coding payment methodology, rather than prohibited utilization limit, insurer has not shown where methodology has been adopted in its policy

PATH MEDICAL, LLC, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO21005344, Division 62. September 21, 2022. Terri-Ann Miller, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Sean Sweeney, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause having come before the Court on Plaintiff's Motion for Partial Summary Judgement regarding an unpaid CPT code that had been billed. The Court having heard argument of the parties and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment is granted for the reasons set forth below.

Plaintiff's motion sought summary judgment regarding an unpaid unit of CPT 97150. The Plaintiff billed, in part, for two units of CPT 97150 on February 6, 2019. The Defendant only allowed and paid for 1 of the 2 units.

The Plaintiff established that the two units of CPT 97150 were related, necessary and reasonable based on the affidavit of Dr. Neil Bonnardel, DC. The Plaintiff stipulated that the Defendant's policy adopted the permissible reimbursement limitation, as set forth in Florida Statute 627.736, which provides a payment limitation based upon 80% of 200% of the Medicare Part B participating physician's fee schedule. The Plaintiff filed a print-out from CMS.gov that established the Medicare Part B participating physician's fee schedule rate for CPT 97150. The Court takes judicial notice of said print-out and the Medicare Part B participating physician's fee schedule rate for CPT 97150. Based on the reimbursement limitation the Defendant owes $29.55 for the unpaid unit of CPT 97150. The Defendant did not dispute the foregoing or file anything in opposition regarding said positions. Based on same the Plaintiff established a prima facie case that the unpaid unit of CPT 97150 was reasonable, related and necessary and that the Plaintiff is therefore entitled to an additional $29.55 in benefits for the unpaid unit of CPT 97150.

The only item that the Defendant filed in opposition to Plaintiff's motion was the affidavit of Zunilda De La Cruz on August 26, 2022. This affidavit took the position that the second unit of CPT 97150 is not compensable under Medicare Part B based upon a purported definition of CPT 97150 from the American Medical Association and unsupported argument that the Plaintiff did not meet the purported definition of CPT 97150 from the American Medical Association.

The Defendant's filing does not rebut the Plaintiff's prima facie case or otherwise create a question of fact for four separate and distinct reasons. First, Defendant's position constitutes a utilization limit and is in direct violation of Florida Statute 627.376(5)(a)3 which "does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare." "A utilization limit is patient-oriented, preventing the patient from treatment." *Progressive Select v. Dr. Rahat Faderani,* 330 So.3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a]. "A limit on utilization means a limitation on the use or duration of a particular service or item." *State Farm v. Pan Am,* 321 So.3d 807 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1214b]. The Defendant's position is not an authorized payment methodology such as MPPR as found by the court in *Dr. Rahat Faderani, supra.* The Defendant's denial of the second unit of CPT 97150 is a utilization limit that is prohibited under Florida Statute 627.736.

Second, the positions taken in the affidavit are not based upon personal knowledge. Other than being a person older than 18 and a purported employee and corporate representative of the Defendant there is no mention of what Ms. De La Cruz's actual background, training and experience consist of or anything else that would demonstrate knowledge of and that would permit Ms. De La Cruz to competently testify as to what is or is not reimbursable under Medicare Part B, how the American Medical Association defines CPT 97150 and why such a position is relevant herein.

Third, and even if the Defendant's denial did not constitute a prohibited utilization limit, in order for the Defendant to claim the ability to pay based upon a Medicare and coding payment methodology, they would have to have taken a factual position that their policy allows them to do such—nowhere in their affidavit do they take this position much less even reference their policy. Stating that the second unit of CPT 97150 is not reimbursable under Medicare Part B is not the same as saying you have adopted a particular coding and payment methodology and then showing where in the policy that coding and payment methodology was actually adopted. Also, the barometer for compensability of the second unit of CPT 97150 is not whether it is compensable under Medicare Part B but rather whether it is compensable under Florida Statute 627.736 and the at-issue policy.

