Volume 30, Number 10, February 28, 2023

FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 597-666

Reports of Decisions of:

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CRIMINAL LAW—JURY TRIAL—SIX-PERSON JURY—CONSTITUTIONALITY. A circuit court judge found that it was compelled by appellate case law to deny a demand for a twelve-person jury filed by a defendant charged with attempted second-degree murder, notwithstanding the judge's reasoning that an "original-intent" would lead to the inevitable conclusion that the use of a six-member jury in a Florida felony trial violates the Sixth Amendment and that the Supreme Court's decision in *Williams v. Florida* holding that six-person juries are constitutional is no longer the law. The order included an extensive analysis of considerations related to Florida's continuing use of six-person juries for serious crimes.** *STATE v. WEST. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. December 2, 2022. Full Text at Circuit Courts-Original Section, page 607a.*

- **CRIMINAL LAW—HABEAS CORPUS—IMMIGRATION DETAINEE. A Florida circuit court judge concluded that it had the authority to issue a writ of habeas corpus ad prosequendum to request the physical custody of a defendant in U.S. Immigration and Customs Enforcement custody to enable the state to pursue criminal charges against the detainee.** *STATE v. LI. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. December 9, 2022. Full Text at Circuit Courts-Original Section, page 612a.*

- **EVIDENCE—JUDICIAL NOTICE. A judge granted a motion to take judicial notice of Google Street View images of a street where the decedent fell and the data related to those images, including the dates the images were created.** *GONZALEZ v. CITY OF MIAMI. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. December 19, 2022. Full Text at Circuit Courts-Original Section, page 615a.*

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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.
COUNTY COURTS	County court opinions.
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Save Calusa Inc. v. Miami-Dade County. Circuit Court, Eleventh Judicial Circuit (Appellate), Miami-Dade County, Case No. 2021-67-AP-01. Circuit Court Opinion at 30 Fla. L. Weekly Supp. 269a (September 30, 2022). Quashed at 47 Fla. L. Weekly D2341a (November 25, 2022). Substituted Opinion at 48 Fla. L. Weekly D224a

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath, blood or urine test—Absence of licensee's driver's license from documents submitted to Department of Highway Safety and Motor Vehicles is not basis for invalidation of suspension where licensee did not contest correctness of his identification and license number can be found on multiple documents entered into evidence—Implied consent warning—Officer was not required to warn licensee of every consequence of refusal so long as licensee was advised that refusal would result in license suspension for one year or, in case of second or subsequent refusal, for 18 months—Licensee's testimony that he believed the implied consent warning was incorrect not basis for writ of certiorari in absence of any allegation that failure to read implied consent warning correctly impacted licensee in some material way

RYAN KELLY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 22 AP 7. December 12, 2022. Counsel: Lance Stephens, for Petitioner. Kathy Jimenez-Morales, Chief Counsel-Driver Licenses, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANGELA C. DEMPSEY, J.) **THIS CAUSE** is before the Court on Petitioner's Petition for Writ of Certiorari, filed on September 1, 2022. Petitioner seeks certiorari review of Respondent's final order suspending his driving privileges for refusal to submit to a breath, blood, or urine test under Section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c), and Sections 322.2615(13) and 322.31, Florida Statutes. This Court reviewed the Record including the Petition, Appendixes, Respondent's Response to Petition for Writ of Certiorari, Petitioner's Reply and the transcript of the hearing. Based on this review and the applicable law, this Court finds as follows:

1. On June 29, 2022, Officer Braxton with Tallahassee Police Department arrested Petitioner for Driving Under the Influence (DUI) and his license was subsequently suspended. Petitioner requested a formal administrative hearing, which took place on July 28, 2022. The hearing officer sustained the suspension, finding there was probable cause that Petitioner 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; Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and Petitioner was told that if he 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. The hearing officer found that all elements necessary to sustain the suspension for refusal to submit to a breath, blood, or urine test under Section 322.2615, Florida Statutes were supported by a preponderance of the evidence. *See* the hearing officer's order August 5, 2022 order (hereinafter referred to as "Order").

2. A circuit court's review of an administrative agency decision is limited to the following: (1) whether procedural due process was accorded, (2) whether the essential requirements of law were observed; and (3) whether the factual findings are supported by competent substantial evidence. *State Dep't of Highway Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1086 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. Further, it is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination. *Cohen v. School Board of Dade County, Florida,* 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984); *Campbell v. Vetter,* 392 So. 2d 6 (Fla. 4th DCA 1980), *pet. for review denied,* 399 So. 2d 1140 (Fla. 1981).

3. Petitioner's arguments can be summarized as follows:

A. The failure of the hearing officer to have Petitioner's driver license in the record is a due process violation and requires invalidation.

B. There was a lack of competent substantial evidence in the record because the officer failed to correctly read the Petitioner the statutorily mandated implied consent warning.

Regarding the failure to admit Petitioner's driver's license into the record below, Section 322.2615(2)(a), Fla. Stat., requires that law enforcement forward to the Department within 5 days after issuing the notice of suspension, the driver's license and the documents related to the Petitioner's arrest. The Petitioner argues that this provision requires the inclusion of the Petitioner's driver's license into the record at the formal review hearing, and the failure to have it in the record is a due process violation. However, the failure to include the Petitioner's driver's license did not deprive the Petitioner of procedural or substantive due process since he did not contest the correctness of his identification. *See Hilton v. State Dep't of Highway Safety and Motor Vehicles,* 29 Fla. L. Weekly Supp. 786a (Fla 13th Cir Ct. Nov. 4, 2021), and *Skinner v. State Dep't of Highway Safety and Motor Vehicles,* 17 Fla. L. Weekly Supp. 400a (Fla. 4th Cir. Ct. Feb. 25, 2010). Because the driver's license number can be found in the arrest report and the DUI citation and both were entered as evidence before the hearing officer, this Court concludes that the absence of Petitioner's driver's license from the documents submitted to the Department does not provide grounds to invalidate the suspension as Petitioner argues.

4. Petitioner next argues there was a lack of competent substantial evidence in the record because the officer did not correctly read the Petitioner the statutorily mandated implied consent warning. Petitioner argues that unrebutted evidence provided by the Petitioner through his testimony that he believes he was not read the correct implied consent warning requires this Court to set aside the suspension.[1] As provided in *Dep't of Highway Safety and Motor Vehicles v. Perry,* 751 So. 2d 1277 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D669a], the statute only requires that law enforcement submit "an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit." *See also* Section 322.2615(2)(a), Fla. Stat. This statutory requirement can be satisfied if the sworn statement of the arresting officer in the arrest report contains a statement that the driver was read the implied consent warning and refused to submit to a breath test. *Perry,* 751 So. 2d at 1280. The language of the implied consent warning need not be typed out verbatim in the arrest report, as the Fifth DCA held "Like the *Miranda* warnings, the implied consent warnings are standard instructions which can be identified in an affidavit by simple reference." *Id.*

5. Moreover, the arrest affidavit, refusal affidavit, and implied consent warning were entered in the record before the hearing officer. That affidavits established Officer Braxton read the implied consent warning to the Petitioner, advising him of the consequences of the refusal to submit to a breath test, and that Petitioner still refused to submit to the breath test. Though Petitioner testified that he believes the implied consent warning was incorrect, this does not state a basis

for a writ of certiorari. In *Rodriguez v. Dep't of Highway Safety and Motor Vehicles,* 20 Fla. L. Weekly Supp. 328a (Fla. 13th Cir. Ct. Jan. 10, 2013), the court held that even if there is a misstatement regarding how a breath test affects the license suspension, denial of the petition is still warranted when the misstatement did not result in a gross miscarriage of justice. Thus, in the absence of any allegation that the failure to read the implied consent warning correctly impacted the Petitioner in some material way, there can be no gross miscarriage of justice in denying this argument.

6. Additionally, there is no legal requirement that the hearing officer determine that the officer *strictly* complied with Section 316.1932 by referencing every single consequence for a refusal to submit referenced in that statute. Instead, the hearing officer need only determine the following with regards to the implied consent warning:

> 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.

See Section 322.2615(7)(b)3., Fla. Stat. Nowhere in this language is it required that the person be told that the refusal is admissible in court or that a second or subsequent refusal constitutes a misdemeanor, despite the fact that both consequences are contained in Section 316.1932, Florida Statutes. The hearing officer's scope of review regarding the required content of the implied consent warning is unambiguous: the person must be told about the driver license suspension that will follow if the Petitioner refuses. Petitioner was informed of those consequences, as reflected in the Affidavit of Refusal and in the Implied Consent Warning Form, and both forms were in the record for the hearing officer's review.

7. Finally, Petitioner argues that his "unrebutted testimony" is sufficient to set aside the suspension. However, a hearing officer is not required to believe the testimony of any witness, even if unrebutted. *See Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 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 and Motor Vehicles v. Dean,* 662 So. 2d 371 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2179c]. Additionally, this Court is not permitted to reweigh the evidence. *See Dep't of Highway Safety and Motor Vehicles v. Wiggins,* 151 So. 3d 457 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a].

8. Accordingly, this Court concludes that the Department's decision to uphold the Petitioner's driver license suspension is supported by competent substantial evidence, that the Petitioner was accorded procedural due process, and that there was no departure from the essential requirements of the law.

ACCORDINGLY, it is hereby **ORDERED** and **ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED**.

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[1]Petitioner remembers virtually nothing about the traffic stop and his subsequent actions, but testified to the events surrounding his arrest based on his review of the video that was not submitted into evidence. *See* Order p. 4 and Transcript, p. 23.

* * *

Counties—Animals—Dangerous dogs—Hearings—Due process—Claims that counsel for dog-bite victim made faces and shook his head during owner's testimony and that victim's affidavit was written by victim's wife were not preserved for appeal—Claim that owners were denied due process by admission of medical settlement between their insurer and victim is unfounded—Hearing officer did not depart from essential requirements of law by finding that victim did not commit act of provocation by taking measures to protect himself and his dog from owners' four dogs, who had escaped unleashed and uncontrolled into condominium common area—Hearing officer's decision to uphold designation of four dogs as dangerous dogs was supported by competent substantial evidence that victim was endangered when dogs ran at him and his dog, causing him to fall and suffer injuries that required amputation of his finger

JENNIFER ARGUELLO, et al., Appellants, v. MIAMI-DADE COUNTY ANIMAL SERVICES DEPARTMENT, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-33 AP 01. December 2, 2022. On Appeal from Administrative Orders of Miami-Dade County, Florida, Hearing Officer, Joseph Podgor, Jr. Counsel: Matthew T. Person, for Appellants. Geraldine Bonzon-Keenan, Miami-Dade County Attorney, and Christopher J. Wahl, Assistant County Attorney, for Appellee.

(Before TRAWICK, WALSH, and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) Jennifer Arguello ("Arguello") and Janellys Feliciano ("Feliciano") (collectively "Appellants") appeal June 14, 2021 Orders designating each of their four dogs "dangerous dogs" following a Miami-Dade County Code Enforcement hearing. The Hearing Officer determined that a "dangerous dog" determination was correctly issued in accordance with the provisions of Section 5-22(d), Miami-Dade County Code along with fines and costs. The Orders also upheld citations for violations of Code Section 5-20(D), which applies to uncontrolled dogs.

On appeal, Appellants argue that their due process rights were violated, that the Orders departed from the essential requirements of law, and that the Orders are not supported by competent substantial evidence.

BACKGROUND

On January 19, 2021, in the early evening, Arguello was in her first-floor condominium apartment preparing to walk Appellants' four dogs:

a) *Walter*—a 2-year old blue and fawn French Bulldog;
b) *Jada*—a 10-year old black and tan Yorkshire Terrier;
c) *Layla*—a 5-year old brown and black Beagle, and
d) *Xabi*—a 3-year old white and tan French Bulldog.

Appellants maintain that unbeknownst to Arguello, as she was unleashing *Xabi* before leashing *Layla* for her walk, *Layla* ran behind Arguello, out the slightly-open entrance door, and into the common area corridor. As Arguello turned to chase *Layla, Xabi* followed her out of the apartment as well. The other two dogs, *Jada* and *Walter* also escaped and ran towards condominium resident Rene Hernandez ("Hernandez") who was simultaneously walking his dog *Bubba*—a 70 or 90 pound Pit Bull or American Staffordshire—out the first-floor stairwell, approximately 20 feet from the doorway to Arguello's apartment. Appellants contend that *Bubba* was leashed but unmuzzled. Seeing the dogs Layla and *Xabi* walking with Arguello, Hernandez reacted by first trying to pick up *Bubba* by the chain. Because *Bubba* was too heavy, Hernandez fell upon *Bubba* and lost his glasses. As he fell, he wrapped his arms around *Bubba's* head. As a result of the turmoil, it is undisputed that Hernandez lost the fourth finger on his right hand from a "crush injury" requiring surgery. When Hernandez returned *Bubba* to his apartment, Arguello picked up *Xabi* and returned to Appellants' apartment. The other dogs, Walter and *Layla,* were already in the apartment having returned on their own, and *Jada* the Yorkie had returned with the help of a neighbor.

Hernandez filed a police report after the incident stating that all four of the Appellants' dogs—*Walter, Jada, Layla and Xabi*—had attacked him, one bit off his finger and another dog bit his left shoulder. Later at the hospital, he stated that one of the French bulldogs—*Walter* or *Xabi*—had bitten off his finger. Arguello was contacted for rabies information regarding *Walter.*

On May 11, 2021, based on the findings of its investigation and

relying on Hernandez's testimony, the Department designated all four dogs—*Walter, Jada, Layla and Xabi*—as dangerous in violation of Code Section 5-22 (d) of the Miami-Dade County Code. Section 5-22(d)(1) provides that a dog shall be designated dangerous if, when unprovoked, it endangers, attacks, or bites a human. The Appellants were also cited for a violation of Code Section 5-20(D), which applies to uncontrolled dogs. Appellants timely requested a hearing on all the citations.

During the subsequent June 14, 2021 virtual hearing ("Hearing"), Arguello testified that only *Xabi* was near Hernandez at the point of his injury as Arguello was helping Hernandez with his dog, but that *Xabi* was never close enough to bite either Hernandez or Bubba. Arguello maintains that she was not aware of any accusations of aggression or endangering.

The Hearing Officer affirmed the citations for violation of Code Section 5-22 (d) and for the violation of Section 5-20(D) (uncontrolled dog) and this appeal followed.

STANDARD OF REVIEW

Appellate review of quasi-judicial proceedings in the Circuit Court is governed by well-established standards: (1) whether due process was afforded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Miami Dade County v. Omnipoint Holdings*, 863 So. 2d 195, 198 (Fla. 2003) [28 Fla. L. Weekly S717a].

ANALYSIS

I. Procedural Due Process

"A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Further, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts. . ." *Id.*

Here, Appellants maintain that there are three procedural errors that require reversal. First, Appellants argue that counsel for Hernandez was acting inappropriately by making faces and shaking his head as Arguello was testifying. Notwithstanding, Appellants failed to object before the Hearing Officer. Accordingly, the argument was not preserved. *See Mora v. State*, 964 So. 2d 881, 883 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2320a]. Moreover, no one at the Hearing said anything about Mr. Hernandez's counsel making facial expressions.

Second, Appellants argue that "[a] medical settlement between Appellants' insurance company and Mr. Hernandez was improperly entered by his counsel and considered by the Hearing Officer." However, no such document was entered into the record. Moreover, the Hearing Officer sustained Appellants' objection and found the medical settlement irrelevant. No further statements about the alleged settlement were made. Finally, if there was any error, it would be harmless.

Appellants' third argument is that the affidavit of Hernandez was written by his wife and that the entire Hearing was premised on Hernandez's "Witness Affidavit". Appellants failed to preserve this argument for review, as they never made an objection at the Hearing. *See Mora v. State, supra.* Accordingly, the argument pertaining to the Hernandez's affidavit cannot be considered by this court.

