

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO: 2014-AP-56-A-O
Lower Case No.: 2011-CT-13182-A-O
2011-CT-13345-A-O
2011-CT-14979-A-O
2012-CT-458-A-O1
2012-CT-700-A-E
2012-CT-905-A-E
2012-CT-5491-A-O
2013-CT-282-A-E
2013-CT-1123-A-E
2013-CT-1338-A-E
2013-CT-1345-A-E
2013-CT-1452-A-O
2013-CT-1511-A-E
2013-CT-3760-A-O
2013-CT-4524-A-O
2013-CT-4940-A-O
2013-CT-5583-A-O
2013-CT-6606-A-O
2013-CT-7221-A-O
2013-CT-7265-A-O
2013-CT-8418-A-O
2013-CT-8666-A-O
2013-CT-9838-A-O
2013-CT-9954-A-O
2013-CT-11175-A-O
2013-CT-11326-A-O
2014-CT-3769-A-O
2014-CT-6496-A-O
2014-CT-6519-A-O
2014-CT-6624-A-O
2014-CT-6690-A-O

STATE OF FLORIDA,

Appellant,

v.

MICHAEL NOVOSELAC, et al.,

Appellees.

_____ /

Appeal from the County Court
for Orange County, Florida

Martha Adams, Deborah Ansboro, Kenneth Barlow,
Maureen Bell, Jeanette Bigney, Deb Blechman,
Carolyn B. Freeman, Steve Jewett and W. Michael Miller,
County Court Judges

Aramis Ayala, State Attorney
William Jay, Cherish R. Adams, and David A. Fear,
Assistant State Attorneys for Appellant

Stuart I. Hyman, Esq., for Appellees Casey Banigan
Pedro Carral, Christopher Caslow, Mary Coleman,
Donna Fiegel, Joseph Flynn, Patricia Freling, Edward Frye,
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and Lisa J. Ramsey, Assistant Public Defender
for Appellees Colm Nolan and Elizabeth York-Williams

Whitney S. Boan, Esq. for Appellees Joseph M. Graham and Robert Taylor

Ileana Azcunaga, Esq. for Appellee Svetlana Kryzhanovskaya

No Appearance for Appellees Casey Abraham, Lucas Acosta-Vega,
Mario Corchado, Bryan Davis, Heather Frietsch, Taylor Garrard,
David Gauck, Kathleen Herald, Johnny Long, Erica Pajotte,
Deborah Pate, Brittany Papalini, Joshua Ross, and Michael Novoselac.

EN BANC

O’KANE, J.

The State of Florida (“State”) appeals the trial court order granting Appellees’ motions to produce the source code and software for the Intoxilyzer 8000, updates, release notes relating to the original code and updates, and related documents. This Court has jurisdiction pursuant to Florida Statutes section 924.07(1)(h). For the reasons set forth below, we reverse.

FACTS AND PROCEDURAL HISTORY

This is a consolidated appeal of thirty-one (31) lower court cases.¹ In each case, Appellees were arrested and charged with Driving under the Influence (“DUI”) after submitting to breath tests on a CMI, Inc. Intoxilyzer 8000 using software version 8100.27. The breath test results were all in excess of .08.

Appellees sought inspection of the electrical and computer components of the Intoxilyzer 8000, its source code and software in support of its assertion that the breath test results were unreliable, warranting their exclusion from evidence in these cases.² A joint hearing on Appellees’ Motion to Produce I (Schedule “A” Items paragraph 18 and 23) and Motion for Production of the Source Code or in the Alternative Motion for Exclusion of the Breath Test Results was held on

¹ Initially, the State improperly filed petitions for writ of certiorari to review the lower court orders. § 924.07(1)(h), Fla. Stat. (2016). We treated the timely filed petitions as notices of appeal. Fla. R. App. P. 9.040(c).

² For lower court cases 2014-CT-6519-A-O (Corchado) and 2014-CT-6690-A-O (Abraham) there is no record that defense motions for production of the source code or the software were filed. Generally, every pretrial motion must be in writing and signed by the party or the attorney for the party, unless waived by the court for good cause. Fla R. Crim. P. 3.190(a). A violation of due process occurs when a trial court address issues that are not the subject of appropriate pleadings. *Kanter v. Kanter*, 850 So. 2d 682, 685 (Fla. 4th DCA 2003); *Todaro v. Todaro*, 704 So. 2d 138, 139 (Fla. 4th DCA 1997). However, the State did not object to the trial court addressing the issues on appeal in the Corchado and Abraham cases and consented at oral argument to review of the orders in those cases as if the motions had been properly filed.

December 5, 6, and 9, 2013, before several county court judges to address multiple cases with the same issues.³

Although the December 2013 hearing was scheduled as an evidentiary hearing, the presiding judge announced at the outset that he was suspending the rules of evidence. He informed counsel that all evidence was being admitted, that hearsay evidence was “fine” and that he did not “expect to hear many objections or any objections.” The presiding judge also indicated that “anything and everything can be thrown against the wall here and will be considered.” (T. 7).

Against this backdrop, the hearing proceeded.⁴ The State and Appellees stipulated to the admissibility of a transcript of proceedings held before a county judge in Seminole County, Florida. Appellees called Florence DeWeist, Stephen Daniels, Thomas Workman, Jr., and Dr. Harley Myler to testify. Appellees further introduced the transcript and exhibits from *State v. Atkins*, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. 2008). (Tr. 10). The State did not call any witnesses.

³ Prior to the December 2013 hearing, defense motions for production of the source code were denied in 2013-CT-282-A-E (Gerrard) and 2013-CT-3760-A-O (Acosta-Vega) by a different county court judge based on the evidence before the lower court at that time. (R9. 127-142, R10. 79-94). No motions for rehearing were filed by the defendants in those cases.