Fourth, and even if the Defendant was able to overcome the foregoing and even if the Court were to accept Ms. Cruz's unsubstantiated testimony as to how the American Medical Association defines physical therapy modalities the Defendant's alleged factual basis for the denial of the second unit of 97150—that the provider did not spend 30 minutes with the patient or that the patient did not receive constant attendance from the person providing the medical service is unsubstantiated. There is no affidavit from the patient, testimony from the provider nor an explanation by Ms. De La Cruz as to how or why she would have personal knowledge as to same. Supporting a defense is solely the province of the Defendant and the Defendant has not done that here. "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." In Re: Amendments to Florida rule of Civil Procedure 1.510, SC20-1490 citing *Wease v. Ocwen Loan Servicing, LLC*, 915 F.3d 987, 997 (5th Cir. 2019).

Based on the evidence presented a reasonable jury or fact finder could not and would not return a verdict for the Defendant. The Plaintiff is entitled to benefits in the amount of $29.55.

* * *

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December 30, 2022
Cite as 30 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Advertisements—A judge may participate as a speaker at an educational and mentoring seminar presented by a law firm targeting law students throughout the state who are not associated with, or intended associates of, the firm—Law firm may advertise judge's participation

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-11. Date of Issue: October 3, 2022.

ISSUES

Issue 1: May a judge participate as a speaker in a legal seminar geared toward the mentorship of law students and presented by a statewide law firm?

ANSWER: Yes.

Issue 2: May the firm advertise the judge's participation?

ANSWER: Yes.

FACTS

A Florida law firm with a statewide presence has asked the inquiring judge to serve as a speaker at a seminar sponsored by the firm. The seminar is entitled the Leadership Training Academy (Academy) and the firm's Diversity and Inclusion Committee serves as its sponsor. The Academy's mission statement is to "serve and inspire the next generation of Florida attorneys by providing them with substantive leadership, legal training and mentorship opportunities while they are law students." The program is in its infancy as this is the second year of its sponsorship. Law students from every law school in the state are the targeted participants. Last year, the firm solicited the assistance of a judge to offer a judicial perspective and lawyers from outside of the firm to address various topics. The agenda for this year's panel includes lawyers from large and small firms, lawyers who serve as in-house counsel and government lawyers. None of the panelist are members of the presenting firm, but the firm's lawyers serve as moderators. The title of this year's Academy is, "Diverse Pathways: Exploring Avenues to a Meaningful Legal Career." The Academy is a service venture and the firm's representative advises that it is educational only and does not serve any other purpose. The firm offers the Academy free of charge and it is virtual.

DISCUSSION

Issue 1

A judge is encouraged to engage in activities to improve the law, the legal system, and the administration of justice. Canon 4. This includes speaking, writing, lecturing and participating in other quasi-judicial activities concerning the law, the legal system, the administration of justice and the role of the judiciary. Canon 4B. The Commentary to Canon 4B states, "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice. . . . To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or *other organization dedicated to the improvement of the law."* (Emphasis added). We have previously discouraged a judge from participating in programs presented by law firms. However, in those instances the firms solicited the assistance of the judge to teach and participate in training the firm's associates. *See* Fla. JEAC Op. 2003-03 [10 Fla. L. Weekly Supp. 661a] (a judge should not accept an invitation to be a participant in an educational seminar at the retreat of a private national law firm, which is exclusively for the members of that firm and which firm has a branch office within the judge's circuit). Fla. JEAC Op. 2015-06 [22 Fla. L. Weekly Supp. 1177a] (a judge may not give an educational presentation to the summer clerks of the judge's former law firm). Here, the judge has been asked to participate in an educational seminar for law students throughout Florida. That a private law firm hosts the seminar is not a disqualifying factor. *See* Fla. JEAC Op. 87-03 (judge may participate in a seminar sponsored by a law firm among others). *See also* Fla. JEAC Op. 2000-20 (a judge is permitted and encouraged to attend bar-related and non-bar-related functions devoted to the improvement of the law, the legal system or the administration of justice).