Appellants fail to explain how any of these errors led to a deprivation of procedural due process. We find that Appellants did receive procedural due process.

II. Essential Requirements of Law

Having found that the Appellants received due process, we turn to whether the Hearing Officer departed from the essential requirements of law. In *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995) [20 Fla. L. Weekly S318a], the Supreme Court held that "applied the correct law" is synonymous with "observing the essential requirements of law."

Section 5-20(d) of the Code, *Regulations on dogs in public areas* states:

> It shall be unlawful for a responsible party to allow, whether willfully or through failure to exercise due care or control, a dog to be unrestrained or to be at large in any manner in or upon: public property; a common area of a private building or development; or the private property of others without the express or implied consent of the property owner. Notwithstanding the foregoing, a dog may be unrestrained and shall not be deemed to be at large if it is supervised by a competent person and is (i) in a park area in which dogs are specifically authorized by a municipality or by the county to be unrestrained; or (ii) engaged in the sport of hunting in an authorized area.

Section 5-22 of the Code, *Dangerous dogs: authority to designate dog as dangerous; confiscation; appeal procedure,* states:

> (d) The Director or designee shall designate a dog as dangerous if the dog commits one (1) or more of the following acts:
>
> (1) To, when unprovoked, endanger, attack, or bite a human;
>
> . . .

Pursuant to Section 5-22(b)(2) of the Code, " 'Unprovoked' means that the victim was acting peacefully and lawfully when encountering the dog and that the dog was not acting defensively or responding to a threat.

Appellants first argue that the Hearing Officer did not find that the Appellants or their dogs were the "legal cause" of the Code violations. The Hearing transcript shows otherwise.

Under Section 5-20(d) of the Code, (dog running at large), the Hearing Officer stated: "These dogs were not under control, the four dogs, and they were loose in violation of the leash laws." (Tr. at 90:17-19). Hernandez also testified about the four loose dogs belonging to Appellants. (Tr. 20:7-8; 20:24).

Under Section 5-22(d)(1), the Department had to show that Appellants' four dogs, when unprovoked, endangered a human. The Hearing Officer found that Appellants' four dogs endangered Hernandez: "All the investigative materials indicate that there was an endangering. The dogs were loose due to the leaving open of a door which is an action of neglect." (Tr. at 89:25-90:1-3). Department representative Ms. Dominguez explained that "[s]o this resulted in our department declaring all four dogs as dangerous for endangering Hernandez and issuing the adequate citations for the violations that occurred." (Tr. at 39:4-7).

Appellants also maintain that the Hearing Officer ignored the fact that the County presented no evidence that the dogs were dangerous, how they were dangerous or how they were aggressive. Notwithstanding, the Hearing Officer correctly applied only Sections 5-20 and 5-22 of the Code in making his decision.

As to Appellants' argument that the dogs were provoked, the Hearing Officer did address the defense of provocation, as follows:

> Appellants' attorney: The dogs came out to play and he's [Hernandez] the one who escalated the situation by provoking them, by becoming aggressive with his dog.
>
> Department Officer: Well, again, he would [not] have been put in this position if the dogs weren't off leash off of the owners' property, not under the owners' control, in order for him to have to pick up his dog to prevent any further incidences. Whether it's his own dog or their dogs, he was trying to prevent an accident, which clearly he failed at it because he did receive some injuries, which are very severe to the point that he's missing part of his finger. So again, it's just for the fact that they endangered him and his dog. Not for which dog bit

what, or whatever.
Tr. at 83:2-23.

Moreover, Hernandez protected himself and his dog to prevent an accident, which did not amount to provocation. The Hearing Officer followed the essential requirements of law.

III. Competent Substantial Evidence

"Competent, substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway Safety and Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a]. The test is whether there exists any competent substantial evidence to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs'*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

The Department had to show that Appellants' four dogs "when unprovoked, endanger[ed] . . . a human." The Department presented the testimony of Hernandez, and his affidavit and photos of his injuries were admitted into evidence. Hernandez testified that while he was walking his leashed dog, *Bubba,* through the atrium-like lobby and out of the building, four unleashed dogs, unaccompanied by their owners, came at him and attacked him. The four dogs were subsequently identified as *Walter, Jada, Layla and Xabi.* Hernandez testified that as the dogs came at him, he tried to pick up *Bubba*, but in the commotion, he tripped and fell down, at which point the four dogs attacked *Bubba* and one of the four attacked Hernandez. While lying on the ground, he attempted to protect *Bubba*, but one of the four dogs, *Jada* the Yorkie, got between them and bit his finger off. Another of the four dogs, *Layla* the Beagle, bit his shoulder.

The Department also presented the testimony of Dr. Serrano, the Department's Chief Veterinarian, that any of the four dogs could have bitten Hernandez's finger with enough force that it needed to be amputated.

The Hearing Officer, as the trier of fact, was able to assess the credibility of the parties. He credited Hernandez's version, not the Appellants' version, and resolved any conflicts in the evidence in Hernandez's favor.

Both the Department and the Hearing Officer explained that they found a violation of Section 5-22 of the Code, not because the dogs "attacked" or bit Hernandez, but because he was endangered when the four dogs ran at him and his dog and created a chaotic situation that caused him to fall and suffer injuries. There is competent substantial evidence supporting the Hearing Officer's conclusions.

Appellants argue that the Findings are not supported by competent substantial evidence because there are conflicts in the evidence, conflicting testimony from the injured party, and lack of competent substantial evidence as to which dog was the "harming dog." Hernandez stated seven times in his reports that he did not know who bit him. Furthermore, Appellants argue that Hernandez's dog *Bubba* was a registered aggressive dog for previously attacking a small dog, giving Hernandez a motive to not report any injury to him from his dog's bite.

However, this court cannot reweigh the evidence. Nor can this court judge the credibility of these witnesses as to the plausibility or capability of *Jada* the Yorkie or any of the four dogs—whose photographs appear in the answer brief—to have severed Hernandez's finger. Our analysis ends, as it must, at the determination that the Hearing Officer's decisions are supported by competent substantial evidence. Applying the foregoing standard on appeal, we are constrained to affirm the decision below.

For the foregoing reasons, the decision below is AFFIRMED. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

* * *

Counties—Code enforcement—Livestock—Evidence—Hearing officer erred in reversing citation for livestock roaming at large on ground that there was no evidence that stray calf belonged to cited owner—Detective's testimony that owner's employee stated that calf belonged to owner and that owner admitted to owning calf, even if hearsay, was admissible at code enforcement hearing—If hearsay rule is applicable to hearing, statements of employee and owner are admissible under exceptions to rule for statement of party's agent and statement of party opponent—Further, police report corroborating ownership of calf was admissible under public records exception to hearsay rule

MIAMI-DADE COUNTY, Appellant, v. LEWIS FORMAN CHISHOLM, JR., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-11 AP 01. December 5, 2022. On appeal from a decision of the Miami-Dade Office of Code Enforcement. Counsel: Christopher J. Wahl, Assistant County Attorney, Geraldine Bonzon-Keenan, Miami-Dade County Attorney, for Appellant. Lewis Forman Chisholm, Jr., pro se, Appellee.

(Before TRAWICK, SANTOVENIA, and R. ARECES, JJ.)

(TRAWICK, J.) In this appeal, we are asked to harken back to a phrase often repeated in English speech classes—"how now brown cow?" On February 22, 2021, Miami-Dade Police Department ("MDPD") Detective Kevin Bohne was working in the Agricultural Patrol Section when he received a report of a "light brown cow" or "calf" roaming loose. Upon arrival in the vicinity of the wayward bovine, Detective Bohne, using all of his cattle rustling skills, captured the disgruntled cow. Ismael Lopez, an employee of Appellee Lewis Forman Chisholm, Jr. (Appellee or "Chisholm"), was present at the scene of the errant beast's capture, and told the Detective that the cow belonged to Chisholm. Detective Bohne called Chisholm, who admitted that the cow was his, and stated that the misbehaving creature had been missing since the previous day. This was not the first instance of Appellee's contrary livestock roaming on neighboring property, as he or his employee had been cited twice before. The Detective issued Appellee a civil citation for violating section 5-18(g) of the Miami-Dade County Code, which provides, in relevant part: "[i]t shall be unlawful for any owner of livestock to unlawfully, intentionally, knowingly, or negligently permit the livestock to run at large or stray."

Appellee requested an administrative hearing, which was held on March 2, 2022. The Miami-Dade Police Department ("the Department") submitted evidence in the form of exhibits and testimony from Detective Bohne. Appellee also took the opportunity to testify. At the conclusion of the hearing, the Hearing Officer reversed the citation and said that she had "not heard any testimony or seen any indicia that this calf actually belongs to Mr. Chisholm." The Department objected, pointing out that the Appellee had admitted to the Detective that the calf was his property. The Hearing Officer responded, "Is it hearsay? I don't know." The Hearing Officer also claimed she did not have a written statement, but the Department pointed out that she had a police report. The Hearing Officer then said "I have made my decision. Thank you very much." She subsequently issued a written decision reversing the citation and this appeal followed.

The issue before this Court is whether to affirm the decision of the Hearing Officer. While the Hearing Officer apparently refused to be "cowed" into the admission of hearsay, by not doing so she failed to follow the essential requirements of law. As a result, her decision was unsupported by substantial competent evidence.

A circuit court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by substantial competent evidence." *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L.

Weekly S318a].

The Hearing Officer rejected the Appellant's competent substantial evidence when reversing the citation. She did so in finding that she had "not heard any testimony or seen any indicia that this calf actually belongs to Mr. Chisholm." The Department pointed out 1) Detective Bohne testified that Lopez, Appellee's employee, told the Detective that the cow belonged to Appellee; 2) Detective Bohne testified that Appellee himself admitted that he was the animal's owner; and 3) the Department had presented a police report, which provided written corroboration of Chisholm's claim of ownership. Given this evidence, it is striking that Appellee Chisholm, present at the hearing, did not contest the testimony that he owned the cow or that it roamed off of his property. The Hearing Officer apparently discounted the testimonial evidence based on the belief that the Detective's testimony was somehow hearsay, even though code enforcement hearings are not subject to strict evidentiary standards.[1] Even if the rules of evidence controlled the admissibility of Detective Bohne's testimony and the police report, this evidence would have been admissible as exceptions to the hearsay rule. The statement made by Appellee's employee Lopez that the cow belonged to Appellee would have been admissible pursuant to Fla. Stat. §90.803(18)(d), which provides a hearsay exception for "[a] statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship." That is precisely what Lopez' statement to Detective Bohne was. Secondly, the statement by the Appellee to the Detective admitting that the animal was his was admissible as the statement of a party opponent, pursuant to Fla. Stat. §90.803(18)(a). Finally, the police report prepared by Detective Bohne was admissible under Fla. Stat. §90.803(8) as a public record exception to the hearsay rule. In refusing to admit any of this evidence, the Hearing Officer made no findings to support a conclusion that the relevant testimony or the police report were incompetent or unreliable, which she would have been compelled to do if she was going to discount it. Thus, her failure to admit this evidence amounted to a failure to observe the essential requirements of law. Further, by not admitting the offered evidence and instead stating that she had "not heard any testimony or seen any indicia that this calf actually belongs to Mr. Chisholm," an issue that was uncontested by Appellee, the Hearing Officer's final decision was not based on competent substantial evidence.

In the words of the legendary commercial pitch line, "where's the beef?!" As we see no meat that would support the Hearing Officer's decision, it is hereby vacated. We remand this case for further proceedings consistent with this opinion. *See Lillyman v. Dep't of Highway Safety & Motor Vehicles,* 645 So. 2d 113 (Fla. 5th DCA 1994) ("When an evidentiary error is made in an administrative hearing, the remedy is to remand for further proceedings."). (SANTOVENIA and R. ARECES, JJ., concur.)

[1]Section 8CC-6(i) of the County Code provides: "The hearing need not be conducted in accordance with the formal rules relating to evidence and witnesses. Any relevant evidence shall be admitted if the Hearing Officer finds it competent and reliable, regardless of the existence of any common law or statutory rule to the contrary."

* * *

Public employees—Counties—Deputy sheriffs— Discipline—Certiorari review of appeals referee's decision to vacate disciplinary suspension of deputy is denied—No merit to claim that hearing officer departed from essential requirements of law by using an improper definition of just cause—Referee specifically referred to definition applicable under county's employee disciplinary appeal process and applied that definition to findings—Further, referee correctly noted that an essential component of just cause is notice to the employee that employee's conduct is a violation that can lead to discipline—Referee's decision was supported by competent substantial evidence consisting of documentation of alleged violations, witness testimony, and video recordings

HILLSBOROUGH COUNTY SHERIFF'S OFFICE, Appointing Authority/Petitioner, v. TONIA BALLARD, Employee/Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 22-CA-002399, Division C. November 3, 2022. Counsel: Melisa L. Bodnar, Tampa, for Petitioner. Jay P. Lechner, Tampa, for Respondent.

ORDER DENYING PETITIONER'S WRIT OF CERTIORARI

(MELISSA M. POLO, J.) Petitioner, Hillsborough County Sheriff's Office (HCSO), seeks certiorari review of a final decision made by an appeals referee under the Hillsborough County Employee Disciplinary Appeal Process (HCEDAP) to vacate the disciplinary action taken by Petitioner against Tonia Ballard, Respondent. This case was originally brought forth as an appeal to the District Court of Appeal in the Second District of Florida. The Second District transferred the petition to this court pursuant to Florida Rule of Appellate Procedure 9.040(b)(1). This court has jurisdiction. Fla. R. App. P. 9.030(c)(3); Fla. R. App. P. 9.190(b)(3). Petitioner advances two arguments in support of the petition: 1) in reviewing the disciplinary action, the referee departed from the essential requirements of law by failing to apply the correct definition of just cause and by taking into consideration the severity of the discipline; and 2) the referee's decision was not supported by competent, substantial evidence. After reviewing the petition, response, reply, all appendices and applicable law, the court determines first that the appeals referee relied on the appropriate definition of just cause, as defined by the HCEDAP and as such, did not depart from the essential requirements of law. Second, the appeals referee's findings were based on competent and substantial evidence, including but not limited to a combination of the documented Standard Operating Procedures (SOPs), witness testimony, and video recordings.

Procedural History

Respondent has been a deputy with HCSO for 18 years. On September 20, 2020, Respondent, at the time a master deputy, was assigned to the Orient Road Jail. One of Respondent's supervisee inmates attempted to escape via the drop-down ceiling and was injured as a result. After an administrative investigation, Petitioner concluded the Complaint Investigation Report and found three violations of the HCSO Rules and Regulations: Rule 3.4.04, Inattention to Duties; Rule 3.4.05, Failure to Follow SOP, Directive, Sheriff's Order; and Rule 3.5.02 Negligence—Associated with Safety of Persons or Property. Petitioner found that Respondent failed to conduct complete wellness checks in a timely manner. Petitioner also found that Respondent incorrectly logged booking numbers for 2 inmates and Respondent was performing improper pat searches and strip searches. Respondent was issued a notice of proposed discipline with a five-day suspension.

Respondent filed an appeal with the Complaint Review Board, after which the board recommended a three-day suspension. Respondent then appealed to a Discipline Review Board, after which the Deputy Chief issued a Notice of Discipline that imposed a fifteen-day suspension and removed Respondent's master status. Respondent appealed the disciplinary action with the Hillsborough County Appeal Intake Office, claiming she had not violated the Rules as written, and sought exoneration. Petitioner filed a motion to dismiss and a motion for summary judgement, both of which were denied by the appeals referee. A hearing was held before the referee on May 26, 2021.

Based on review of the evidence, including video recordings and testimony from Respondent's supervisors, the referee found that Petitioner did not meet its burden to show that Respondent violated

the rules listed above. The referee found, based on witness testimony, that Respondent had not intentionally deviated from the policies and procedures as written, there was no evidence that the policies as defined by Petitioner were ever communicated to Respondent, and there was no notice to the Respondent that her conduct was a violation that could lead to discipline. Finding that there were no violations, and that the disciplinary action was not supported by just cause, the referee vacated the action in its entirety and restored Respondent to the same position she would have been in had the action not been taken, pursuant to HCEDAP 2.9(c), and issued a written decision on June 10, 2021. This petition followed.