⁴ Although the December hearing was a joint hearing, the exhibits considered by the lower courts were not filed in all the lower court cases. Several exhibits were filed in *State v. Ganuelas*, 2011-CT-3092-A-O; however, *Ganuelas* is not part of this consolidated appeal because the notice of appeal was not timely filed. This Court allowed the record to be supplemented with the exhibits filed in *Ganuelas* because those exhibits were reviewed by the lower courts when they rendered the decisions on appeal. Fla. R. App. P. 9.200(f)(2); *Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 571 (Fla. 4th DCA 2000) (stating that the purpose of rule 9.200(f) is to allow supplementation of the record with an item considered by the lower court, but omitted from the record on appeal, recognizing that pleadings are sometimes considered by the court but not placed in the record prior to entry of the final judgment).

After considering the evidence, the trial court ordered the State to produce the source code and software for the Intoxilyzer 8000, updates, release notes relating to the original code and updates, and related documents. The trial court determined that:

1. The source code for all software versions of the Intoxilyzer 8000 and revision histories or release notes and supporting documents and the Intoxilyzer 8000 software versions 26 and 27 and supporting documents are material under Florida Rules of Criminal Procedure 3.200(f).
2. FDLE owns the Florida Specific Software operating the Intoxilyzer 8000.
3. FDLE and the prosecution possess the Intoxilyzer 8000 source code and software versions 26 and 27 in the laptop computers of agency inspectors.
4. The defense shall be allowed effective access to the source code for all versions of the software and supporting documents within 21 days of the order and the prosecution may request a continuance for the production upon a showing of good faith.
5. The prosecution is precluded from introducing any results from the Intoxilyzer 8000 breath test through the Implied Consent shortened predicate or a traditional scientific predicate until the Intoxilyzer 8000 software versions 26 and 27 and the supporting documents are provided.

The State appealed and advanced the following arguments: (1) the trial court erred by ordering the production of the Intoxilyzer 8000 software because the production of the software, as opposed to the source code, was not noticed for hearing and was not the subject of the hearing; (2) the trial court erred by admitting the *Atkins* record pursuant to Florida Statutes section 90.803(22) because that section is an unconstitutional infringement on the Florida Supreme Court's rule making authority; (3) the trial court abused its discretion in compelling the State to make the source code available to Appellees because there was no competent substantial evidence that it owned or possessed the source code; 4) the trial court abused its discretion in finding that the source code, software, and supporting documents are material pursuant to Rule 3.220(f); and

5) the trial court abused its discretion in finding that further litigation of the Order would not be a basis for receiving additional time to comply. We find merit to several of the State’s arguments.

STANDARD OF REVIEW

The order under review is a discovery order. A trial court’s ruling on a discovery matter is discretionary and should not be disturbed absent a showing of an abuse of discretion. *State v. Tascarella*, 580 So. 2d 154, 155 (Fla. 1991). “If reasonable men could differ as to the propriety of the action taken by the lower court, then the action is not unreasonable and there can be no finding of an abuse of discretion.” *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

In this case, the trial court conducted an evidentiary hearing and made specific findings of fact in fashioning the order under review. We review those findings of fact to determine whether they are supported by competent substantial evidence. *Wright v. State*, 161 So. 3d 442, 447 (Fla. 5th DCA 2014). Competent substantial evidence is “evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.” *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). “[E]vidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *Id.* Whether a finding is supported by competent substantial evidence necessarily entails a consideration of whether evidence is “legally sufficient.” *Florida Power and Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *see Dusseau*, 794 So. 2d at 1273–74. “Sufficient evidence is ‘such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded.’” *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (quoting *Black’s Law Dictionary* 1285 (5th ed. 1979)).

ANALYSIS

I. Lack of Notice - Software.

The State argues that the trial court erred by ordering production of the Intoxilyzer 8000 software because software was not the subject of the hearing and was not specifically delineated in the Notice of Hearing. The State argues it was denied due process on this basis.

The denial of due process is fundamental and procedural due process “requires adequate notice and an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Luckey v. State*, 979 So. 2d 353, 355-56 (Fla. 5th DCA 2008) (quoting *Boddie v. Connecticut*, 401 U.S. 371 (1971)). This includes the opportunity to testify and to present evidence. *Vazquez v. Vazquez*, 626 So. 2d 318 (Fla. 5th DCA 1993). “[A]s a general rule, a violation of due process occurs when a court determines matters not noticed for hearing[.]” *Kanter v. Kanter*, 850 So. 2d 682, 685 (Fla. 4th DCA 2003); *Winddancer v. Stein*, 765 So. 2d 747 (Fla. 1st DCA 2000).

Appellees filed motions seeking production of various items prior to the hearing. However, the Notice of Hearing below limited the scope of the hearing to Defendant’s Motion for Production of the Source Code or in the Alternative Motion for Exclusion of the Breath Test Results and Defendant’s Motion to Produce I (Schedule “A” Items paragraphs 18-23).⁵ (3rd Supp. R., 4th Supp. R1.- R6.). At the outset of the December 2013 hearing, the trial court reiterated that the motions to be considered were Defendant’s Motion to Produce Schedule A items, paragraphs 18-23 and Defendant’s Motion for Production of the Source Code, or in the Alternative Exclusion of the Breath Test Results. (T. 5).