Issue 2

The Academy, as a part of its advertisement for the event, will include the name of the speakers, the areas of the law they practice and the perspective they will comment on. Previously, we have concluded that it is appropriate to use a judge's name and likeness when advertising a seminar offered by nongovernmental organization where the judge will be a presenter speaking on law related topics. Fla. JEAC Op. 2007-09 [14 Fla. L. Weekly Supp. 694b]. We cautioned then that the judge's participation had to be presented "in a tasteful and dignified manner" and the advertisement should state "only that the judge will be a featured speaker and . . . not go farther to suggest the judge endorses the provider or any of its services or products." *Id.* However, we have concluded that using a judge's name in advertisements related to a seminar co-sponsored by a law firm could violate the Canons because it would allow the judge's name and position to be used to advance the private interest of that firm. Specifically, in Fla. JEAC Op. 87-03, the judge was asked to participate in a seminar sponsored by a private law firm, the Academy of Florida Trial Lawyers, and the University of West Florida. While the Committee felt the judge's participation in the seminar was permissible, all but one member of the Committee felt it necessary to remove any mention of sponsorship of the law firm to avoid running afoul of Canon 2B (A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others). With this opinion, we now recede from Fla. JEAC Op. 87-03 to the extent that it prohibits a judge from participating in an educational or mentoring seminar sponsored or co-sponsored by a law firm where the seminar is not a fundraiser and is not solely for the benefit of the firm or its members. We caution that the inquiring judge should make it clear that the advertisement must be tasteful, dignified and should only recount the judge's name; current judicial service and that the judge is a featured speaker. The judge must ensure the ad does not suggest the judge endorses the firm, is in any way associated with the firm or that the firm has a position of influence with the judge.

Two members of the committee would answer both questions in the negative and conclude as follows: Canon 4A of the Code of Judicial Conduct provides that a judge shall conduct all of the judge's quasi-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge. Members of the sponsoring law firm practice law in the circuit in which the inquiring judge sits. It is likely that a litigant would be uncomfortable appearing in front of a judge who had recently been a speaker at a seminar sponsored by the opposing law firm. This creates a reasonable doubt as to the judge's capacity to act impartially.

REFERENCES

Fla. Code Jud. Conduct, Canons 2B, 4, 4A, 4B, and Commentary to Canon 4B

Fla JEAC Ops. 87-03, 2000-20, 2003-03 [10 Fla. L. Weekly Supp. 661a], 2007-09 [14 Fla. L. Weekly Supp. 694b], and 2015-06 [22 Fla. L. Weekly Supp. 1177a]

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—A judge may not ethically employ members of their family

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-12. Date of Issue: October 3, 2022.

ISSUE

Whether the Canons of Judicial Conduct prohibit a judge to employ a spouse as the Judge's Judicial Assistant.

ANSWER: Yes.

FACTS

The inquiring judge's judicial assistant position is vacant. The judge asks whether the Code of Judicial Conduct would allow the judge to hire the judge's spouse as the judicial assistant.

DISCUSSION

The inquiring judge acknowledges having read and considered Fla. JEAC Op. 2015-09 [23 Fla. L. Weekly Supp. 495a], as well as § 112.3135, Florida Statutes. That opinion dealt with the question of whether a judge could continue to employ the judicial assistant after the assistant's marriage to the judge's son. The JEAC, after examining the above statute and the Canons, concluded that the assistant's continued employment with the judge would be prohibited. Like in Fla. JEAC Op. 15-09 [23 Fla. L. Weekly Supp. 495a], we are called "to examine not only the Code of Judicial Conduct, but also §112.3135, Florida Statutes." As noted in that opinion, both sources must be examined as Canon 2A of the Code of Judicial Conduct mandates that judges "shall respect and comply with the law" and Canon 3C(4) requires judges to avoid nepotism.