Standard of Review

The court's scope of 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 judgement are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

Discussion

Petitioner contends that the referee departed from the essential requirements of law by focusing on the disciplinary action itself. Petitioner also contends that the referee departed from the essential requirements of the law by using an improper definition of just cause. Finally, Petitioner argues that the referee's decision was not supported by competent, substantial evidence because he ignored evidence of Respondent allegedly admitting to violating SOPs and rules in previous hearings and investigations.

As outlined by HCEDAP 2.9(c), the referee's role is limited to determining whether the disciplinary action was supported by a violation of the appointing authority's rules, policies, or procedures or whether the action was supported by just cause as defined by the HCEDAP. The referee may either uphold the action or vacate the action in its entirety, but has no jurisdiction to modify. In this case, the referee commented on the escalation of discipline, but explicitly stated that this escalation was not a factor in his findings.

Just cause for disciplinary action is defined in the HCEDAP and includes a long list of circumstances that would constitute just cause. Petitioner argues that the referee did not apply this definition of just cause in making his decision, and for that reason he applied the incorrect law. However, in his decision the referee specifically referred to the HCEDAP definition, and applies that definition to his findings. The referee also stated that an essential component of just cause is notice that the conduct of an employee is a violation and can be subject to discipline. It is evident that the referee applied the correct standard of just cause in making his decision. Because the referee applied the correct definition of just cause, there was no departure from the essential requirements of the law. *Dep't of Highway Safety & Motor Vehicles v. Robinson,* 93 So. 3d 1090, 1092 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1542a] ("Applying the correct law incorrectly does not warrant certiorari review."); *Dept. of Highway Safety & Motor Vehicles v. Edenfield,* 58 So. 3d 904, 906 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D523a] ("[A] misapplication or an erroneous interpretation of the correct law does not rise to the level of a violation of a clearly established principle of law.").

Petitioner argues that the referee's decision is contrary to the greater weight of the evidence. However, in a certiorari review, it is not this court's place to reweigh evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085-86 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] ("When exercising its certiorari review power, the circuit court is not permitted to reweigh the evidence or substitute its judgment for that of the agency."). This court instead must determine whether the evidence was reasonable and logical. *Wiggins v. DHSMV,* 209 So. 3d 1165, 1172-73 (Fla. 2017) [42 Fla. L. Weekly S85a] (stating that "[e]vidence that is confirmed untruthful or nonexistent" or "hoplessly in conflict" is not competent, substantial evidence). The referee relied on documentation of the alleged violations, witness testimony, and video recordings, which were neither hopelessly in conflict nor confirmed untruthful. Having reviewed the SOPs and the evidence available to the referee, this court finds that the referee's decision was supported by competent, substantial evidence.

It is therefore ORDERED that the petition is DENIED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Hearings—Inability to subpoena arresting officer—Due process claim based upon licensee's inability to subpoena arresting officer, who was no longer employed by agency was not preserved for appellate review where licensee framed the issue as one of lack of competent substantial evidence, rather than as lack of due process—Decision is supported by competent substantial evidence despite absence of officer's testimony—Law allows hearing officer to uphold suspension based solely on documentary evidence

ELIZABETH NIEBLAS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 22-CA-005623, Division B. November 1, 2022. Counsel: Barry Taracks, Taracks & Associates, P.A., Tampa, for Petitioner. Michael Lynch, Assistant General Counsel, DHSMV, Orlando, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MARK WOLFE, J.) This case is before the court on Elizabeth Nieblas's Amended Petition for Writ of Certiorari filed dated July 14, 2022 seeking review of the Department's May 26, 2022 order upholding the suspension of her driving privilege for her unlawful breath-alcohol level. The petition is timely, and this court has jurisdiction. Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P; §322.31, Fla. Stat. The petition contends that the interplay of Rule15A-6.012(3)(a), Florida Administrative Code, and section 119.071(4)(d), Florida Statutes, prevented her from subpoenaing the arresting officer and, in the process, denied her a fair hearing. Petitioner contends that the petition should be granted on the authority of this Court's decision in *Smith v. DHSMV*, 30 Fla. L. Weekly Supp. 193a (Fla. 13th Jud. Cir. [Appellate], May 25, 2022). In *Smith,* a similar occurrence was framed in the hearing and on circuit court review as a lack of due process stemming from Petitioner's inability to secure the arresting officer's attendance at the hearing, whereas here, Petitioner framed the issue in the proceeding below as a lack of competent, substantial evidence to support the suspension because the arresting officer was not present. Because Petitioner did not preserve the due process issue for appellate review, and the law allows the hearing officer to uphold a suspension on the basis of documentary evidence alone, competent, substantial evidence supports the hearing officer's decision to uphold the suspension. Accordingly, the petition must be denied.

JURISDICTION

Jurisdiction to review a decision of the Department upholding or invalidating a suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. §§ 322.31; 322.2615(13), Fla. Stat. As such, this court has jurisdiction to review the decision upholding the suspension of Petitioner's driving privilege.

STANDARD OF REVIEW

The Court reviews an administrative decision to determine whether Petitioner received procedural due process, whether the essential

requirements of the law have been observed, and whether the administrative findings and judgement are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

FACTS AND PROCEDURAL HISTORY

On February 1, 2022, at 2:41 P.M. Trooper Fisher of the Florida Highway Patrol was dispatched to an accident scene at North Dale Mabry Highway and West Lambright Street. Petitioner was identified by officers initially responding to the scene as the driver who caused the accident. Trooper Fisher observed several indicators of impairment, specifically that she was aggressive and uncooperative, smelled strongly of alcohol, had slurred speech, bloodshot eyes, and she appeared unsteady on her feet. After completing his crash investigation, Trooper Fisher began a DUI investigation. Petitioner admitted consuming alcohol and Xanax. After Petitioner refused to perform field sobriety exercises, Petitioner was placed under arrest. Petitioner later agreed to and did provide a breath sample. Her breath-alcohol levels were .236 and .234 g/210L—well over the legal limit of .08. As a result, her driving privilege was suspended.

Petitioner requested a formal review hearing to challenge the administrative suspension. A hearing was held May 26, 2022. At a formal review hearing of an administrative suspension because of an unlawful breath alcohol level, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, and whether Petitioner had a breath-alcohol level of 0.08 or higher. §322.2615(7)(a), Fl. Stat. Petitioner attempted to subpoena Trooper Fisher; the subpoena was returned unserved because Trooper Fisher was no longer an employee of the Florida Highway Patrol. Although the hearing officer appears to have been amenable to a continuance, Petitioner's attorney indicated that he wished to proceed. Counsel presented no evidence; instead, he moved to invalidate the administrative suspension of Petitioner's license on the ground that Trooper Fisher's absence left the record without competent, substantial evidence to support upholding the suspension. The hearing officer's May 26, 2022 Order determined that the facts within the self-authenticating documents submitted by Trooper Fisher provided the necessary evidence that Petitioner was driving or in actual physical control of a vehicle while under the influence of alcohol. This timely petition followed.

DISCUSSION

Petitioner's sole argument is that Rule 15A-6.012(3)(a), Fla. Admin. Code, and §119.071(4)(d), Florida Statutes collectively deprive the Petitioner of due process because an arresting officer who has left an agency's employment cannot be subpoenaed by the Petitioner, depriving Petitioner of a real opportunity to be heard. Under the administrative rule, an agency employee designated to accept service for a subpoenaed witness is not required to accept service if the witness is no longer employed by the agency. Rule 15A-6.012(3)(a), Fla. Admin. Code R. Under state law, the personal contact information of active or former law enforcement personnel is exempt from the public record. §119.071(4)(d) Fla. Stat. Petitioner supplied *Smith v. DHSMV*, 30 Fla. L. Weekly Supp. 193a (Fla. 13th Jud. Cir. [Appellate], May 25, 2022) as supplemental authority for her argument. In *Smith*, this court found that the interplay of the two rules, in addition to the hearing officer's *refusal* to issue subpoena on her own initiative, deprived the petitioner of due process and that additional safeguards may be employed in cases with similar situations without creating undue burden or altering the existing rules and procedures. *Id*.

Smith is distinguishable from this case. In *Smith,* the issue was framed in the underlying hearing as a denial of due process. Here, the brief transcript in Petitioner's appendix shows that the issue was presented as one involving a lack of evidence. Regarding the evidence, Florida law allows a hearing officer to conduct review of the suspension, even a formal review, based on the reports of law enforcement and documents relating to the administration of a breath or blood test. §322.2615(11), Fla. Stat. In this case, the documentary evidence alone provided competent, substantial evidence to uphold the suspension. *See also Dep't of Highway Safety and Motor Vehicles v. Pitts*, 815 So. 2d 738, 742 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D999b] (a hearing officer's determination can be based on written documents and reports submitted by law enforcement).

The foregoing said, a suspension must be invalidated if an arresting officer fails to appear *pursuant to a subpoena*. §322.2615(11), Fla. Stat. (Emphasis added.) Here, however, Trooper Fisher did not fail to appear pursuant to a subpoena because a subpoena was not served. Moreover, Petitioner did not raise the issue that she was denied due process by her then-present inability to secure Trooper Fisher's appearance; she simply argued that the record lacked competent, substantial evidence to uphold the suspension. As already stated, competent, substantial evidence supports the hearing officer's decision. Having failed to raise the due process issue, Petitioner failed to preserve it for appellate review. "Generally, a petitioner cannot raise in a petition for writ of certiorari a ground that was not raised below." *Watkins v. State*, 159 So. 3d 323, 325 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D606e] (quoting *First Call Ventures, LLC v. Nationwide Relocation Servs., Inc.*, 127 So.3d 691, 693 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2431a]). "For [the] argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the. . .motion below." *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) [35 Fla. L. Weekly S137a] (quoting *Harrell v. State*, 894 So.2d 935, 940 (Fla. 2005) [30 Fla. L. Weekly S82a]).

Petition DENIED.

* * *

Counties—Code enforcement—Short-term rentals—Rental of home for fewer than 7 consecutive days—Evidence that code enforcement officer attempted to make online reservation at home for fewer than 7 consecutive days was not sufficient to support finding that owners were not in compliance with code on day fines began to accrue where officer did not complete reservation online or receive confirmation number and owners did not otherwise confirm reservation—Order denying contest of finding of non-compliance is quashed

ROBERT V. CANTON and DEBORAH CANTON, Appellants, v. HILLSBOROUGH COUNTY, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appellate Division. Case No. 20-CA-3272, Division X. L.T. Case No. 19016452. January 5, 2022. On review of a final order of the Code Enforcement Special Magistrate for Hillsborough County, Florida. Counsel: Robert V. Canton and Deborah Canton, Pro se, Thonotosassa, Appellants. Christine Beck and Kenneth C. Pope, Tampa, for Appellee.

APPELLATE OPINION

(MOE, J.) We review a denial of a contest by the Hillsborough County Code Enforcement Board (the "**CE Board**"), which found that Appellants Robert and Deborah Canton ("**Appellants**") had not complied with a November 25, 2019 Order Finding Violation. Because no substantial, competent evidence supports the decision, we quash the Order Denying Contest.

I. JURISDICTION

We have jurisdiction. Section 162.11, *Fla. Stat.*

II. STANDARD OF REVIEW

Decisions of code enforcement boards and magistrates are reviewed on appeal to determine whether Appellants were afforded due process, whether the decision comports with 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). Because Appellants did not appeal the original Order Imposing Fine, that Order is final and is not under review here. We confine our review to the Order Denying Contest.

III. PROCEDURAL POSTURE

Appellants are the owners of a 59-acre goat, cattle, and horse farm in Thonotosassa, Florida. Three contiguous parcels make up Appellants' property but only one parcel is the subject of this case: 059720.0100 (the "**Subject Parcel**"). The Subject Parcel is 15.65 acres, zoned AR, and is homesteaded. Both a single family residence and farmworker housing are located on the Subject Parcel.

This case began with a complaint from a neighbor about large "goat yoga" events being held on one of Appellants' other two parcels: 059723.0000 (the "**Goat Yoga Parcel**"). The neighbor complained that many of the goat yoga attendees used her private road to access the Goat Yoga Parcel. The neighbor also inquired whether Appellants had obtained a permit for concrete work being done on the property. The record contains no indication that the neighbor raised any concerns about an Air BnB.

On September 20, 2019, a Code Enforcement Officer ("**CE Officer**") visited Appellants' property. Prior to arrival at the property, the CE officer checked Air BnB's website and found a listing for Appellants' home. The listing appeared to advertise the home as being available for stays of less than seven days.

Appellants were cited for "Improper Use of Zone" in a Notice of Violation and Notice of Hearing (the "**Combo Notice**") served on them on September 20, 2019. The Combo Notice indicated that the premises in violation was 12520 Franklin Road, parcel number 059720.0100, which is zoned AR (Agricultural Rural).[1] The "Improper Use of Zone" violation was described as follows: "Dwelling #1 on the property is being rented through AirBnB. Home cannot be rented for less than seven consecutive days. AirBnB account allows home to be rented for less than seven consecutive days. Please adjust account so it conforms to code."

The Combo Notice notified Appellants that if compliance was not achieved for the alleged violations, they were ordered to appear before the CE Board on November 22, 2019. Appellants were in communication with the CE Officer and believed that they had shown that the violation was corrected so they did not appear for the November 22, 2019 hearing. Following the hearing, the CE Board gave Appellants an additional three days to comply and then entered an Order Imposing Fine on November 25, 2019. The property was inspected on November 26, 2019 and found in non-compliance. Although there is no evidence in the record that the property was actually rented for a period of less than seven days on the date of the original Notice of Violation or any day since that time, Appellants nonetheless accrued $27,000 in fines until the County was satisfied that they had complied.

Appellants contested the finding of non-compliance and the matter as heard on February 28, 2020 (the "**Non-Compliance Hearing**"). At the Non-Compliance Hearing, Appellants argued that they showed the CE Officer that they were in compliance shortly after they were served with the Combo Notice and on that basis assumed that the hearing was canceled. Appellants further attacked the reliability and veracity of the code enforcement officer's evidence that the property was not in compliance.

The Board rejected Appellants' contest and this appeal followed.

IV. ANALYSIS

We limit our review to the Order Denying Contest, and do not review the correctness of the Order Finding Violation because it was not timely appealed. *Gabor Czinke and Eva Czinke v. Hillsborough County, Florida*, 27 Fla. L. Weekly Supp. 796a (Fla. 13th Jud. Cir. [Appellate] Oct. 22, 2019).

A. Due process

We reject Appellants' argument that they were not afforded due process. The fundamentals of the process due in administrative proceedings are notice and a meaningful opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] (Procedural due process requires both fair notice and a real opportunity to be heard "at a meaningful time and in a meaningful manner.) Here, Appellants received notice of the Non-Compliance Hearing, appeared, and participated in the hearing.

B. Competent, substantial evidence

We agree with Appellants that the record lacks substantial, competent evidence to support a finding that Appellants were not in compliance on the date the fines began to run. Substantial evidence is "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), *cited by Atkins North America, Inc. v. Tallahassee MH Parks, LLC,* 277 So. 3d 1156, 1160 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2217a]. Here, the record contains no evidence that at the time of the Notice of Violation the Appellants were engaged in the act that Code Enforcement cited as the violation, namely renting a residence for a period of less than seven days. Because Appellants failed to preserve for appeal the issue of whether they were in violation in the first instance, the only issue we address here is whether they were in violation when the time to bring the property into compliance expired.