⁵ The record only contains notices of hearing filed in the following seven lower court cases on review: 2012-CT-700-A-E (Novoselac), 2013-CT-282-A-E (Garrard), 2013-CT-1123-A-E (Long), 2013-CT-4524-A-O (Pate), 2013-CT-8418-A-O (Pajotte), 2013-CT-8666-A-O (Davis), and 2013-CT-9838-A-O (Gauck).

The items described in paragraphs 18 – 23 of Schedule A to the Motion to Produce I did not include the Intoxilyzer software. Rather, the materials sought were the source code, schematics for the Intoxilyzer 8000, and other documents not including the software. Although the attorneys and witnesses repeatedly referenced the software and source code during the hearing, those references alone could not expand the scope of materials sought without an express agreement of the parties. Appellees’ counsel never argued for the production of the software in his closing argument, and the State never argued against its production. Rather, the focus of both parties’ argument was the source code – whether the State owned or possessed it and whether it should it be produced to allow Appellees to explore whether the source code was the reason for the errors in breath test results.

Finally, the trial court clarified the subject of the hearing during Appellees’ closing argument: “you’re asking us to compel or ask that – ask the State to produce the source code.... I mean, that – that’s what you’re asking. All right. That’s what the motion says.” (T. 871-872). The trial court then acknowledged in its order that “the issue before the court is whether the State should be required to produce the source code.” (R. 81). Having failed to provide the State notice that software was included as part of the hearing, the trial court abused its discretion by ordering its production. *Luckey*, 979 So. 2d at 355-56; *Kanter*, 850 So. 2d at 685.

II. Consideration of the *Atkins* testimony.

The trial court considered the record from *Atkins* when it concluded that the Intoxilyzer 8000 software and source code are material under Rule 3.220(f) and that that State owns and possesses the software and source code. The State argues that the trial court abused its discretion in overruling its hearsay objection and admitting the *Atkins* testimony under section 90.803(22), Florida Statutes. This Court agrees.

Section 90.803(22), Fla. Stat. (2016) provides that former testimony of a witness is admissible in a proceeding if the testimony was given in another proceeding and the party against whom the testimony is given had an opportunity and similar motive to develop the testimony. Section 90.803(22) does not require that the witness be unavailable for the former testimony to be admissible. The trial court determined here that the State had the opportunity and similar motive to develop the witness testimony in *Atkins*, and therefore that testimony was admissible.

The Florida Supreme Court refused to adopt section 90.803(22) as a procedural rule expressing grave concerns about the statute's constitutionality. *In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 342 (Fla. 2000). In that opinion, the Court cited several reasons why section 90.803(22) should not be adopted. They included the following: (1) the amendment violated a defendant's constitutional right to confront adverse witnesses; (2) this expanded former-testimony hearsay exception would result in "trial by deposition," thereby precluding the fact-finder from evaluating witness credibility; (3) the amendment strips the section 90.804(2)(a) former testimony exception of its "unavailability" requirement, thereby making the section 90.804 exception obsolete; (4) the amendment is inconsistent with several rules of procedure, including when depositions can be used in civil and criminal court proceedings and trials, thereby causing confusion as to which rule should control. *Id.* In a later appeal, the Supreme Court addressed the State's use of testimony from a prior proceeding in a criminal prosecution. *State v. Abreau*, 837 So.2d 400 (Fla. 2003). In *Abreau*, the Supreme Court held the statute unconstitutional because it violated the defendant's confrontation rights. *Id.* at 406.

The First District later examined the exception in *Grabau v. Department of Health, Board of Psychology*, 816 So. 2d 701, 709 (Fla. 1st DCA 2002). The *Grabau* court held that section 90.803(22) was unconstitutional as it infringed on the Supreme Court's rule making authority

conferred by article V, section 2(a), of the Florida Constitution; and as a violation of article II, section 3, of the Florida Constitution, because it obviates and conflicts with section 90.804, Florida Statutes, which requires a witness be unavailable for the use of former testimony, and finally because it denies due process. There are no other court opinions specifically addressing the constitutionality of the statute.⁶

As *Grabau* is the only district court opinion addressing the constitutionality of section 90.803(22) as it relates to the infringement on the Supreme Court's rule making authority, we are bound to follow it. *See, Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts); *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980) ("The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Supreme] Court."). Applying *Grabau* to this case, we conclude that the trial court abused its discretion in admitting the *Atkins* testimony. To the extent that any of the trial court's findings of fact were based upon the *Atkins* testimony, those findings of fact are not supported by competent substantial evidence.

III. State's ownership or possession of the software and source code.

The State next argues that the trial court erred by finding that it owns and possesses the software and source code to the Intoxilyzer 8000 because there was no evidence to support that finding. The State claims that the trial court improperly relied on the contract between FDLE and

⁶ Appellees and the trial court point out that the court in *Alvarez v. Crosby*, 907 So.2d 1231 (Fla. 3d DCA 2005) did not address the statute's constitutionality. They infer from that omission that the statute is therefore constitutional. In *Alvarez*, the court mentions section 90.803(22) in one sentence of the opinion, stating in *dicta* that although the issue was not raised by the parties, a proffer of prior testimony could be made by the defendant under section 90.803(22). It is clear from the opinion that the parties in *Alvarez* did not raise the statute itself or its constitutionality in their appeal.

CMI which does not mention the transfer of ownership of any intellectual property including the software or source code.

Appellees argue that the trial court properly found that the State owns the software and source code based on the testimony of Ms. DeWeist and the purchase order documenting the transaction. Appellees argue that the language of the purchase order identifying the item purchased as “Florida Specific Software” and the testimony of Ms. Barfield from *Atkins* that FDLE received and retained copies of the software version and successive software versions demonstrates that FDLE purchased and owns the software.⁷ Appellees also argue that the “Purchase Order Conditions and Instructions,” which they maintain were incorporated by reference into the purchase order, is evidence that the State received the rights and ownership to the source code, software, and revision histories with the purchase of the Intoxilyzer 8000. An examination of this evidence is therefore necessary.