The Committee reaffirms the analysis found and result reached in Fla. JEAC Op. 15-09 [23 Fla. L. Weekly Supp. 495a] and will only write to discuss this inquirer's contention that Florida Statute § 112.3135 does not apply to judges, to erase any lingering doubts that judges are prohibited from employing any of their family members.

The present inquirer feels that § 112.3135, Florida Statute, does not apply to elected judges. The judge reaches this conclusion by taking issue with the inclusion of a judge in the definition of a "Public Official." This is so, the judge posits, because the Legislature left out "judges" in the list of examples of some who are included as a "public official."

A review of the relevant portion of the Statute follows:

§112.3135, Restriction of employment of relatives.

(1) In this section, unless the context otherwise requires:

(a)"Agency" means:

(2) an office, agency, or other establishment in the legislative branch;

(3) an office, agency, or other establishment in the judicial branch;

(c) "Public Official" means an officer, including a member of the Legislature, the Governor, and a member of the Cabinet, or an employee of an agency . . .

(d) "Relative" . . . means an individual who is related to the public official as . . . wife . . .

(2)(a) A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement in the agency in which the official is serving or over which the official exercises jurisdiction or control any individual who is a relative of the public official.

The inquiring judge maintains that since the Legislature did not include "judge" under the example of public officials covered under §112.3135(1)(c), the judge is not subject to the Statute's prohibition. The inquirer feels Fla. JEAC Op. 15-09 [23 Fla. L. Weekly Supp. 495a] wrongly assumed that a judge was covered by the Statute. The inquirer's interpretation of the application of the Statute is not correct.

It is clear that the above Statute applies to any "office, agency, or other establishment in the judicial branch." § 112.3135(1)(a)(3), Florida Statutes. When the Florida Statutes refer to an "office or officer," such reference "includes *any* person authorized by law to perform the duties of such office." § 1.01(6), Florida Statutes (emphasis added). Additionally, Article V, § 8 of the Florida Constitution provides that "[n]o person shall be eligible for *office* of justice or judge of any court unless. . ." Therefore, a judge is unquestionably an officer of the judicial branch. As such judges qualify as "an officer . . . in whom is vested the authority by law, rule, regulation . . . to employ . . ." § 112.3135(1)(c), Florida Statutes. Moreover, the Legislature's choice to use the word "including" to list some of the "officers" to whom the definition of "public official" applies, does not mean that other persons or entities, like judges, would be excluded. "Generally, it is improper to apply *expressio unius* to a statute in which the Legislature used the word 'include.' [citations omitted]. This follows the conventional rule in Florida that the Legislature uses the word 'including' in a statute as a word of expansion, not one of limitation. [citations omitted]." *White v. Mederi Caretenders Visiting Service of Southeast Florida, LLC*, 226 So. 3d 774, 781 (Fla. 2017) [42 Fla. L. Weekly S803a].

Lastly, independent of the above discussed statute, Canon 3C(4), Florida Code of Judicial Conduct, clearly prohibits the inquirer from employing the spouse as the judicial assistant. This Canon requires judges to "avoid nepotism and favoritism." The commentary to Canon 3C(4) specifically lists "secretaries" as a type of appointee the judge should refrain from appointing or employing if nepotism would be involved. And to make it very clear that this Canon's prohibition is analogous with the above statute, the Commentary to Canon 3C(4) alerts judges to "see also Florida Statute § 112.3135 (1991)." Therefore, judges are prohibited from employing or appointing any relatives and are subject to the prohibitions contained in Florida Statute § 112.3135 (1991).

REFERENCES

Florida Constitution, Article V, § 8
Florida Statutes, § § 1.01(6) and 112.3135
White v. Mederi Caretenders of Southeast Florida, LLC, 226 So. 3d 774, (Fla. 2017) [42 Fla. L. Weekly S803a]
Fla. Code Jud. Conduct, Canon 2A and Canon 3C(4)
Fla. JEAC Op. 15-09 [23 Fla. L. Weekly Supp. 495a]

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Hospitals—Non-profits—A judge may serve as member of committee of the board of directors of not-for-profit hospital where committee is not involved in fundraising and hospital is rarely, if ever, a party to litigation in relevant court

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-13. Date of Issue: October 17, 2022.