The evidence presented by the County regarding the AirBnB is not substantial, competent evidence of a violation. Significantly, there is not substantial, competent evidence in the record that Appellants were hosting AirBnB guests at the time the fines began to accrue. The evidence offered for the violation was that the CE Officer confirmed a reservation online; however, the CE Officer did not complete the reservation online and receive a confirmation number. Nor did the owner otherwise confirm the reservation. Put simply, the code does not permit a Code Enforcement Officer to issue a Notice of Violation for an inchoate or attempted violation that has not actually occurred. "Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973). For these reasons, the Order Denying Contest must be quashed.[2]

In light of the foregoing and because we find no merit in them, it is unnecessary to address the other issues raised by Appellants.

It is therefore ORDERED that the petition is GRANTED and the Order Denying Contest is QUASHED on the date imprinted with the undersigned's signature. (MOE, GABBARD, and DANIEL, JJ.)

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[1]The Combo Notice also cited Appellants for "Inoperable Vehicles." The Inoperable Vehicles aspect of the citation is not at issue in this appeal.

[2]In *Khoyi v. Hillsborough County* [28 Fla. L. Weekly Supp. 376c], a divided panel of this court ruled that "the Hillsborough County Code as a whole intends to restrict short-term vacation rentals to properties meeting specific locational and licensing criteria."

* * *

RALPH GUTIERREZ, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-001285. Admin. Hearing D.L. # G362-720-80-128-0. November 17, 2022. Petition for Writ of Certiorari from Petitioner. Counsel: Ralph Gutierrez, Pro se, Petitioner. Michael Lynch, Assistant General Counsel, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition and its Appendix, and the applicable law, the Petition for Writ of Certiorari is hereby **DENIED**. (BOWMAN, ALSPECTOR, and CASEY, JJ., concur.)

* * *

SELLITTI FAMILY LIMITED PARTNERSHIP, a West Virginia Limited Partnership, Petitioner, v. TOWN OF LAUDERDALE-BY-THE-SEA, Florida municipal corporation, and DAVID STAUDACHER and SHERRI STAUDACHER, Individually, Respondents. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 22-004467. Admin. Hearing January 10, 2022. November 17, 2022. Petition for Writ of Certiorari of Final Administrative Order, from Sellitti Family Limited Partnership, a West Virginia Limited Partnership. Counsel: Henry B. Handler, Weiss, Handler & Cornwell, PA, Boca Raton, for Petitioner. Laura K. Wendell, Weiss Serota Helfman Cole & Bierman, P.L., Fort Lauderdale, for Respondent The Town of Lauderdale-By-The-Sea. Ian E. DeMello, Shubin & Bass, P.A., Miami, for Respondents David Staudacher and Sherri Staudacher.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition and its Appendix, the Responses, the Reply and the applicable law, the Petition for Writ of Certiorari is hereby **DENIED**. (J. BOWMAN, S. ALSPECTOR, and D. CASEY, JJ., concur).

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to breath test—Collateral estoppel—Fact that defendant was found not guilty of charge of refusing to submit to breath test did not bar state from introducing refusal evidence in defendant's separate trial for DUI—Determination of whether a person refused a breath test in a prosecution for refusing to submit is based upon factors that are not identical to those considered when determining admissibility of refusal evidence in a DUI prosecution—Refusal to submit was admissible as evidence of consciousness of guilt where defendant testified that he refused to submit to breath test and that he was told refusal would result in suspension of driving privilege

STATE OF FLORIDA, Appellant, v. MICHAEL CARY MCINTOSH, Appellee. Circuit Court, 18th Judicial Circuit (Appellate) in and for Brevard County. Case No. 05-2016-AP-025057-AXXX-XX. L.T. Case No. 05-2016-CT-014102-AXXX-XX. February 22, 2017. Appeal from Brevard County Court, Cathleen Clarke, Judge. Counsel: John M. Toppa, III, Assistant State Attorney, for Appellant. Ryan McCarville, Assistant Public Defender, for Appellee.

(PER CURIAM.) The Appellee was charged with DUI as well as refusing to submit to a breath test. The charges were severed and the Appellee proceeded to trial upon the charge of refusing to submit to a breath test. The jury returned a verdict of not guilty. Based upon the jury's verdict, the Appellee sought to prevent the State from admitting any evidence regarding the Appellee's refusal to submit to a breath test in his subsequent DUI trial. The trial court granted the Motion in Limine finding that the evidence was barred by collateral estoppel and would be inadmissible in the Appellee's trial for DUI. The State appealed the trial court's Order.

In *Grzelka v. State,* 881 So. 2d 633 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a], the Court considered whether evidence regarding an individual's refusal to submit to investigative testing is admissible in a DUI trial. The Court determined that as long as an individual was advised of one adverse consequence, evidence that the defendant refused to submit to investigative testing would be admissible as it tends to prove a consciousness of guilt. *Id.* at 634. During the trial for refusing to submit to a breath test, the Appellee testified that he refused to submit to a breath test and that he was advised that refusal would result in a suspension of his driving privilege. Thus, the evidence would be admissible in his DUI trial as evidence of consciousness of guilt.

"For the doctrine of collateral estoppel to preclude relitigation of an issue in a subsequent action, the parties and issues must be identical, and the particular matter must have been fully litigated and determined in a contest resulting in a final decision of a court of competent jurisdiction. *Dep't of Health & Rehabilitative Servs. v. B.JM.,* 656 So.2d 906, 910 (Fla.1995) [20 Fla. L. Weekly S188a]. The refusal element of "refusing to submit" is not determined by a jury until after the jury determines whether the individual was warned that his or her driving privilege would be suspended and that the individual was warned that he or she could be charged with a misdemeanor if his or her driving privilege had previously been suspended based upon a refusal to submit. Thus, the determination whether an individual refused in a prosecution for "refusing to submit" is based upon factors that are not identical to those considered when determining the admissibility of evidence regarding an individual's refusal to submit in a DUI prosecution. Accordingly, the evidence is not rendered inadmissible based upon collateral estoppel.

The Order Granting Motion in Limine is **REVERSED** and this matter is **REMANDED** for proceedings in accordance with this opinion. (ROBERTS, TAYLOR and REINMAN, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Criminal law—Attempted second degree murder—Six-person jury—Constitutionality—Although applying original-intent analysis that Supreme Court would apply leads to inevitable conclusions that use of six-member jury in Florida felony trials violates Sixth Amendment and that decision in *Williams v. Florida* holding that six-person juries are constitutional is no longer the law, recent decision from Fourth DCA concluding that *Williams* is still the law compels trial court to deny defendant's motion for twelve-person jury

STATE OF FLORIDA, Plaintiff, v. ULYSES WEST, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F20-9878. December 2, 2022. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S DEMAND FOR A TWELVE-PERSON JURY

> Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law that I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing around. The same thing was done, if I remember right, by the Founder of Christianity.
>
> — from G. K. Chesterton, "The Twelve Men"

Defendant Ulyses West is charged with attempted second-degree murder and related crimes. If convicted, he faces life in prison.

In Florida such crimes are ordinarily tried to a jury of six, as provided by the Fla. Const. Art. I § 22 and Fla. Stat. § 913.10 ("six persons shall constitute a jury to try all [non-capital] cases"). Defendant argues, however, that as a consequence of the opinion of the Supreme Court of the United States in *Ramos v. Louisiana,* 590 U.S. __ (2020) [28 Fla. L. Weekly Fed. S144a], and, more broadly, the principles of "originalism" or "original intent" reflected in that opinion (and indeed in so much of the Supreme Court's contemporary jurisprudence), six-person felony juries must now be deemed violative of the Sixth Amendment to the Constitution, as made applicable to the states by the Fourteenth Amendment, *see, e.g., Missouri v. Frye,* 566 U.S. 134, 138 (2012) [23 Fla. L. Weekly Fed. S198a]; *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968).

I. "Originalism"

The Supreme Court has, in recent years, made clear not once but repeatedly and emphatically that the cynosure of constitutional adjudication is "original intent."[1] Whether this hermeneutic approach is wise or foolish is not for a state-court trial judge—one of the hewers of wood and drawers of water of the judicial system—to say. It is undeniably the position of the justices presently constituting the Supreme Court that the Constitution is to be interpreted according to its "original intent."[2] In accordance with that position, Defendant avers that Florida's use of six-person juries in serious criminal trials is unconstitutional.

II. *Williams v. Florida*

On its face, Defendant's argument appears to be foreclosed by *Williams v. Florida,* 399 U.S. 78 (1970). In that case as in this one, a Florida criminal defendant raised the issue "whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six." *Williams,* 399 U.S. at 86.

The *Williams* court conceded that it had, or appeared to have, resolved that issue previously. In *Thompson v. Utah,* 170 U.S. 343 (1898), "the Court announced . . . that the jury referred to in the [Sixth] Amendment was a jury 'constituted, as it was at common law, of twelve persons, neither more nor less.' " *Williams,* 399 U.S. at 90-91 (quoting *Thompson,* 170 U.S. at 349). "Subsequent decisions have reaffirmed th[at] announcement in *Thompson*." *Williams*, 399 U.S. at 91-92 (citing *Patton v. United States,* 281 US. 276 (1930); *Rassmussen v. United States,* 197 U.S. 516 (1905); *Maxwell v. Dow,* 176 U.S. 581 (1900)).

But the *Williams* court began its reconsideration of the issue by dismissing "the intent of the Framers" as nothing more than "an elusive quarry," *Williams* at 92, not at all the lodestar of constitutional analysis. Indeed apropos the issue raised by *Williams,* original intent was deemed a quarry too elusive to be worth pursuing; the Court chose to "turn[ ] to other than . . . historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution." *Id.* at 99. Instead of original intent and contemporary historical evidence, "The relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment." *Id.* at 99-100. Although felony juries had consisted of 12 jurors since the 14th century, and were known to the Founders' generation to have consisted of 12 jurors since the 14th century, "that particular feature of the jury system"—the use of 12 jurors, neither more nor less—"appears to have been a historical accident." *Id.* at 89; *see also id.* at 102 ("the fact that the jury at common law was composed of precisely 12 is a historical accident").

Justice Harlan dissented on this issue, and in so doing adumbrated *Ramos v. Louisiana* and like-kind originalist jurisprudence. He began by taking the majority to task for forsaking the available and ample historical evidence underlying the Sixth Amendment. "History," according to Justice Harlan, "continues to be a wellspring of constitutional interpretation" in this context. *Williams* at 124 (Harlan, J., dissenting). The majority's analysis "strip[s] off the livery of history from the jury trial." *Id.* at 122 (Harlan, J., dissenting).

> With arduous effort the Court first liberates itself from the "intent of the Framers" and "the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." . . . Unburdened by the yoke of history the Court then concludes that the policy protected by the jury guarantee does not require its perpetuation in common-law form.

Id. at 122-23 (Harlan, J., dissenting).

Part and parcel of the majority's disregard of original intent was its "argument . . . that the number '12' is a historical accident." *Id.* at 125 (Harlan, J., dissenting). For Justice Harlan, this was beside the point. Perhaps the reason or reasons that juries consist of 12—as they had done for nearly half a millennium at the time the Constitution was authored, as they have done for more than seven centuries now—is indeed so thoroughly lost in the mists of history that no more can be done than to describe it as an "accident."[3] Perhaps the reason is as suggested by the great English author and poet G. K. Chesterton in the quotation appearing at the outset of this order. Perhaps there is another reason, unknown and unconsidered. It matters not. At the time of the drafting of the Constitution[4] and the Bill of Rights, the definition of "jury" included the number 12. That, as Justice Harlan points out, is undeniably what the Framers *understood* "trial by jury" to mean. That, as justice Harlan points out, is undeniably what the Framers *intended* "trial by jury" to mean. Where that number came from had long since ceased to be consequential. Suppose, as the *Williams* majority does,

that the number 12 was, indeed, hit upon by historical accident. Penicillin was hit upon by accident, but we do not for that reason ask doctors to pretend that it does not exist, or that it does not matter.

III. *Ramos v. Louisiana*

Florida v. Williams was relied upon when, in *Apodaca v. Oregon,* 406 U.S. 404 (1972), the Court concluded that a jury verdict in a criminal case could be less than unanimous. *See also Johnson v. Louisiana*, 406 U.S. 356 (1972). Nearly half a century later, in *Ramos v. Louisiana,* the Court explained why *Apodaca* was wrong; and, by unavoidable implication, why *Williams* must be wrong.

Rather than consulting original intent, the plurality in *Apodaca* "declared that the real question before them was whether unanimity serves an important 'function' in 'contemporary society." *Ramos,* 590 U.S. at __ (citing *Apodaca,* 406 U.S. at 410). Having defined the constitutional issue in that way, the plurality "conclud[ed] that unanimity's costs outweigh its benefits in the modern era," *Ramos* at __, such that the requirement of unanimity could be jettisoned from the constitutional guarantee of trial by jury without doing damage to that guarantee. That hermeneutic approach, offered as an alternative to originalism, is, according to *Ramos,* what made *Apodaca* entirely wrong.

> Our real objection here isn't that the *Apodaca* plurality's cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. . . . [A]t the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. . . . We [judges] are entrusted to preserve and protect that liberty, not balance it away.

Ramos at __. Replace "a unanimous verdict" with "a 12-person jury" and the foregoing paragraph could have been written for the case at bar.

In truth much of *Ramos* could have been written for the case at bar. Rather than employ a "functionalist" or "cost-benefit" analysis, the *Ramos* court consulted "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward," *Ramos* at __. It quoted, for example, from Blackstone for the proposition that no felony defendant could be convicted unless "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors." *Ramos* at __ (quoting 4 Wm. Blackstone, *Commentaries on the Laws of England* 343 (1769)).[5] That passage was offered in *Ramos* to support the requirement of a unanimous verdict; but it supports equally the requirement of a 12-person jury.

Other statements of "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward" are to the same effect. For example: "Accusations of criminal conduct are tried at the common law by jury; and wherever the right to this trial is guaranteed by the constitution without qualification or restriction, it must be understood as retained . . . with all the common-law incidents to a jury trial." Thos. Cooley, *A Treatise on the Constitutional Limitations* 453-54 (7th ed. 1903).[6] A trial "jury is a body of twelve men . . . . Any less than this number of twelve would not be a common-law jury, and not such a jury as the Constitution guarantees to accused parties." *Id.* at 455-57. "Twelve constitute a common-law jury; hence all our courts hold that a less number will not satisfy the constitutional guaranty of a jury trial." Joel Prentiss Bishop, *Criminal Procedure* § 897 p. 521 (4th ed. 1895) (collecting cases).[7] So fundamental to the meaning of the word "jury" was the concept of 12 jurors that the very institution of the jury itself was often referred to by the figure of speech, "twelve good men and true." *See, e.g.,* Cockburn and Green, ed., *Twelve Good Men and True: The Criminal Trial Jury in England 1200-1800* (1988).[8]

Typical of early American jurisprudence is a 1727 enactment of the State of Delaware, entitled "An Act of Privilege to a Free Man," which provides:

> That no free man within this government shall be taken or imprisoned, or disseized of his freehold or liberties, or be outlawed or exiled, or other ways hurt, damnified, or destroyed, nor to be tried or condemned but by the lawful judgment of his twelve equals, or by the law of England, and of this government.

1 Laws of the State of Delaware 119 (1797).

There is no support—none whatever—for any notion that at or about the time the Constitution was framed, twelve-person juries were used solely in capital cases, with juries of lesser numbers used in other felony cases (as is the case in Florida today).[9] While the Revolutionary War raged, the General Assembly of New Jersey, on October 8, 1778, passed a statute designed to control traffic in and out of enemy lines. Among other things, it provided for seizure of persons and goods, vested powers of adjudication in justices of the peace, and allowed a six-person jury on demand of either party. In 1779 a seizure made under the new act was brought before a Monmouth County justice for adjudication and tried to a six-man jury. Although the statute appeared to cut off all right to appellate review, the state supreme court accepted the matter and, on September 7, 1780, reversed the judgment below. There is no written record of the supreme court's opinion, but such historical remnants as exist make clear that reversal was based on the unconstitutionality of a six-person jury in a criminal case. Bernard Schwartz, *A History of the Supreme Court* 7 (1993).