Order No. D0113360 created June 17, 2005 is FDLE’s purchase order of the Intoxilyzer 8000 from CMI. (Tr. 29, 30, Defense Exhibit 101). The purchase order describes the item purchased as the “Intoxilyzer 8000 with Badge Reader, Modem, and Internal Printer.” The purchase order states that “[e]ach Intoxilyzer 8000 package” includes “Florida Specific Software” among other components. The following additional language appears on the first page of the purchase order:

Additional Item Info: Terms and Conditions:
http://marketplace.myflorida.com/vendor/po_tou.pdf.

The purchase order does not expressly include any mention of the Intoxilyzer source code or other intellectual property rights.

⁷ For the reasons discussed *supra*, reliance on the *Atkins* transcript was error.

The document titled “Purchase Order Conditions and Instructions” (hereafter “conditions sheet”) is attached to the purchase order submitted into evidence by Appellees.⁸ Paragraph 13 of that document states: “[b]y accepting this electronic purchase order, the vendor agrees to be bound by these conditions and instructions.” The conditions sheet includes various codes and descriptions seemingly unrelated to each other and the issue under consideration here. The condition sheet includes the following:

CY Copyrights and right to data

Where activities supported by the contract produce original writing, sound recordings, pictorial reproductions, drawings or other graphic representation and works of any similar nature, the department has the right to use, duplicate and disclose such materials in whole or in part, in any manner, for any purpose whatsoever and to have others acting on behalf of the department to do so. If the materials so developed are subject to copyright, trademark or patent, legal title and every right, interest claim or demand of any kind in and to any patent, trademark, or copyright or application for the same, will vest in the state of Florida, department of state for the exclusive use and benefit of the state. Pursuant to § 286.021 Florida statutes, no person, firm or corporation, including parties to this contract, shall be entitled to use the copyright, patent or trademark without the prior written consent of the department of state.

The department shall have unlimited rights to use, disclose, or duplicate, for any purpose whatsoever, all information and data developed, derived, documented, or furnished by the contractor under this contract. All computer programs and other documentation produced as part of the contract shall become the exclusive property of the state of Florida, department of state and may not be copied or removed by any employee of the contractor without express written permission of the department.

The only testimony relating to the purchase order came from Ms. DeWeist, a purchasing specialist for FDLE. She first became involved in the process of purchasing the Intoxilyzer in

⁸ Although the purchase order and conditions sheet were admitted below as a single document, there is no evidence that the conditions sheet was actually attached to the purchase order when it was submitted to CMI by FDLE in 2005. It is unclear whether the conditions sheet was ever attached to the purchase order or, additionally, the circumstances under which several check marks were placed on the conditions sheet.

2002. As a data entry employee, she prepared the purchase order at issue here in June 2005. Ms. DeWeist was not involved in the discussions between CMI and FDLE concerning this purchase, nor was she aware of the registration process for a vendor, or whether the State bought any licensing agreements or intellectual property rights to the software with the purchase of the Intoxilyzer 8000. (T. 16, 18, 33). In connection with the language of the purchase order, Ms. DeWeist testified that the web address noted after the “Terms and Conditions” section on the purchase order is an address where the vendor can access terms and conditions that are part of the purchase order. She stated that code CY was part of the terms and conditions of the purchase order “if it applied.” She explained that the conditions sheet does not go out with the purchase order but the vendor can access it at the web address. Ms. DeWeist had never seen the conditions sheet before and did not know whether any of the terms set forth therein applied to the purchase order in this case. She did not know if a vendor was required to agree to the terms and conditions to sell to the State. She stated she did not know if the vendor here accepted the terms and conditions, but she did not handle any discussions about the terms with the vendor. (T. 25-28, 39-45).

In the order under review, the trial court found that the conditions sheet was incorporated into the purchase order by the parties and that the State owned the software and source code to the Intoxilyzer 8000 because of the language of code CY. The Court disagrees. To incorporate a collateral document by reference, the collateral document must be sufficiently described or referred to in the incorporating document. *OBS Co., Inc. v. Pace Const. Corp.*, 558 So. 2d 404, 406, (Fla. 1990); *BGT Group, Inc. v. Tradewinds Engine Services, LLC*, 62 So. 3d 1192, 1194 (Fla. 4th DCA 2011). A mere reference to the collateral document is not sufficient to incorporate the collateral document into the contract. *Temple Emanu-El of Greater Fort Lauderdale v. Tremarco Indus., Inc.*, 705 So. 2d 983, 984 (Fla. 4th DCA 1998). In addition, the incorporating

document must include some expression of an intent to be bound by the collateral document. *BGT Group*, 62 So. 3d at 1194; *Temple Emanu-El*, 705 So. 2d at 984. The words “subject to” or a similar phrase generally indicates the intent of the parties to be bound by the collateral document. *St. Augustine Pools, Inc. v. James M. Barker, Inc.*, 687 So. 2d 957, 958 (Fla. 5th DCA 1997). However, the phrase “subject to” or a similar phrase, without more, is insufficient to bind the parties to the collateral document. *Affinity Internet, Inc. v. Consol. Credit Counseling Services, Inc.*, 920 So. 2d 1286, 1288 (Fla. 4th DCA 2006).