ISSUE

May a county court judge serve as a member of the board of directors on the long-range planning committee of a local, not-for-profit hospital, where that committee is not involved in fundraising and the hospital is rarely, if ever, a party to litigation in the relevant county court?

ANSWER: Yes.

FACTS

The inquiring judge wishes to serve as a member of a not-for-profit cancer-treatment hospital's board of directors on its long-term planning committee. Doing so would honor the request of a person who was treated at this hospital. The hospital qualifies as an IRS 501(c)(3) entity and reportedly has for nearly twenty years. The judge advised that board members serve on various committees with each committee having its own focus. The judge's committee is not

involved in fundraising as that is done by a separate committee.

As detailed below, the hospital is rarely involved in proceedings or litigation before the county court on which the judge serves. The judge's service will not be compensated and is not expected to interfere at all with judicial duties.

DISCUSSION

The answer to the inquiry is found primarily in Canon 5 of Florida's Code of Judicial Conduct. Canon 5B encourages judges to participate in extrajudicial activities concerning non-legal subjects. Canon 5A states:-

> A judge shall conduct all of the judge's extra-judicial activities so that they do not:
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
> (2) undermine the judge's independence, integrity or impartiality;
> (3) demean the judicial office;
> (4) interfere with the proper performance of judicial duties;
> (5) lead to frequent disqualification of the judge; or
> (6) appear to a reasonable person to be coercive.

Canon 5C(3) authorizes a judge to serve as an officer or director of a charitable or civic organization subject to specific limitations and other applicable Code requirements. Prior opinions of this committee have implicitly treated not-for-profit-hospitals as falling within an approved category of organizations. Given its Section 501(c)(3) status and the services it provides, classification as a charitable or civic organization seems appropriate.

Canon 5C(3)(a) states that a judge cannot serve as a director of such an organization if the organization would be engaged in proceedings or be frequently in adversary proceedings before the judge or the court of which the judge is a member. To ensure that serving on the board of directors would not lead to frequent disqualifications, the judge inquired of and was advised by the clerk of the court that there had been no cases in that county's county court system during the last five years in which the hospital was a party. There were some county court garnishment proceedings in which the creditor sought to garnish a hospital employee's wages. The clerk of court advised that the hospital had been involved in approximately forty litigated cases in the relevant circuit court during that same five-year period. Thus, the judge's anticipated service does not appear to run afoul of those restrictions. Likewise, the judge's serving on the board of directors does not appear to violate Canon 5C(b)(1)'s prohibition against a judge personally or directly participating in fundraising. Nor does it seem to violate any of the general limitations of Canon 5A, set forth above.

In Fla. JEAC Op. 06-28 [14 Fla. L. Weekly Supp. 111a], we opined that a judge was permitted to serve on the board of a not-for-profit rural health clinic where the board did not participate in fundraising. We note that some of the JEAC's earlier advisory opinions discouraged participation on hospital boards either, because they were for profit corporations (Fla. JEAC Op. 83-09) or because an earlier version of Canon 5C(3)(a) prohibited such service if the subject organization would predictably or frequently appear before any court (Fla. JEAC Ops. 91-25 and 91-32).

Thus, it is our opinion that the inquiring judge may go forward as outlined above. We remind the judge to be mindful of any changes in the hospital's status as a charitable or civic organization and any changes that may lead to frequent disqualification or predictable appearances before the judge's court. Finally, we express the JEAC's appreciation of the inquiring judge having undertaken to review and discuss the Code of Judicial Conduct and our prior archived opinions before reaching out for an opinion.

REFERENCES

Fla. Code of Judicial Conduct, Canon 5A, 5B, 5C(3)
Fla. JEAC Ops. 06-28 [14 Fla. L. Weekly Supp. 111a], 91-32, 91-25, and 83-09

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