I recognize that *Williams* is still in the law books, and that I would ordinarily be bound to follow it until the Supreme Court formally recedes from it. But the functionalist analysis, the cost-benefit analysis, that the plurality employed in *Apodaca* and that the Court expressly and emphatically repudiated in *Ramos* is precisely the analysis employed in *Williams.* The conclusion that *Williams* "was egregiously wrong from the start," *Dobbs v. Jackson Women's Health Organization,* 597 U.S. __, __, 142 S.Ct. 2228, 2243 (2022) [29 Fla. L. Weekly Fed. S486a], and would also be repudiated if it were to come before the Court now, is inescapable. The Court would employ original-intent analysis, and would inevitably conclude that the jury guaranteed by the Sixth Amendment is a jury of twelve.

Florida felony juries of six may be convenient. They may be efficient. But they are not constitutional. Of course the Sixth Amendment, like its Florida congener, could be amended, *see* U.S. Const. Art. V, to interpolate after the word "jury" the phrase "which shall consist of not fewer than six"—or four, or three, or two—"jurors." Until that very unlikely amendment is made, however, Florida's use of six-person juries in serious criminal cases will remain unconstitutional.

IV. Additional considerations

Even on its own "functionalist" terms, *Williams* fails. *Williams* asserts that:

> The performance of [the jury's] role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size.

Williams, 399 U.S. at 100-01 (fn. omitted). These assertions are

offered with meager citation to decisional, social-scientific, or other authority. For example, "[t]he *Williams* Court had scant support for its conclusion that, 'there is no discernible difference between the results reached by the two different-sized juries'." Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size,* 21 Law & Hum. Behav. 451, 452 (1997). The *Williams* majority simply assumes that the performance of the jury's "role is not a function of the particular number of" jurors, *Williams,* 399 U.S. at 100. Treating trial by jury, not as having value as an end in itself but merely as a means to other ends, other goals, the *Williams* majority simply assumes that "these goals are [not] . . . less likely to be achieved when the jury numbers six, [rather] than when it numbers 12." *Id.* The *Williams* majority assumes that "the reliability of the jury as a factfinder hardly seems likely to be a function of its size." *Id.* at 100-01.

We know more now than we did half-a-century ago when *Williams* was written. We have social-scientific evidence now which entirely debunks these functionalist assumptions. *See, e.g., A Meta-Analysis of the Effects of Jury Size, supra* at 465 (reporting social-scientific evidence that "the size of the jury affects jury decision processes. . . . Smaller juries are more likely to contain no members of minority groups. Twelve-person juries spend more time in deliberation . . . [and] accurately recall more trial testimony"); *see also* Barbara Luppi & Francesco Parisi, *Jury Size and the Hung-Jury Paradox,* 42 J. Legal Stud. 399 (2013); Monica K. Miller & Michelle N. Kazmar, *Psychology Research and Public Opinion Do Not Support Proposed Changes to the Jury System,* 30 Hamline L. Rev. 285 (2007); Alisa Smith & Michael J. Sacks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence,* 60 Fla. L. Rev. 441 (2008); *Sixth Amendment—The Required Number of Jurors,* 69 J. Crim. L. & Criminology 516 (1978).[10]

But the most important post-*Williams* development in this regard is the Court's own opinion in *Ballew v. Georgia,* 435 U.S. 223 (1978), in which Justice Blackmun was given what was no doubt the difficult and awkward job of explaining why reducing jury size by six (from 12 to six) did no violence to the Sixth Amendment guarantee of trial by jury, but reducing jury size by one (from six to five) did. *Ballew* involved a Georgia trial before a jury of five.

Justice Blackmun made far-reaching concessions. He acknowledged, for example, that "recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity." *Ballew,* 435 U.S. at 232-33. He acknowledged that, "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result." *Id.* at 233. He acknowledged that, "Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes." *Id.* at 234. He acknowledged that, "post-*Williams* studies . . . raise significant doubts about the consistency and reliability of the decisions of smaller juries." *Id.* at 235. He acknowledged that, "the data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense." *Id.* at 236. All these far-reaching concessions are consistent with what we now know about the jury trial process. All these far-reaching concessions are inconsistent with the unsupported and unsupportable functionalism of *Williams.*

Justice Blackmun was not alone in making these concessions. Concurring for the Chief Justice and Justice Rehnquist as well as himself, Justice Powell frankly admitted that, "the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved." *Id.* at 245-46 (Powell, J., concurring). But as originalist sources make clear, *see* discussion *supra* at 8-11, the line that had to be drawn somewhere had been drawn very clearly by those who wrote the Constitution. It had been drawn at the number 12.

Whether viewed in terms of the functionalism that it embraces or the originalism that it rejects, *Williams* has not survived the scholarship of the last half-century. I well recognize my obligation to follow the law as set forth by wiser judges on higher courts. But where, as here, the Supreme Court has made it clear and more than clear that it will return from a road erroneously taken, *see Ramos v. Louisiana, supra,* it is difficult for a judge of a lower court to feel obliged to follow that road in pursuit of further error.

Florida v. Williams is an emperor wearing no clothes. The United States Supreme Court will not continue pretending that the emperor is sumptuously attired. Must I continue to pretend?

V. Conclusion

Had this order been filed six weeks earlier, it would have ended here. I would have concluded that *Florida v. Williams* is no longer the law, and that Defendant is entitled to a jury of 12. In the interim, however, an appellate court of this state has concluded the contrary.

Ramos v. Louisiana was decided two years ago. While the vaunted Miami criminal defense bar, public and private, temporized and dawdled, a lawyer in St. Lucie County, Florida, appears to have raised the issue at bar. In the ordinary course, the matter then wound its way to the Fourth District Court of Appeal which, less than six weeks ago, decided *Guzman v. State*, __ So.3d __ (Fla. 4th DCA Oct. 26, 2022) [47 Fla. L. Weekly D2154a].

In *Guzman,* the Fourth District found that the issue of a 12-person jury was likely not properly before it, *Guzman,* __So.3d at __; but that if it was, the Supreme Court in *Ramos* "ha[d] not revisited its express holding in *Williams*," *Guzman*, at __, and the Supreme Court "does not normally overturn . . . earlier authority *sub silentio*." *Id.* (quoting *Shalala v. Illinois Council on Long Term Care,* 529 U.S. 1, 18 (2000)). Noting how terse is the *Guzman* majority's discussion of this issue, Defendant asks me to pass over it as mere *dictum.* It is terse. But it is not *dictum.*[11]

By operation of Florida's well-settled "*Pardo* rule," *see Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992), I am, in the absence of a binding decision from the Third District, bound by a decision from the Fourth District. As a judge of a lower court, I must follow controlling appellate case law. But judges of lower courts "may state their reasons for advocating change" while they follow controlling appellate case law. *Hoffinan v. Jones,* 280 So. 2d 431, 434 (Fla. 1973). I have done so. *See supra* at 7-11; *see also Guzman,* __ So. 3d at __ (Gross, J., concurring) ("The *Ramos* majority . . . contains references to the common law requirement of a 12-person jury and suggests that the Sixth Amendment affords a right to the essential elements of a trial by jury as understood and applied at common law").

We will be ignoring, not effectuating, the intent of the Supreme Court, not to say the intent of our Constitution's Framers, by trying this defendant before a jury of fewer than 12 good men and women and true. We will be ignoring a constitutional right.

But like every lower-court judge I must obey the decisions of higher courts, "agreeing with some, disagreeing with some, following all, because our bondage to the law is the price of our freedom." *Johnson v. Johnson,* 284 So. 2d 231, 231 (Fla. 2d DCA 1973). *Guzman* has considered *Ramos* and found *Williams* still to be the law. I sincerely hope and confidently believe that the Third District will find otherwise. Until it does, however, Defendant's motion for a 12-person jury must be respectfully denied.

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[1]It is, therefore, of merely historical interest that prior generations of Supreme Court justices took a decidedly contrary position. *See, e.g., Weems v. United States,* 217 U.S.

349, 373 (1910):

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.

A decade after *Weems,* Oliver Wendell Holmes wrote:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Missouri v. Holland, 252 U.S. 416, 433 (1920).

In *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 442-3 Chief Justice Charles Evans Hughes had this to say about "original intent:"

> If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

And in an unpublished concurring opinion that could have come from no pen but his, Justice Cardozo added:

> To hold this may be inconsistent with things that men said in 1787 when expounding to compatriots the newly written constitution. They did not see the changes in the relation between states and nation or in the play of social forces that lay hidden in the womb of time. It may be inconsistent with things that they believed or took for granted. Their beliefs to be significant must be adjusted to the world they knew. It is not in my judgment inconsistent with what they would say today, nor with what today they would believe, if they were called upon to interpret "in the light of our whole experience" (in Holmes's words) the Constitution that they framed for the needs of an expanding future.

In his separate opinion in the "steel seizure" case, *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579, 634 (1952), Justice Robert Jackson opined that, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."

[2]*See, e.g., New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127-27 (2022) [29 Fla. L. Weekly Fed. S440a] (Thomas, J.); *Gamble v. United States,* 139 S. Ct. 1960, 1989 (2019) [27 Fla. L. Weekly Fed. S926a] (Thomas, J., concurring) ("Our judicial duty to interpret the law requires adherence to the original meaning of the" Constitution); *Baze v. Rees,* 553 U.S. 35, 94 (2008) [21 Fla. L. Weekly Fed. S164a] (Thomas, J., concurring). *See, e.g., Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2266 (2022) [29 Fla. L. Weekly Fed. S486a] (Alito, J.); *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1888 *et. seq.* (2021) [28 Fla. L. Weekly Fed. S882a] (Alito, J., concurring). *See, e.g., Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407, 2428 (2022) [29 Fla. L. Weekly Fed. S543a] (Gorsuch, S.) (stressing "analysis focused on original meaning" of the Constitution); *Fulton v. City of Phildelphia,* 141 S. Ct. at 1931 (Gorsuch, J.) ("no excuse for refusing to apply the original public meaning" of the Constitution); *Torres v. Madrid,* 141 S. Ct. 989, 1003 (2021) [28 Fla. L. Weekly Fed. S693a] (Gorsuch, J., dissenting) ("the majority must disregard the Constitution's original and ordinary meaning"); *See, e.g., Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.* 537 F. 3d 667, 688 (D. C. Cir. 2008) (Kavanaugh, J., dissenting) ("it is always important . . . to begin with the constitutional text and the original understanding").

[3]"The requirement of twelve in the petit jury, unless by consent, and the need of unanimity, seemed now"—*i.e.,* by the 14th century—"to have become the settled rule." James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 89-90 (1898). Professor Thayer then quotes with approval the following passage from an earlier work, which he identifies as "Duncomb's Trials *per Pais,* (1665)."

> And first as to their [*i.e.,* the jury's] number twelve: and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve. 1 Kings iv. 7. . . . Therefore not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters in law, in the Exchequer Chamber, and there were twelve counsellors of state for matters of state; and he that wageth his law must have eleven others with him who believe he says true. And the law is so precise in this number of twelve, that if the trial be by more or less, it is a mistrial.

[4]Apart from the language of the Sixth Amendment, the Constitution provides at Art. III § 2 that, "The trial of all crimes, except in cases of impeachment, shall be by jury." The guarantee of trial by jury is the only one of the rights of liberty that appears in both the original Constitution itself and the Bill of Rights.

[5]The widespread reliance on Blackstone by American lawyers and judges during the era in which the Constitution was drafted is well documented. "Over 1,000 copies of Blackstone's *Commentaries* were imported to America before 1772, and 1,400 copies of the first American edition in 1772 were subscribed for in advance by virtually every leading member of the American legal profession." Randy J. Holland, *Anglo-American Templars: Common Law Crusaders,* 8 Del. L. Rev. 137, 148 (2006). And the 39 men who signed the Constitution were themselves singularly well-versed in the common law. Seven of them—William Livingstone, John Blair, John Dickenson, John Rutledge, Charles Coteswood Pickney, Charles Jared Ingersoll, and Charles Pickney—were members of Middle Temple, one of the four Inns of Court at which English barristers studied. Allen E. Shoenberger, *The United States' Constitutional History through the Barristers and Political Theories of the Middle Temple Inn of Court,* 18 J. Juris 117, 118 (2013), *available online at* https://lawecommons.luc.edu/facpubs/623/.

[6]The first edition of Judge Cooley's magisterial treatise was published in 1868. It has been described as "the most influential treatise of constitutional law in the second half of the nineteenth century." Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism,* 18 Georgetown Journal of Law & Public Policy 49 (2020).

[7]The first edition of Bishop's treatise, which was to the same effect as to this point, dates to 1866. The cases upon which it relies to support the proposition that a criminal jury must, as a matter of constitutional law, consist of 12 jurors, are collected from reported opinions in the state courts of Illinois, Indiana, Nevada, Ohio, Michigan, Mississippi, Missouri, Texas, Wisconsin, and elsewhere.

[8]In *Measure for Measure,* Act II sc. 1, Shakespeare, after referring to "[t]he jury," then offers the appositive, "the sworn twelve."

[9]Defendant argues that a six-person jury deprives him of his jury-trial right under the federal, not the Florida, Constitution. But even Florida courts have recognized that a jury, as understood by the drafters of the United States Constitution, consisted of 12. Between June 13, 1892, and June 3, 1899, there was no statute in effect in Florida setting the number of jurors for civil trials. In *Florida Fertilizer & Mfg. Co. v. Boswell,* 34 So. 241, 45 Fla. 301 (Fla. 1903), the Florida Supreme Court was presented with a challenge to a six-person jury in a civil trial that occurred in March of 1899. In resolving the challenge, the court relied upon the common-law savings clause of the Florida Constitution, now Fla. Stat. § 2.01, which provides that the common law as it existed on July 4, 1776, is the law of Florida unless superceded by positive constitutional or statute law. Because the trial at bar took place during that hiatus when there was no positive law authorizing six-person juries, 12 jurors were required (as would have been the case under the common law on July 4, 1776), and the judgment was reversed. *Florida Fertilizer & Mfg.,* 34 So. at 242, 45 Fla. at 304-05.

[10]For a plenary list of relevant social-scientific studies—plenary as of the time that *Ballew v. Georgia* was written—*see Ballew*, 435 U.S. at 231 n. 10.

[11]In *Khorrami v. Arizona,* 598 U.S. __ (2022) [29 Fla. L. Weekly Fed. S643b], the Court denied *certiorari* in a case raising the issue raised herein. *Guzman* is precedential; by contrast, it is a principle too well-settled to invite citation to authority that the mere denial of *cert* is not precedential.

* * *

Criminal law—Racketeering Influenced and Corrupt Organization Act—Motion to reinstate RICO charge that state conceded should be dismissed based on governing law at the time is denied—RICO charge was dismissed with prejudice, and reinstatement would result in piecemeal prosecution since defendant has already been tried for related charges—Fact that jury hung on some of those related charges does not provide exception to rule barring piecemeal prosecution

STATE OF FLORIDA, Plaintiff, v. BENSON CADET, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case Nos. F07-31111B & F15-5361, Section 60. August 14, 2022. Miguel M. de la O, Judge. Counsel: Joshua Weintraub, for Plaintiff. Scott Sakin and Jeffrey Weinkle, for Defendant.

ORDER DENYING THE STATE'S MOTION TO REINSTATE COUNT II

THIS CAUSE came before the Court on the State of Florida's ("State"), Motion to Set Aside Prior Non-Final Ruling and to Reinstate Count II—RICO ("Motion"). The Court has reviewed the Motion, the Defendant, Benson Cadet's ("Cadet"), Response to the Motion, heard argument of counsel, and is fully advised in the premises. The Motion is **DENIED**.