In *Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc.*, the court found no evidence that the parties intended to incorporate the terms of the collateral document into their service contract. *Id.* at 1288. The service contract between the Affinity and Consolidated stated “[t]his contract is subject to all of SkyNetWEB’s terms, conditions, user and acceptable use policies located at <http://www.skynetweb.com/company/legal/legal.php>.” *Id.* at 1287. Affinity’s vice-president stated in her affidavit that the contract expressly incorporated the user agreement located at <http://www.skynetweb.com/company/legal/user-agreement.php>. The court found that the service contract contained no clear language of an intent of the parties to incorporate the terms of the user agreement because the user agreement was not expressly referred to nor sufficiently described in the service contract. *Id.* at 1288. The court also noted that Consolidated was never provided a copy of the user agreement or its contents. *Id.*

In *Access Telecom, Inc. v. Numaxx World Merchants, LLC*, the Court found that a contract stating “[p]lease visit our website for terms and conditions at www.numaxx.com that govern this transaction,” was sufficient to incorporate by reference those terms and conditions into the parties’ contract. *Access Telecom, Inc. v. Numaxx World Merchants, LLC*, 1:13-CV-20404, 2013 WL 12108129, at *7 (S.D. Fla. Nov. 25, 2013). The court found that the purchase order specifically

provided that it is subject to the incorporated collateral document. The court also determined that because the purchase order uses the language “terms and conditions,” the collateral document entitled “Terms and Conditions” was sufficiently described or referred to in the purchase order.

In this case, there is no express language in the purchase order referencing the source code, licensing rights or code CY. The purchase order lacks any language, such as “subject to,” “governed by” or the like, demonstrating the parties’ intent to be bound by code CY or any other conditions set forth in the conditions sheet. The purchase order simply states “Additional Item Info: Terms and Conditions: http://marketplace.myflorida.com/vendor/po_tou.pdf.” This language is insufficient to support the incorporation of the conditions sheet into the purchase order. *BGT Group*, 62 So. 3d at 1194; *Temple Emanu-El*, 705 So. 2d at 984.

The incorporating language contained in the conditions sheet does not alter the Court’s conclusion. Although paragraph 13 of the conditions sheet states “[b]y accepting this electronic purchase order, the vendor agrees to be bound by these conditions and instructions,” there is no evidence that the conditions sheet was attached to the purchase order or that CMI was provided a copy of such document at the time of the transaction. The trial court’s determination that the condition sheet was incorporated into the purchase order is simply unsupported by this record. *Affinity*, 920 So. 2d at 1289 citing *Gustavsson v. Washington Mut. Bank, F.A.*, 850 So. 2d 570, 574 (Fla. 4th DCA 2003).

The trial court determined that FDLE both owned and possessed the software and source code by virtue of the purchase order, conditions sheet and Ms. DeWeist’s testimony. The language of the documents themselves and Ms. DeWeist’s testimony do not support that conclusion. The trial court abused its discretion by ordering production of the source code where its finding that FDLE possessed or owned the source code is not supported by competent substantial evidence.

CONCLUSION

Based on the record in this case, we reverse the order under review. The trial court denied the State due process of law when it ordered the State to produce the software for the Intoxilyzer 8000 without giving the parties notice that the production of the software, as opposed to the source code, would be the subject of the December 2013 hearing. The trial court abused its discretion by admitting the *Atkins* testimony pursuant to section 90.803(22) because that section is unconstitutional. The trial court's admission of the *Atkins* testimony was error. Lastly, the trial court's finding that the State owned or possessed the source code was not based upon competent substantial evidence. For these reasons, the trial court abused its discretion by entering the order under review. Given our ruling on these issues and the record before us, we need not address whether the source code is material and subject to discovery pursuant to Rule 3.220(f) or whether the trial court abused its discretion by precluding the State from seeking additional time to comply with its order if it proceeded with further litigation.

REVERSED AND REMANDED.

G. ADAMS, J. KEST, MYERS, JR., ROCHE, STROWBRIDGE, THORPE, and WHITE, JJ.,
concur.

HIGBEE, J., dissents with an opinion, in which BARBOUR, BLECHMAN, SHEA, and TENNIS,
JJ, concur.

HIGBEE, J., dissenting.

This a consolidated appeal of thirty-one (31) lower court cases as referenced in the Majority Opinion. This appeal specifically addresses a joint discovery hearing wherein the Appellees had moved the Appellant to allow inspection of the electrical and computer components of the Intoxilizer 8000, the source code, and software of the Intoxilizer 8000.

On appeal a trial court's ruling on a discovery matter is discretionary and should not be disturbed absent a showing of an abuse of discretion. *State v. Tascarella*, 580 So.3d 154, 155 (Fla. 1991). "If reasonable men could differ as to the propriety of the action taken by the lower court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

A lower court's findings of facts supported by competent substantial evidence are accepted as correct. *Wright v. State*, 161 So. 3d 442, 447 (Fla. 5th DCA 2014). Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "[E]vidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id.* Whether a finding is supported by competent substantial evidence necessarily entails a consideration of whether evidence is "legally sufficient." *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *see also Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1273–74 (Fla. 2001). "Sufficient evidence is 'such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded.'" *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (quoting Black's Law Dictionary 1285 (5th ed. 1979)).

At the December 2013 hearing, the lower court judge announced there were several defense and State exhibits that were already accepted by the court for review including the transcript of the testimony and exhibits from *State v. Atkins*, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 20, 2008) provided by the defense. (R. Transc. 10). Defense witnesses Florence DeWiest,

Stephen Daniels, Thomas Workman, Jr., and Dr. Harley Myler testified. (R. Transc. 11-54, 55-437, 438-653, 656-781).

Appellant did not present any witnesses at the hearing. Appellant presented a report from an expert who examined the source code and determined that he did not find any errors that could lead to invalid breath test readings; CMI's Statement of Corporate Policy stating that the Intoxilyzer 8000 software, including the source code and object code, are confidential and a trade secret owned by CMI; and several other documents to support its position that the State does not possess or own the source code or software and that access to the source code and software is not necessary to challenge the breath test results.

Both sides also stipulated that proceedings held before a county judge in Seminole County should be submitted, this transcript was not included in the record at bar. It is unknown whether some or all of the record at issue was duplicative of this record that was considered by the lower court upon the agreement of all parties.

As this was a discovery hearing, the Court relaxed the rules of evidence, and both the appellants and appellees submitted their information to the En Banc Panel for its' consideration regarding the requested inspection.

The first issue we address is whether the lower court abused its discretion in admitting into evidence the *Atkins* testimony along with all of the other items, transcripts and testimony. Per *State v. Abreau*, 837 So. 2d 400 (Fla. 2003), the Court found that section 90.803(22) violates the confrontation clause in criminal proceedings to the extent that it allows a prosecutor to use a trial witness testimony from a previous proceeding without a showing that the witness is unavailable to be applicable. There are no cases in which the Florida Supreme Court has found that a statute authorizing the admission of hearsay evidence was unconstitutional under Article V, Section 2(a)

and *Grabau* can be distinguished. The issues argued in this case are the same as some of the issues argued in *Atkins* and Appellant had an opportunity to cross examine the witnesses in *Atkins* whose testimonies were relevant for this case. That combined with the nature of the hearing; again, a discovery hearing; the manner in which both sides presented their information and argument, and the other materials stipulated by both sides for consideration, causes us to decide, in dissent of the majority opinion, that the lower court appropriately considered the *Atkins* transcript.

Secondly, we address Appellant’s argument that the lower court erred by ruling on the issue of the software because it was not noticed for hearing and not the subject of the hearing.

While the notices of hearing that are incorporated in the record state “*Defendant’s Motion for Production of the Source Code or in the Alternative Motion for Exclusion of the Breath Test Results and Defendant’s Motion to Produce I* (Schedule “A” Items paragraphs 18-23). (3rd Supp. R., 4th Supp. R1.- R6.), the record includes numerous references to both “software” and “source code”.

Throughout the motions, records, and transcripts under review, the record is replete with instances where the words “software” and “source code” have been interchangeably used in testimony, records and argument; by the State, witnesses, and by the Appellees.⁹ As such, we find that the Intoxilizer software 8100.26 and 8100.27, revision histories and source code were

⁹ The Court uses the term “source code” at the beginning of the hearing T page 5 line 11-14, and in closings pages 840-842. Multiple software references are found on page 10 line 6 and page 29 lines 19 and 22. Witnesses referred to software and source code together; page 72 lines 18-25 and 27, page 105 lines 7-12, page 129 lines 4-7, page 130 lines 9-11, page 374 lines 6-16. References to the “software source code issue” are found on pages 132 lines 119-21 and page 186 lines 6-7. Experts discuss the differences conceptually between software, source code and even “object code” on page 471 lines 6-25, page 472 lines 1-25 and further on pages 492, 494-497, page 505 and page 565 lines 4-10. “Software” is used as a euphemism for source code without clear delineation of terms on pages 670 and 671. The State refers to software in cross examination; page 33 lines 11-13, page 376 lines 16-18, page 378 lines 3-10, page 379 lines 3-6 and 7-11 and refers to the concepts together; page 33 lines 19-23, page 34 line 1, page 374 lines 2-5, page 378 lines 13-18 (where there is a reference to 8100.27 but means software), and page 732 lines 2-5, “various versions of software and the source code”.

raised in the motions to produce and the lower Court did not abuse their discretion in considering them to be at issue in the hearing.

Finally, with regard to materiality, Appellant argues that the trial court erroneously determined that the source code, software, and supporting documents are material pursuant to Rule 3.220(f) because section 316.1932(1)(f)4, Florida Statutes (2011), specifically exempts these items from disclosure when they are not in the State's possession. Appellant claims that the record demonstrates that those items are not in its possession. Appellees claim that the items are discoverable upon showing of materiality under Rule 3.220(f). The Majority opinion eliminates consideration of Ms. Barfield's testimony or any other evidence from *Atkins* on this issue, finds that to the extent that the trial court relied upon *Atkins* to support any of its findings that they are not supported by competent substantial evidence and as a result fails to address whether the source code is material and subject to discovery pursuant to Rule 3.220(F).

As we find that the admission of the *Atkins* record was permissible, we engage in further analysis as to the materiality of the source code, software, and what is subject to discovery pursuant to Rule 3.220(F)

Section 316.1932(1)(f)4 states:

Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney.

.....

Full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.

Rule 3.220(f) states “[o]n a showing of materiality, the court may require such other discovery to the parties as justice may require.”

As Appellees argue, section 316.1932(1)(f)4 does not define material. Fla. Stat. §316.1932(1)(f)4. It only defines full information. *Id.* Items that constitute full information are listed in the statute. *Id.* However, full information is not equivalent to material information and section 316.1932(1)(f)4 does not determine whether information is material. *Id.* Instead, “material” is defined as information reasonably calculated to lead to admissible evidence. *Demings v. Brendmoen*, 158 So. 3d 622, 625 (Fla. 5th DCA 2014) (citing *Franklin v. State*, 975 So. 2d 1188, 1190 (Fla. 1st DCA 2008)). The trial court was not prohibited by section 316.1932(1)(f)4 from finding that the software, source code, and supporting documents are material if those items are reasonably calculated to lead to admissible evidence. Fla. Stat. § 316.1932(1)(f)4.