I. BACKGROUND.

In 2007, Cadet was indicted on 26 counts, which included charges of RICO Conspiracy, RICO, First Degree Murder, Attempted First Degree Murder, and Conspiracy to Commit First Degree Murder. In 2016, Cadet and several co-Defendants filed motions to dismiss Count I (RICO Conspiracy) and Count II (RICO). It is undisputed that the

State conceded—based on the governing law at the time—that Count II should be dismissed. We know based on the transcript of the hearing that but for the State's concession this Court's predecessor, Judge Dava Tunis, would have denied the motion to dismiss Count II as to Cadet. *See* September 9, 2016 Transcript at 6 ("So, therefore, at this time the court is going to deny the defendants' motion as it relates to both counts one and two, motion to dismiss of the RICO and RICO conspiracy. But for the concession that I already mentioned that was provided by the State with regards to—two of the defendants[, Benson Cadet and Robert St. Germaine,] that I have already spoken about and that's the court ruling.") (cleaned up).

Cadet proceeded to trial in 2019 on all the counts for which he was indicted except Count II. The jury convicted Cadet of Count I, acquitted Cadet of two counts, Judge Tunis acquitted him of seven counts, and the State nolle prossed six counts on which the jury could not reach a verdict, leaving nine counts to be tried.

Cadet is currently specially-set for trial on September 6, 2022 pursuant to an amended trial order this Court issued on March 13, 2022. All pretrial motions have been argued (except one), and all have been ruled upon (except one). 300 jurors have been specially summoned for voir dire.

The Third District Court of Appeal recently issued an opinion in the case of Cadet co-Defendant, Frantzy Jean-Marie. *Jean-Marie v. State*, 339 So. 3d 1084 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1168a]. Although this opinion was issued on June 1, 2022, the State waited nearly two months to file the Motion. As a result of the decision in *Jean-Marie*, the State now believes it should not have agreed to dismiss Count II and seeks to "reinstate" Count II.[1] Cadet characterizes the State's Motion not as an effort to "reinstate," but rather as a successive prosecution.

In its simplest form, the State's argument is that Judge Tunis orally dismissed Count II with the agreement of the State, but did not enter a written order. Because it was not reduced to writing, the order dismissing Count II was not a "rendered" final order and the State could not appeal it. Therefore, even though the State had no intention of appealing Judge Tunis' dismissal of Count II, it nevertheless seeks to have this Court set aside the non-final order and reinstate Count II. Unsurprisingly, the State cannot point to any precedent for this novel argument.

The Court concludes that the Motion should be denied. There are many reasons for why the State's position is not well-taken, likely even some this Court is not wise enough to identify. The Court will focus only on two.

II. RULE 3.151(C) BARS PIECEMEAL CRIMINAL PROSECUTIONS.

Florida Rule of Criminal Procedure 3.151(c) provides:

> Dismissal of Related Offenses after Trial. When a defendant been tried on a charge of 1 of 2 or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion unless a motion by the defendant for consolidation of the charges has been previously denied, or unless the defendant has waived the right to consolidation, or unless the prosecution has been unable, by due diligence obtain sufficient evidence to warrant charging the other offense or offenses.

The Rule requires the State to prosecute all charges that arise from the same conduct at one time. "Rule 3.151(c) is a mandatory joinder rule that . . . compels a trial court to dismiss charged offenses that are so connected to those for which a defendant has already been tried that they could have been joined or consolidated in the original case." *State v. Varnum*, 991 So. 2d 918, 920 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1916a].

The Rule is intended to "protect defendants from successive prosecutions based upon essentially the same conduct." *Brown v. State*, 251 So. 3d 973, 975 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1553a]; *see State v. Harris*, 357 So. 2d 758, 759 (Fla. 4th DCA 1978) ("the purpose behind a rule such as our Rule 3.151 is to protect defendants from 'successive prosecutions based upon essentially the same conduct.' "); *Dixon v. State*, 486 So. 2d 67, 69 (Fla. 4th DCA 1986) ("The purpose behind rule 3.151(c) is to allow the defendant a means to protect himself (by motion to dismiss) from multiple trials on charges of related offenses when he has already suffered a prior trial on a related offense."); *see also State v. Gibson*, 682 So. 2d 545, 547 (Fla. 1996) [21 Fla. L. Weekly S465a] ("We agree with the interpretations of the rule reached in *Dixon v. State*, 486 So. 2d 67, 69 (Fla. 4th DCA 1986) and *State v. Harris*, 357 So. 2d 758, 759 (Fla. 4th DCA 1978)") (cleaned up).

Obviously, Count II is related to the charges for which Cadet was tried in 2019. If the State is allowed to "reinstate" Count II, Cadet would be subject to prosecution for essentially the same conduct as was litigated in his 2019 trial. Suffice it to say that the 2019 trial featured all of the predicate acts which are alleged to constitute the basis for Count II which the State now seeks to "reinstate."

The State's response is that although the acts are related, the State is entitled to a windfall from the fact the jury hung on some counts in 2019. The State candidly admits that if Cadet's jury had reached verdicts on all counts in 2019, the State would be foreclosed from "reinstating" Count II. This is exactly the result which Rule 3.151 forbids.[2]

There is no exception in the Rule for retrials following a hung jury. The Rule refers to the defendant having "been tried," it does not require that the jury have reached a verdict. In *Franklin v. State*, 719 So. 2d 938 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2177a], the defendant was charged with DUI manslaughter and leaving the scene of an accident involving death. At trial, the jury acquitted the defendant of leaving the scene of an accident involving death but hung on the DUI manslaughter charge. Before the retrial on the DUI manslaughter charge, the State amended the information to add a count for leaving the scene of an accident involving injuries. The trial court denied the defendant's motion to dismiss this new charge. The First DCA reversed based on Rule 3.151(c) because Franklin had been tried for a related offense; the fact the State was entitled to a retrial on a different charge did not allow the State to add a new charge.

> [Rule 3.151(c)] applies to defendants who have been subjected to a trial on one of the related offenses. . . . [The] commentary under the ABA Standards Relating to Joinder and Severance, Approved Draft 1968, which stated that if the defendant is actually tried for one offense, the defendant may thereafter move for dismissal of a charge on a related offense if he or she was unaware of the charge or *there was no such charge at the time of the first trial.*

Id. at 940 (emphasis added). Therefore, because the State proceeded to try Cadet in 2019 on all charges other than Count II—charges which there can be no dispute relate to Count II, Rule 3.151(c) bars the State from attempting to revive Count II.

III. THE STATE DISMISSED COUNT II WITH PREJUDICE.

At the hearing on the motions to dismiss Counts I and II in 2016, Judge Tunis and the State engaged in the following discussion:

> THE COURT: So, essentially you are is conceding that is Benson Cadet and Robert St. Germaine.
>
> MR. ROSENBLATT: As far as is substantive RICO in count two. We cannot go forward and obtain a guilty verdict as to those instances.
>
> THE COURT: So, for purposes of Juan [the Clerk], who is writing this down, for count two on the case, the state is abandoning or agreeing that count two—
>
> MR. ROSENBLATT: Would not apply to those two defendants.
>
> THE COURT: In Robert St. Germaine and who dismissed.
>
> MR. HOWELL: Robert St. Germain and Benson Cadet.

THE COURT: [Robert] St. Germaine and Benson Cadet will be dismissed.

MR. ROSENBLATT: As to those two defendants, yes.

September 8, 2016 Transcript at 42-43.

The State conceded that it could not "go forward and obtain a guilty verdict as to" Count II against Cadet. As a result, Judge Tunis denied the Defendants' motions to dismiss Count II except as to the concessions the State made regarding Cadet. September 9, 2016 Transcript at 4, 6. The State dismissed Count II *despite* the fact that Judge Tunis ruled that the motions to dismiss were deficient under rule 3.190(c)(4). *Id.* at 6. In other words, Judge Tunis denied the motions to dismiss, but it was the State that insisted she nevertheless dismiss Count II as to Cadet.

Although neither the State nor Cadet could point this Court to a case with the same fact pattern, the Court finds *State v. Anders*, 388 So. 2d 308 (Fla. 3d DCA 1980) particularly instructive and persuasive. In *Anders*, the State was not ready to proceed on the day of trial. The trial court, on motion of the Defendant, dismissed the case for lack of prosecution when the State refused to enter a nolle prosse. The Third DCA noted that "[b]y failing to take a nolle prosse, and explicitly declining to move for another continuance—either of which would have maintained some life in the case—the state clearly invited the court to administer the coup de grace." *Id*. at 308.

There was no such passivity here. The State did not stand silent as Judge Tunis dismissed Count II. Rather, the State asked Judge Tunis to dismiss Count II. If the State's refusal to dismiss or seek a continuance in *Anders* was an *invitation* for "the court to administer the coup de grace," here the State insisted on court-assisted suicide. The State intended the demise of Count II to be final because the State had no intention of appealing the dismissal of Count II in light of the fact that (1) it requested the dismissal of Count II, and (2) if it had wanted to appeal the dismissal it would have requested a written order from Judge Tunis. The dismissal was intended to be final and it is.

In *Anders*, the Third DCA explicitly rejected "gotcha!" tactics, whether employed by the defense or the State. *Id*. at 309 n.4 ("this case may be cited for the proposition that the 'gotcha!' doctrine applies not only to criminal, as well as civil cases, but to the prosecution as well as the defense") (cleaned up). One can hardly imagine a move more "gotcha!" than agreeing a charge should be dismissed, but one trial and six years later arguing that because the Court did not enter a written order, which the State had no intention of appealing at that time, the dismissal was not final and the charge could be revived.

The Third DCA recognized in *Anders* the authority of a trial court to dismiss a case with prejudice when the State abandons a prosecution. *Id*. at 309 n.3. Again, the State's argument here pales in comparison to the facts in *Anders*. In *Anders*, the State refused to go to trial but also refused to seek a continuance. By contrast, the State affirmatively asked that Judge Tunis dismiss Count II. Having obtained exactly what it demanded, the State's Motion is **DENIED**.

[1]Cadet does not argue that the State misapprehends the effect of the recent *Jean Marie* opinion, and that issue is not material to the resolution of the Motion.

[2]Subsection (c) provides that the related charges shall be "dismissed on the defendant's motion." Although no such motion has been filed here, none is necessary because Count II was already dismissed. The Court addresses this Rule because if the Motion were granted, then Cadet would move to dismiss Count II and the Court would have to again dismiss it pursuant to Rule 3.151(c).

* * *

Criminal law—Habeas corpus—Immigration detainee—Circuit court has authority to issue writ of habeas corpus ad prosequendum to request temporary physical custody of defendant in U.S. Immigration and Customs Enforcement custody to enable state to pursue criminal charges against defendant—In *State ex rel. Deeb*, Florida Supreme Court abolished writ as tool to effectuate arrest of defendant from elsewhere in state because it had been superceded by statute, but did not abolish writ as tool to request temporary physical custody from another sovereign—Defendant's status as immigration detainee, not federal prisoner, does not diminish court's authority to issue writ—Arguments that court lacks authority to issue writ because defendant is in ICE custody, because ICE is holding defendant in county outside of court's territorial jurisdiction, and because custodian has not been included as necessary party in litigation lack merit because they confuse writ of habeas corpus ad prosequendum with writ of habeas corpus ad subjiciendum et recipiendum—Writ of habeas corpus ad prosequendum does not test legality of federal detention of defendant or demand anything; it is request for ICE to agree to transfer temporary physical custody of defendant to state—Statutory territorial limitations do not apply to writ of habeas corpus ad prosequendum—No rules or procedures exist requiring that custodian be made party to petition for writ of habeas corpus ad prosequendum, but ICE has been notified of state's efforts to obtain writ—Petition for writ is granted

STATE OF FLORIDA, Plaintiff, v. LI LI, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F22-03511. Section 09. December 9, 2022. Joseph D. Perkins, Judge. Counsel: Joshua H. Hubner and Natasha Mathurin, Assistant State Attorneys, for Plaintiff. Jason Vila and Ariana Aboulafia, Assistant Public Defenders, for Defendant.

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS AD PROSEQUENDUM

Does a Florida Circuit Court have the authority to issue a writ of habeas corpus ad prosequendum to request temporary physical custody of a defendant in United States Immigration and Customs Enforcement ("ICE") custody to enable the State of Florida to pursue criminal charges against the defendant? The answer is yes.

BACKGROUND

The State filed various criminal charges against Li Li. While she was on pretrial release, ICE took her into federal custody. Shortly thereafter, the State filed its August 26, 2022 Petition for Writ of Habeas Corpus Ad Prosequendum ("Petition") asking the Court to request temporary physical custody of Li from ICE.

In her August 31, 2022 Response, Li objected. Her primary argument is that a writ of habeas corpus ad prosequendum does not exist under Florida law. Li also argues that the Court lacks jurisdiction over a person in federal custody under federal law, the Court cannot use the writ to obtain custody of an immigration detainee because immigration proceedings are civil, not criminal, in nature, the State has not included the custodian as a necessary party in this litigation, and the Court lacks jurisdiction because ICE is housing her in Broward County, Florida, outside of the Court's territorial jurisdiction. On October 25, 2022, the State filed its Memorandum of Law addressing Li's arguments,[1] and on December 1, 2022, Li filed her Reply Memorandum. The Court held a hearing on December 9, 2022.

After consideration, the Court **GRANTS** the Petition. As discussed below, the power to issue a writ of habeas corpus ad prosequendum existed at common law, and there is no constitutional provision, statute, or rule abrogating or superseding the writ as a tool to request temporary physical custody of a defendant from another sovereign. Although the Florida Supreme Court in *State ex rel. Deeb v. Fabisinski*, 152 So. 207, 209-10 (Fla. 1933) held that statutes governing statewide issuance of capias and bench warrants superseded the writ, the holding of *Deeb* is limited to intrastate requests for custody of a defendant. Li's remaining arguments fail because they confuse the writ of habeas corpus ad prosequendum with the writ of habeas corpus ad subjiciendum et recipiendum.

PRIMER ON THE WRIT OF HABEAS CORPUS AD PROSEQUENDUM

"Habeas corpus" is a generic term that includes various types of

writs of habeas corpus. *Deeb*, 152 So. at 209-10 (discussing various writs with the words "habeas corpus" in their names); *Ex parte Bollman*, 8 U.S. 75, 84 (1807) (Marshall, C.J.) (same); *see also Carbo v. United States*, 364 U.S. 611, 614-15 (1961). The most famous writ of habeas corpus is the writ of habeas corpus ad subjiciendum et recipiendum, which tests the legality of the petitioner's detention. *Deeb*, 152 So. at 209; *Bollman*, 8 U.S. at 84; *see* Fla. Stat. § 79.01. Due to its public esteem and marked importance, the writ of habeas corpus ad subjiciendum et recipiendum is often referred to as the "Great Writ" or simply as the "writ of habeas corpus" without the additional Latin words. *Deeb*, 152 So. at 210; *Bollman*, 8 U.S. at 95.

Another less popular writ with the words habeas corpus in its name is the common law writ of habeas corpus ad prosequendum (sometimes shortened to "Writ" in this Order), which "issue[s] when it is necessary to remove a prisoner . . . to be tried in the proper jurisdiction . . . ." *Ex parte Bollman*, 8 U.S. at 98; *accord Deeb*, 152 So. at 210; *Cabo*, 364 U.S. at 620. At least when issued by one sovereign and directed to another sovereign, the Writ, unlike the Great Writ, does not command anything. It is a procedure founded in principles of comity among sovereigns, and compliance by the receiving sovereign is a matter of discretion. *Dickey v. Circuit Court, Gadsden County, Quincy Fla.*, 200 So. 2d 521, 523-24 (Fla. 1967) (citing *Ponzi*, 258 U.S. at 255, 261).[2] "Essentially, the Writ is the equivalent of a request for temporary physical custody." *State v. Kaipio*, 435 P.3d 1040, 1043 (Ariz. Ct. App. 2019) (quotation omitted).