Furthermore, DeWeist’s testimony that the State purchased the Intoxilyzer 8000 with the Florida Specific Software that **includes the source code** and Barfield’s testimony that FDLE had the software on their laptops and on discs constitute competent substantial evidence that those items are in the State’s possession. Dr. Myler’s and Workman’s testimony stating that examination of the source code and software is necessary to determine the cause of the anomalies identified in the defense exhibits is competent substantial evidence that the source code is material.

Appellant argues that only less than 50 tests of out of over 450,000 tests showed anomalies, the opinions of defense witnesses Daniels and Workman should not have been considered because they do not meet the *Daubert*¹⁰ standard, and the trial court gave improper weight to Workman’s testimony because the trial court improperly referred to him as Dr. Workman. The trial court’s error in identifying Workman as Dr. Workman was insignificant. There is no evidence that the trial court gave Workman’s testimony improper weight because it mistakenly referred to him as doctor. The trial court accurately identified Workman’s credentials and experience in its order. In

¹⁰ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

addition, Daniels did not testify as an expert and the trial court acknowledged that he was not an expert. Requiring a Daubert-type hearing prior to discussing what information and materials may be needed to make a Daubert claim is putting the cart before the horse.

By considering all the testimony at the hearing, the Defense and State exhibits, the testimony provided in Atkins, and giving greater weight to the testimony of the expert witnesses who testified at the hearing, the trial court did not abuse their discretion. Based on the testimony of Mr. Workman and Dr. Myler and the evidence submitted at the hearing, there was competent substantial evidence to support the trial court's finding that the source code is material because there were numerous anomalies with the Intoxilyzer 8000 results and the anomalies may be caused by the source code.

Appellant argues that the trial court erred by finding that it owns or possesses the source code and software because there was no evidence that FDLE is in possession of the source code or software. Appellant claims that the trial court improperly interpreted the contract between FDLE and CMI because there is no mention in the contract of ownership of the intellectual property rights to the software or source code. Appellant also argues that FDLE's act of returning the software in its possession to CMI demonstrates the parties' intent that the software was to be used, not owned, by FDLE. In addition, Appellant claims that collateral estoppel applies because of the Second Circuit Court's declaratory judgment in *FDLE v. CMI*, No. 2008-CA-3619 (Fla. 2nd Cir. Ct. Sept. 10, 2009), finding that CMI owns the software and source code. Appellant also argues that it was determined in *Moe v. State*, 944 So. 2d 1096 (Fla. 5th DCA 2006), that the State does not own source code. *Moe* was based upon the specific facts in that case, upon a record which has not been demonstrated is identical to the facts and record in this case. *Id.*

The language used in a contract is the best evidence of the intent and meaning of the contracting parties. *Gendzier v. Bielecki*, 97 So. 2d 604, 605 (Fla. 1957); *Republic Services, Inc. v. Calabrese*, 939 So. 2d 225 (Fla. 5th DCA 2006); *Whitley v. Royal Trails Prop. Owners' Ass'n, Inc.*, 910 So. 2d 381 (Fla. 5th DCA 2005). If the language of a contract is clear and unambiguous, there is no need to look outside the four corners of the contract to determine the intent. *Gowni v. Makar*, 940 So. 2d 1226 (Fla. 5th DCA 2006); *Garcia v. Tarmac American Inc.*, 880 So. 2d 807 (Fla. 5th DCA 2004); *Harris v. School Bd. of Duval County*, 921 So. 2d 725 (Fla. 1st DCA 2006).

The Defense introduced the original purchase order for the Intoxilyzer 8000 for FDLE use in Florida created on June 17, 2005. (Tr. 29, 30, DE. 101). The description of the items purchased listed the Intoxilyzer 8000 with Badge Reader, Modem, Internal Printer, Florida Specific Software, and other items. Paragraph 13 of the contract states, “By accepting this electronic purchase order, the vendor agrees to be bound by these conditions and instructions.” Following paragraph 13 are four pages of conditions and instructions that include “CY Copyrights and right to data” which states:

If the materials so developed are subject to copyright, trademark or patent, legal title and every right, interest claim or demand of any kind in and to any patent, trademark, or copyright or application for the same, will vest in the state of Florida, department of state for the exclusive use and benefit of the state. Pursuant to § 286.021 Florida statutes, no person, firm or corporation, including parties to this contract, shall be entitled to use the copyright, patent or trademark without the prior written consent of the department of state.

All computer programs and other documentation produced as part of the contract shall become the exclusive property of the state of Florida, department of state and may not be copied or removed by any employee of the contractor without express written permission of the department.

(emphasis added).

Appellant claims that the CY is not part of the purchase order because it was not “checked.” Only two of the 28 conditions have handwritten check marks on the right side. Appellant argues that the fact that these two areas were checked and that the CY was not checked demonstrates that the CY is not part of the purchase order.

There is no area in the listed conditions to include or exclude any of the conditions by making a check mark. DeWiest testified that the computer system does not put check marks on the documents. (Tr. 39). When the State asked DeWiest about the items with check marks, she stated, “But we did not do that. [I] assumed they were Mr. Hyman’s checks.” (Tr. 34). She also testified that the CY was part of the purchase order if it applied. (Tr. 28). The CY refers to computer programs. The description of the item purchased in the purchase order is Florida Specific Software. Therefore, there was competent substantial evidence to support the trial court’s findings that the CY was part of the purchase order and the State owns the Intoxilyzer 8000 with Florida Specific Software, which includes the source code and software. *De Groot*, 95 So. 2d at 916 (determining that competent substantial evidence is relevant evidence as a reasonable mind would accept as adequate to support a conclusion).