Despite lending temporary physical custody of the defendant to the sovereign issuing the Writ, the sovereign agreeing to comply with the Writ retains primary jurisdiction over the defendant:

> [A]s a general rule, the first sovereign to arrest an offender has priority of jurisdiction over him for trial, sentencing, and incarceration. The jurisdiction of the first sovereign continues until the first sovereign relinquishes its priority by, for example, bail release, dismissal of the state charges, parole release, or expiration of the sentence. When a prisoner is produced for prosecution in [the second sovereign] pursuant to a . . . writ of habeas corpus ad prosequendum, the [producing sovereign] retains primary jurisdiction over the prisoner, and [the second sovereign's legal] custody commences only when the [producing sovereign's] authorities relinquish the prisoner on satisfaction of the . . . obligation [to the producing sovereign]. This rule derives from the fact that the . . . writ of habeas corpus ad prosequendum merely loans the prisoner to [the second sovereign]. Principles of comity require that when the writ is satisfied, the second sovereign returns the prisoner to the [producing] sovereign.

Weaver v. Buss, 2011 WL 3608532, at *11 n. 10 (N.D. Fla. June 16, 2011) (citations omitted), *report and recommendation adopted* 2011 WL 3648493 (N.D. Fla. Aug. 15, 2011); *see Kaipio*, 435 P.3d at 1043-44 (excellent discussion of priority jurisdiction and temporary transfers of physical custody pursuant to a Writ).

DISCUSSION

I. THE COURT IS AUTHORIZED TO ISSUE THE WRIT

A. The Court has authority to issue the Writ unless a constitutional provision, statute, or rule abrogates or supersedes it.

Li contends that there is no statute or rule recognizing the Writ in Florida, Reply at 1, but she answers the wrong question. Florida courts are common law courts.[3] "Common-law writs of procedure that have not been abrogated or superseded by the Constitution or by statutory regulations are available in this state, but the use of such judicial writs may be regulated by statute or by rules of court . . . . ." *Lamb v. State*, 107 So. 535, 537 (Fla. 1926).

The question, thus, is whether there is a constitutional provision, statute, or rule superseding the Writ. Li has not identified any such provision. To the contrary, the Florida Constitution authorizes circuit courts "to issue writs of . . . habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction." Fla. Const. Art. V, § 5.

To support her argument that the Writ does not exist in Florida because there is no express statutory authorization, Li highlights that federal statutes, unlike Florida statutes, expressly authorize the Writ. *See* 28 U.S.C. § 2241(c)(5). There are two problems with this argument. First, federal authority to issue the Writ dates back to the Judiciary Act of 1789 and the general authorization for federal courts to issue various types of writs of habeas corpus. When Congress amended the law in 1948 to expressly refer to the Writ, it did so without any intent to change existing law governing habeas corpus. *See Carbo*, 364 U.S. at 614-19 (discussing the evolution of statutory authority for federal courts to issue the Writ). Over 150 years of federal recognition of the Writ based on general authority to issue writs of habeas corpus supports interpreting Florida's general authorization for circuit courts to issue writs of habeas corpus as including the authority to issue writs of habeas corpus ad prosequendum.

Second, unlike Florida courts, federal courts are not common law courts. Thus, unlike Florida courts, which have authority to issue common law writs unless such authority is otherwise abrogated or superseded, federal courts have only the authority the U.S. Constitution or federal statutes grant them. *See Passett v. Chase*, 107 So. 689, 695 (Fla. 1926) ("[J]urisdiction in habeas corpus is granted to the federal courts only in certain cases, by virtue of our federal Constitution and statutes, whereas the state tribunals are vested with all the broad common-law power and jurisdiction under this ancient writ to inquire into all sorts of unlawful detentions, excepting only in so far as that power and jurisdiction has been limited . . . ."); *accord Ex parte Bollman*, 8 U.S. 75, 93 (1807).

B. The Supreme Court did not abolish the Writ in *Deeb*.

Li argues that the Supreme Court in *Deeb* abolished the Writ. It did, but only as a tool to obtain physical custody of a defendant from elsewhere in the State, not as a tool to obtain temporary physical custody from another sovereign. In *Deeb*, Florida's Second Judicial Circuit committed Deeb to the Florida State Hospital located within the circuit in Gadsden County. Five days later, a grand jury in the First Judicial Circuit indicted Deeb for murder, and the First Judicial Circuit issued a Writ directing the hospital superintendent to produce Deeb before the court in Escambia County to answer the murder charge. *Id.* at 208.

On a petition for writ of prohibition, a pertinent issue before the Court was whether the First Judicial Circuit had jurisdiction to issue the Writ when the defendant was located outside of the First Judicial Circuit. The Supreme Court never answered the question, instead holding that the Writ had been superseded by statutes authorizing issuance of statewide capias and bench warrants. *Id.* at 210 ("A capias or a bench warrant, appropriate process for the apprehension of a person charged with crime, runs throughout the state and may be served in any county under the regulations prescribed by statute."); *id.* at 212 ("The writ of habeas corpus ad respondendum et recipiendum and the writ ad prosequendum have as stated been superseded by the ample provision of the statute for the arrest of the accused, and there exists no longer any necessity for their use if indeed they have not become altogether abandoned and superseded by other statutes so that the circuit court has no jurisdiction to issue them."). The Supreme Court issued the writ of prohibition without prejudice to the First Circuit's issuing a capias or a bench warrant pursuant to Florida Statutes.

While *Deeb* certainly abolishes the Writ as a tool to effectuate a defendant's arrest elsewhere in Florida, it does not abolish the Writ as a tool to obtain temporary custody of a defendant from another

sovereign. First, the Court used unequivocal language when holding that various statutes supersede the Writ as a tool for obtaining custody of Deeb from another Florida jurisdiction, but used only suppositional language questioning whether the writ has become superseded in its entirety. *See id.* at 212 (quoted in previous paragraph, starting with the words "if indeed").

Second, *Deeb* did not involve a Writ seeking temporary physical custody of a defendant from another sovereign, so language suggesting that the Writ should be abolished in such circumstances is dicta and not binding. *See Pedroza v. State,* 291 So. 3d 541, 547 (Fla. 2020) [45 Fla. L. Weekly S93a] (holding that the only statements of law in an opinion are those within its holding, which "consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment"); *Cont'l Assur. Co. v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986) (dicta is persuasive but not binding).

Third, other Florida cases have tacitly approved Florida courts requesting temporary custody of a defendant from another jurisdiction. *See State v. Gazda*, 257 So. 2d 242, 243 (Fla. 1971) (after federal prisoner was not returned to State custody pursuant to bench warrant, trial court issued writ of habeas corpus ad prosequendum and successfully obtained physical custody of respondent from federal government); *Hoskins v. State*, 221 So. 2d 447 (Fla. 1st DCA 1969) ("As a result of the latter petition, an order for writ of habeas corpus ad prosequendum was entered by the Circuit Court of Leon County on December 20, 1967, directed to the Warden of the United States Penitentiary, Atlanta, Georgia, and the United States Marshal for the Northern District of Florida, to cause Hoskins to be brought before that Court on January 8, 1968, at the expense of Leon County, Florida.").[4]

Fourth, the Supreme Court has demonstrated in other contexts a willingness to abolish writs in a piecemeal fashion as statutes and rules are enacted or amended in a way that makes the writs unnecessary. For example, the Court gradually eroded the common law writ of error coram nobis over a period of two decades. *See State v. Stettin*, 364 So. 2d 95, 96 (Fla. 3d DCA 1978) (holding that county court could issue common law writ of error coram nobis); *State v. Woods*, 400 So. 2d 456 (Fla. 1981) (holding that writs of error coram nobis have now been abolished in civil cases by Florida Rule of Civil Procedure 1.540(b) but remain viable in criminal cases); *Richardson v. State*, 546 So. 2d 1037, 1039 (Fla. 1989) ("We hold that all newly discovered evidence claims must be brought in a motion pursuant to Florida Rule of Criminal Procedure 3.850, and will not be cognizable in an application for a writ of error coram nobis unless the defendant is not in custody."); *Wood v. State*, 750 So. 2d 592, 595 (Fla. 1999) [24 Fla. L. Weekly S240a] (amending Rule 3.850 to include out of custody movants, thereby eliminating the need for the writ of error coram nobis, and abolishing availability of such writ in light of the amendment). Similarly, although "rule 3.850 has absorbed many of the claims traditionally brought under habeas corpus," *Richardson v. State*, 546 So. 2d 1037, 1039 (Fla. 1989), there are still many uses for the writ other than a collateral attack upon a judgment and sentence. *See Greenwood v. State*, 51 So. 3d 1278, 1279 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D256c](testing the reasonableness of bail or pretrial release conditions); *Clarke v. Regier*, 881 So. 2d 656, 658 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1898d] (testing involuntary placement in a mental hospital); *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) [25 Fla. L. Weekly S891a] (bringing a claim of ineffective assistance of appellate counsel).

Finally, statutes authorizing statewide capias and bench warrants do not eliminate the need for the Writ in its entirety because they do not provide a mechanism to obtain temporary physical custody of an immigration detainee from the federal government. Indeed, no one has identified any statute or rule providing such a mechanism and thereby obviating the need for the Writ.

C. Li's status as an immigration detainee and not a federal prisoner does not diminish the Court's authority to issue the Writ.

In her reply, Li argues that the Writ is inapplicable because she is not a federal prisoner but, rather, is a federal detainee in civil immigration proceedings. Li has not offered any meaningful reason why her status as a federal immigration detainee somehow minimizes this Court's authority to request temporary physical custody over her. If anything, her status as an immigration detainee strengthens the proposition that the Court has authority to issue the Writ because detailed statutory procedures exist governing requests for temporary physical custody of federal prisoners, *see* Fla. Stat. § 941.45, potentially superseding the Writ in such circumstances.[5] *See Lamb*, 107 So. at 537.

In sum, the Writ is alive and well in Florida as a tool to request temporary physical custody of an immigration detainee from the federal government.

II. LI'S REMAINING ARGUMENTS CONFUSE THE WRIT OF HABEAS CORPUS AD PROSEQUENDUM WITH THE WRIT OF HABEAS CORPUS AD SUBJICIENDUM ET RECIPIENDUM.

The Court can easily dispose of Li's remaining arguments. Li argues that the Court lacks jurisdiction to issue the Writ because Li is in ICE custody. She also argues that the Court lacks jurisdiction to issue the Writ because ICE is holding her in Broward County, which is outside the territorial jurisdiction of this Court. Finally, she argues that the Petition is defective because the custodian is a necessary party to a habeas proceeding. These arguments confuse the Writ and the Great Writ.

As for the first argument, the Court certainly does not have the power to issue the Great Writ on behalf of a federal prisoner. *See Passett*, 107 So. at 692 ("The general proposition that a state court has no right to exercise jurisdiction in habeas corpus in behalf of a prisoner held by a federal officer under and by virtue of federal process and authority, or color of it, is well settled."). The Writ, however, does not command the federal government to do anything. Rather, it serves as a polite request that the federal government agree to transfer temporary physical custody of Li to the State of Florida. *Barber v. Page*, 390 U.S. 719, 724 n. 5 (1968) (noting that the federal Bureau of Prisons generally honors writs of habeas corpus ad prosequendum issued by state courts); *Huston v. State of Kan.*, 390 F.2d 156, 157 (10th Cir. 1968) ("In order for the writ of habeas corpus ad prosequendum to be used to bring appellant to trial in a Kansas state court, the writ must issue from that court."); *State v. Kaipio*, 435 P.3d 1040 (Ariz. Ct. App. 2019) (discussing comity considerations in the context of a state writ of habeas corpus ad prosequendum requesting temporary custody of a defendant in federal ICE custody); *State v. Eesley*, 591 N.W.2d 846, 854 (Wis. 1999) ("While it is true that federal authorities may not be compelled to honor writs of habeas corpus ad prosequendum issued by state courts, federal authorities have consistently honored such writs as a matter of comity."); *People v. McLemore*, 311 N.W.2d 720, 721 (Mich. 1981) (noting that the decision by federal authorities to honor a state-court-issued Writ is a matter of comity); *State v. Dickerson*, 777 N.W.2d 529, 533 (Minn. Ct. App. 2010) (same). Additionally, ICE's own guidance materials recommend that state prosecutors needing physical custody of an immigration detainee obtain a Writ from state court:

> If an ICE detainee is needed as a defendant or witness in an upcoming criminal proceeding, you may obtain a writ from an appropriate state or local judge ordering the alien's appearance in court on a specific

> date. While federal agencies are not bound by state court orders, ICE will generally honor the writ of a state or local judge directing the appearance of a detainee in court.

U.S. Immigration and Customs Enforcement, *Tool Kit for Prosecutors*, p. 8, https://bit.ly/ICEToolKit (case sensitive) (2011).

As for the second argument, the Florida Constitution does not impose any territorial limitations on the Court's authority to issue various writs of habeas corpus or other writs. Fla. Const. Art. V, § 5. Although the Legislature or Supreme Court certainly can regulate through statute or rule the use of writs, *Lamb*, 107 So. 537, the only territorial limitation in the context of a writ of habeas corpus appears in section 79.09, Florida Statutes. That section, however, must be read in conjunction with section 79.01, which plainly refers to the Great Writ, not a writ of habeas corpus ad prosequendum. *See id.* (discussing the requirement for a petition for writ of habeas corpus contending that a detainee "is detained without lawful authority"); *see also Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996) [21 Fla. L. Weekly S130a] ("[A] statute in derogation of the common law must be strictly construed. A court will presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute." (citation omitted)). The decision in *Carbo*, while not binding, is well-reasoned and persuasive on this point. After discussing the evolution of a similar federal statute authorizing issuance of various writs of habeas corpus and imposing territorial limitations, the Court concluded that statutory territorial limitations applied to the Great Writ but not the writ of habeas corpus ad prosequendum. *Carbo*, 364 U.S. at 19.

Finally, the Court is not moved by Li's argument that the Petition omits the custodian as a necessary party. Detailed statutes and rules establish procedures governing petitions for and issuance of the Great Writ. No such procedures exist governing issuance of a writ of habeas corpus ad prosequendum. The Court accepts the State's representation in its Memorandum and at one of the status hearings relating to the Petition that ICE has been notified of the State's efforts to seek the Writ. Additionally, the Writ will be directed to the custodian, and the Court will give ICE the opportunity to be heard if it so desires.

CONCLUSION

For the foregoing reasons, the State's Petition for Writ of Habeas Corpus Ad Prosequendum is GRANTED. The Court will separately issue the Writ.

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[1]The State also argued that Li does not have standing to object. While the State's position may be well founded, *see, e.g., Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922) ("[A defendant] may not complain if one sovereignty waives its strict right to exclusive custody of him [or her] for vindication of its laws in order that the other may also subject [the defendant] to conviction of crime against it."), the Court does not address this issue and assumes, without deciding, that she has standing.

[2]There is disagreement among federal circuits regarding whether a state is required under the Supremacy Clause to comply with a writ of habeas corpus ad prosequendum issued by a federal court. *Compare U.S. v. Plau*, 680 F.3d 1 (1st. Cir. 2012) (*en banc*) *with id.*, at 8 (Torruella, and Thompson, J.J. dissenting) (discussing circuit opinions throughout the country and disagreeing regarding whether the Supreme Court has resolved this question).

[3]*See* Fla. Stat. § 2.01 ("The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state."); Fla. Stat. § 775.01 ("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.").

[4]The State cites *Dickey v. Circuit Court, Gadsden County, Quincy, Fla.*, 200 So. 2d 521 (Fla. 1967), but that case simply stands for the proposition that the State of Florida has the authority to request temporary custody of a federal prisoner. *Id.* at 523-24. A federal prisoner sought a writ of mandamus compelling the circuit judge to initiate procedures to have the prisoner transferred to State custody for trial. The Court held that a federal prisoner could not seek such relief against the circuit court but, rather, could seek it only against the prosecutor. In so holding, the Court assumed (without deciding) that the procedure would be for the State prosecutor to apply to the federal district court for the writ of habeas corpus ad prosequendum directed at the federal warden. *Id.* at 528.