In addition, the trial court’s finding that FDLE possessed copies of the Intoxilyzer software is supported by Laura Barfield’s testimony in Atkins acknowledging that FDLE had copies of the Intoxilyzer software on its laptops and on compact discs. (AB. 18, 25, R3. 206, AT. 287-286, Feb. 4, 2008). As such, the trial court did not abuse its discretion in concluding that the State owns and possesses the Florida Specific Software that includes the source code because there was competent substantial evidence to support the trial court’s findings.

The trial court determined that the State owns and possesses the source code and software and thus may require the State provide material evidence in its possession. *See Fla. R. Crim. P.*

3.220(f); *State v. Coney*, 294 So. 2d 82, 85 (Fla. 1973). Appellant argues that Appellees must first exert their own efforts and resources to obtain the requested information citing to *Coney*, and argues that another panel of this Circuit in *State v. Burton* found that the *Atkins* record does not show that the defense is unable to obtain the source code by other means.

In *Coney*, 294 So. 2d at 85, the Court agreed with the First District Court that found:

A determination should first be made as to whether all or any part of the information sought by defendant is readily available to him by the exercise of due diligence through deposition, subpoena, or other means. If so, the motion should be denied; if not, the court should then proceed to a determination as to whether the information sought may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory. If this determination is resolved in the affirmative, the motion should be granted; otherwise, denied.

So long as the pertinent and relevant information requested by a defendant is readily available to the state attorney from other state governmental agencies for his use in the prosecution of the case even though not reduced to his actual possession, then it should likewise be made available to the defendant upon his timely demand.

(citing *State v. Coney*, 272 So. 2d 550 (Fla. 1st DCA 1973)).

Dr. Myler testified that he went to CMI four times to inspect the Intoxilyzer 8000 source code for other defendants. (R. Transc. 660-61). Dr. Myler stated he was forbidden from removing his notes from the testing facility and CMI disassembled and destroyed the hard drive of the laptop he used to conduct the testing. *Id.* Dr. Myler testified that without his notes he could not prepare a report necessary to provide testimony about his observations because of the complex nature of the testing. (R. Transc. 661-62). In contrast, CMI did not apply this same restrictive access to FDLE employees. The trial court noted Patrick Murphy, an FDLE employee, inspected the Intoxilyzer source code and was permitted to retain his notes that were stored in his desk at

FDLE.¹¹ (R3. 189, DE. 107, Tr. 662-65). Dr. Myler testified that Murphy's notes would have no value to him because they were Murphy's analysis, did not provide the information that he would be looking for in his analysis of whether the machine worked properly, and was a static analysis, not a dynamic analysis that he performed. (R. Transc. 664-67).

Based on Dr. Myler's testimony about CMI's restrictive access applied to defense experts, the trial court did not abuse its discretion in finding that the source code was not readily available to Appellees. However, the source code was readily available to the State, through FDLE as demonstrated by evidence of Patrick Murphy's unrestricted access. Since the source code was not readily available to Appellees, the next step as explained in *Coney* is to determine whether the information may reasonably be considered admissible and useful to the defense because it is probably material and exculpatory. *Coney*, 294 So. 2d at 85. As stated above, the trial court did not abuse its discretion in finding that the source code is material and possibly exculpatory if it is determined that the Intoxilyzer 8000 is not functioning as it should. Therefore, as stated in *Coney*, the source code should be made available to the Defense upon a timely demand because the trial court's finding that the State possesses the source code is supported by competent substantial evidence. *Id.*

As to the issue that further litigation of the request to produce would not be a basis for additional time to comply was an abuse of discretion because the outcome of the appeal would profoundly affect the remainder of the proceedings, this argument is moot.

"An appeal by the state from a pretrial order shall stay the case against each defendant upon who application the order was made until the appeal is determined." § 924.071, Fla. Stat. (2011).

¹¹ Patrick Murphy has a B.S. in General Studies and a M.S. in Forensic Toxicology and Forensic Science. He is the Department Inspector for FDLE Alcohol Testing Program and testified about the Intoxilyzer 8000 in several counties throughout Florida.

Therefore, once the State filed an appeal, the lower court cases were automatically stayed. However, section 924.071 does not prevent the trial court from enforcing its order prior to the State filing a notice of appeal or if the State pursued other litigation such as a petition for extraordinary relief that does not automatically stay a pretrial order. *Id.*; *Byrd-Green v. State*, 40 So. 3d 848 (Fla. 3d DCA 2010). Therefore, the trial court’s statement that, “Further litigation of this Request to Produce or this Order will not be considered a basis for additional time,” is not an abuse of discretion unless the trial court proceeded with the cases while this appeal was pending.¹² The State has not alleged that the trial court has proceeded with the cases while this appeal was pending. Therefore, it was not an abuse of discretion to include this statement if the trial court stays the proceedings while an appeal is pending.

Based on the record in this case, we dissent, finding that the lower court did not abuse its discretion in finding that the State was provided sufficient notice that the software would be at issue at the hearing, that considering the *Atkins* testimony was constitutionally permissible, the software and source code are material and are owned or in possession of the State. As such, we agree with the lower court’s ruling, that same should be made available to Appellees in order to introduce the breath test results under section 316.1934, Florida Statutes (2008).

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 3rd day of October, 2018.

JULIE H. O’KANE
CIRCUIT JUDGE, for the Court

¹² The statement “Further litigation of this Request to Produce or this Order will not be considered a basis for additional time,” is not included in all the orders on appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished on this _____ day of October, 2018, to the following:

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And to all Orange County Court Judges set forth above.

Judicial Assistant