[5]The Court obviously does not decide that question in this Order.

* * *

Torts—Municipal corporations—Evidence—Judicial notice—Motion to take judicial notice, under sections 90.2035 and 90.202(12), of Google Street View images of street where decedent allegedly fell and dates images were created is granted—Request for special jury instruction on judicial notice is granted

KAYELMIS (PR) GONZALEZ, Plaintiff, v. CITY OF MIAMI, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2016-004757-CA-01. Section CA24. December 19, 2022. Antonio Arzola, Judge. Counsel: Ben Murphey, Lawlor White & Murphey, Fort Lauderdale, for Plaintiff. Linette Aguirre, Miami City Attorney Office, Miami, for Defendant.

AGREED ORDER GRANTING PLAINTIFF'S SECOND AMENDED REQUEST FOR JUDICIAL NOTICE OF GOOGLE STREET VIEW IMAGES AND DATA AND JURY INSTRUCTION ON JUDICIAL NOTICE

This case is before the Court on the agreement of the parties to the entry of this Order on Plaintiff's Second Amended Request for Judicial Notice of Google Street View Images and Data and Request for Jury Instruction on Judicial Notice (Request). Plaintiff's Decedent allegedly fell on a damaged section of the street near 100 West Flagler St. in Miami. Plaintiff asked this Court to judicially notice certain Google Street View images of the street where Decedent allegedly fell, and data related to those images like the dates the images were created.

I. PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE UNDER SECTION 90.2035.

Plaintiff requested judicial notice of the images and data under section 90.2035 of the Florida Statutes. Section 90.2035(1) allows this Court to judicially notice images and related data from a widely accepted web mapping service when the service has a date showing when the information was created. The Court finds Google Street View is a widely accepted mapping service as contemplated by section 90.2035(1) and the images and data discussed in Plaintiff's Request have dates showing when the images and data were created. The Court finds Plaintiff complied with the requirements of section 90.2035(1)(b). Therefore, Plaintiff's request for judicial notice of the images and data under section 90.2035 is **GRANTED**. The Google Street View images and data are admissible evidence at trial and/or any hearing in this case.

II. PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE UNDER SECTION 90.202(12).

Section 90.2035(4) states that section 90.2035 does not "affect, expand, or limit standards for any matters that may otherwise be judicially noticed. Plaintiff also requested judicial notice of the images and data under sections 90.202(12). Section 90.202(12) allows this Court to judicially notice facts that aren't subject to dispute because they're capable of determination by a source whose accuracy can't be reasonably questioned. Section 90.202(12) of the Florida Evidence Code is modeled on the Federal Rules of Evidence and therefore federal decisions on judicial notice are persuasive authority. *See Ellis v. State*, 622 So. 2d 991, 997 (Fla. 1993); *see also Moore v. State*, 452 So. 2d 559, 561-62 (Fla. 1984).

Google Street View images and data are a source whose accuracy cannot reasonably be questioned. *E.g., Pahls v. Thomas*, 718 F.3d 1210, 1216, n.1 (10th Cir. 2013) (judicially noticing Google Earth images and data). In *Matthews v. Raymond*, the court judicially noticed Google images and data about drive time displayed by Google. 2013 WL 2395911, at *6 n.8 (E.D.N.Y. May 31, 2013). In

Magee v. Glacier Water Services, Inc., the court took judicial notice of Google Street View images and related data. 2017 WL 396287, at *3 n.29 (E.D. La. Jan. 20, 2017) (citing *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (judicially noticing Google image and data)). In *Matheny v. Metropolitan Transit System*, the court took judicial notice of unauthenticated Google Street View images and data. 2019 WL 1586742, at *1 n.1 (S.D. Cal. Apr. 12, 2019).

In *Call v. Badgley*, the court took judicial notice of Google Maps images, dates, and data. 254 F. Supp. 3d 1051, 1061 (N.D. Cal. 2017). In *Safari Park, Inc. v. Southridge Property Owners Ass'n of Palm Springs*, the court took judicial notice of Google Maps images and data. 2018 WL 6843667, at *2 (C.D. Cal. Dec. 4, 2018). In *Cellco Partnership v. City of Peoria*, the court took judicial notice of Google Maps images and related data. 2017 WL 2125669, at *7 (C.D. Ill. May 16, 2017). In *Weems v. Curry*, the court took judicial notice of Google Maps images and related data. 2014 WL 7011534, at *1 n.1 (D.N.J. Dec. 11, 2014). In *Cloe v. City of Indianapolis*, the court judicially noticed Google Maps images and related data. 712 F.3d 1171, 1177, n. 3 (7th Cir. 2013). In *United States v. Townsel*, the court relied on, among other things, Google Street View images and related data and portions of the Old Farmer's Almanac in deciding a motion to suppress. 2016 WL 11480133, at **1, 6 n.3 (W.D. Tenn. Sep. 8, 2016).

In *United States v. Rosario*, the court relied on unauthenticated Google Maps images and related data in deciding a motion to suppress. 2018 WL 847779, at *7 n.4 (E.D. Pa. Feb. 13, 2018). The courts did the same thing in *United States v. Harris*, 2013 WL 1285860, at **2, 4 (D. Vt. Mar. 27, 2013) and *United States v. Garretson*, 2013 WL 5797613, at *6 (D. Nev. Oct. 28, 2013). In *Johnson v. Alhambra & O Associates*, the court took judicial notice of Google maps navigation distance, Google maps showing the number of "copy shops" within "ten miles or less" of a location, and a Google Street View image of a location. 2019 WL 2577306, at **1-2 (E.D. Cal. June 24, 2019). Google Street View images and related data are entitled to judicial notice under section 90.202(12) because they concern facts that aren't subject to dispute because they're capable of determination by a source whose accuracy can't be reasonably questioned. Therefore, Plaintiff's request for judicial notice of the images and data under section 90.202(12) is **GRANTED**. The Google Street View images and data are admissible evidence at trial and/or any hearing in this case.

III. PLAINTIFF'S REQUEST FOR JURY INSTRUCTION ON JUDICIAL NOTICE.

"A trial court is required to instruct the jury regarding the law applicable to the facts in evidence and the law of the case." *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2923a] (internal quotes omitted). This Court is authorized to instruct the jury on matters that were judicially noticed. *See* § 90.206, Fla. Stat. A special jury instruction is proper when it is needed to avoid confusing or misleading the jury. *See McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 152 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1736b]. If a standard jury instruction does not adequately address the facts of a case, then a special instruction is warranted. *Mitchell v. State*, 958 So. 2d 496, 499 (Fla. 4th DCA 2007). [32 Fla. L. Weekly D1387a] "[A] trial court abuses its discretion when it fails to give a proposed instruction that is (1) an accurate statement of the law, (2) supported by the facts of the case, and (3) necessary for the jury to properly resolve the issues." *N. Lauderdale Supermarkets, Inc. v. Puentes*, 332 So. 3d 526, 528-29 (Fla. 4th DCA 2021) [47 Fla. L. Weekly D44a].

Therefore, Plaintiff's request for a jury instruction on judicial notice is **GRANTED**. This instruction will be given to the jury:

> The rules of evidence allow me to accept facts that no one can reasonably dispute. The law calls this "judicial notice." I've judicially noticed that Plaintiff's Exhibits [ID numbers to be determined at trial] are Google Street View images of the part of the street where Caridad Trelles claims to have fallen that were taken on or about the date indicated on them even though no one introduced evidence to prove it. You must accept these facts as true for this case.

* * *

Insurance—Attorney's fees—Amount

BRIAN BARROS, et al., Plaintiffs, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE17015754. Division 14. November 14, 2022. Carlos Augusto Rodriguez, Judge. Counsel: Frantz C. Nelson, Font & Nelson, PLLC, Ft. Lauderdale, for Plaintiffs. Kristy Qiu, Universal Property & Casualty Insurance, Ft. Lauderdale, for Defendant.

FINAL JUDGMENT

THIS CAUSE having come before the Court on October 31, 2022, for evidentiary hearing on Plaintiff's claim for Attorney's Fees and Costs, the Court having reviewed the record evidence and objections of the parties, heard the arguments of counsel, and being otherwise fully advised in the premises, it is hereby ORDRED AND ADJUDGED as follows:

1) Plaintiff's counsels are entitled to fees, costs and interest in accordance with Florida Statutes 627.428 and 627.736, the settlement of the Underlying Claim on August 14, 2021 with stipulation to Plaintiff's entitlement to reasonable attorney's fees and costs, pursuant to the Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees, pursuant to Plaintiff's Notice of Filing of Time Sheets, Costs and Hourly Rate Claims, and the Affidavit of Plaintiff's Attorney's Fees Expert, pursuant to Plaintiff's Certification of Plaintiff's Compliance and Defendant's Notice of Filing Affidavit of Defendant's Attorney's Fees Expert as well as Defendant's corresponding Notice of Filing Exhibits to the Evidentiary Hearing, and pursuant to the relevant factors in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), *Standard Guarantee Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), as well as the appropriate factors in the Statewide Uniform Guidelines for Taxation of Costs.

2) The Court awards as reasonable hourly rates in the community for the Plaintiffs' attorneys as follows:

a. Mr. Jose P. Font: $550.00 per hour.
b. Mr. Frantz C. Nelson: $500.00 per hour.
c. Mr. Bryan Fischer: $300.00 per hour.
d. Ms. Jaime Martin: $300.00 per hour.
e. Mr. Adam Friedman: $300.00 per hour.
f. Ms. Caroline Carollo: $300.00 per hour.
g. Mr. Paul Dent: $250.00 per hour.
h. Mr. Nixon Laroche: $250.00 per hour.
i. Ms. Noor Fawzy: $250.00 per hour.
j. Mr. Yisroel Silverman: $250.00 per hour.

3) The Court reviewed the reduction in the number of Plaintiff's hours presented by Defendant through their expert and finds those reductions reasonable thus, the total amount of attorney's fees awarded by the Court is $97,420.52.

4) From this sum, the Court deducts any time billed by Plaintiff's counsel subsequent to settlement of the case on August 14, 2021 (which entries total 0.8 billed by Mr. Jose Font x $550.00 per hour + 5.1 billed by Mr. Frantz Nelson x $500.00 per hour = $2,990.00; the remaining post-settlement entries, having already been denied by Defendant's expert).

5) As such, **the total attorney's fees awarded to Plaintiff are $94,430.52**.

6) The Court awards the Plaintiff taxable costs pursuant to the agreed upon recommendation of Plaintiff's expert in the amount of **$6,214.54**.

7) Plaintiff is entitled to recover the expert witness fees of attorney Warren Diener based upon the holding and reasoning contained in the cases *Stokus v. Phillips*, 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c] and *Travieso v. Travieso*, 474 So. 2d 1184 (Fla. 1985). The Court awards Plaintiff's expert Mr. Warren Diener $500.00 per hour x 13.7 hours incurred for expert services performed in this matter for a total of **$6,850.00**.

8) Therefore, Plaintiff's Counsel, FONT & NELSON, PLLC, and its attorneys recover from the Defendant the following:

a. Reasonable attorney's fees in the amount of **$94,430.52**.

b. Reasonable costs in the amount of **$6,214.54**.

c. Expert Witness Fees for attorney Warren Diener in the amount of **$6,850.00**.

d. For a total sum of **$107,495.06**, together with post-judgment interest at the rate of 4.25% per annum until payment in full of the judgment for which let execution issue forthwith.

* * *

Torts—Negligence—Premises liability—Slip and fall—Transitory foreign substance in business establishment—Motion to strike all negligence claims except those permitted under section 768.0755 is denied—Section 768.0755, which requires that person who slips and falls on foreign substance in a business establishment prove that establishment had actual or constructive knowledge of dangerous condition, does not prevent plaintiff from making allegations of negligent operation of store, but plaintiff cannot use negligent mode of operation theory to avoid required proof that store had actual or constructive notice of dangerous condition

BIYUEH CHOU, Plaintiff, v. NEW YORK MART SUNRISE, INC., Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE19019118. Division 05. December 1, 2022. Martin J. Bidwill, Judge. Counsel: Ben Murphey, Lawlor White & Murphey, LLP, Fort Lauderdale, for Plaintiff. Barry Dubinski, Galloway, Johnson, Tompkins, Burr & Smith, PLC, Fort Lauderdale, for Defendant.

ORDER DENYING MOTION

This case came before the Court on Defendant's Motion to Strike All Claims of Negligence Except What is Permitted by Section 768.0755 of the Florida Statutes. On October 31, 2022, the Court hear oral argument on the Motion. Ben Murphey, Esq. argued for Plaintiff and Barry Dubinsky, Esq. argued for Defendant. The Court is fully-advised on the Motion and denies it.

This case involves an alleged slip and fall on a transitory foreign substance in Defendant's store on March 26, 2019. Plaintiff sued Defendant for negligently injuring her and alleged Defendant owed Plaintiff a non-delegable duty to operate, inspect, and maintain the store in a reasonably safe condition, to warn Plaintiff of any latent dangers in the store, and to act reasonably under the circumstances with regard to Plaintiff's safety and well being. (Compl. ¶ 14.)

Plaintiff alleged Defendant breached its duty to Plaintiff by: a) operating the store in a negligent way; b) having flooring for the store that wasn't sufficiently slip-resistant; c) not testing the slip resistance of the flooring; d) not inspecting the floor properly; e) not maintaining the floor properly; f) not having floor mats to protect against slip and falls; g) not having enough properly functioning drains on the floor; h) not having and/or enforcing a proper ice safety program; i) not having and/or enforcing a proper water safety program; j) not having an employee constantly looking for and removing slipping hazards from the floors given that water and ice regularly got on the floor; k) failing to discover and protect Plaintiff from the slippery portion of the floor that caused her to fall; l) failing to protect Plaintiff from slipping hazards in the store; m) failing to warn Plaintiff of the dangerous flooring; and n) choosing not to act reasonably under the circumstances with regard to Plaintiff's safety and wellbeing (collectively "the negligent conditions"). (Compl. ¶ 15.)

Section 768.0755 of the Florida Statutes applies to this case and it states:

> **Premises liability for transitory foreign substances in a business establishment.**
>
> 1. If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
>
> a. The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
>
> b. The condition occurred with regularity and was therefore foreseeable.
>
> 2. This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

Defendant moved to strike all claims of negligence except what is permitted by section 768.0755. Defendant argues that Plaintiff's claims of negligence present a negligent mode of operation theory of liability that is precluded by section 768.0755. The negligent mode of operation theory of liability focuses on whether a defendant's mode of operating its business could reasonably cause that defendant to anticipate that dangerous conditions could arise as a result of the mode of operation. *E.g., Markowitz v. Helen Homes of Kendall Corp.*, 826 So. 2d 256, 259 (Fla. 2002) [27 Fla. L. Weekly S724a]. If the evidence establishes a negligent mode of operation, then the issue of actual or constructive knowledge becomes a non-issue. *Id.*

Section 768.0755 simply requires a plaintiff to prove actual or constructive notice of the foreign substance before liability can be imposed on a defendant. § 768.0755(1); Fla. S. Judiciary Comm., CS/SB 1224, Staff Analysis 1 (Mar. 21, 2010). Constructive notice can be proven by circumstantial evidence showing: a) the dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or b) the condition occurred with regularity and was therefore foreseeable. §§ 768.0755(1)(a)-(b). Under section 768.0755(1)(b), "evidence of recurring or ongoing problems that could have resulted from operational negligence or negligent maintenance becomes relevant to the issue of foreseeability of a dangerous condition." *Speedway, LLC v. Cevallos*, 331 So. 3d 731, 735 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2643a].

Section 768.0755 does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises. § 768.0755(2). Defendant owed Plaintiff a common-law duty to operate its store in a reasonably safe way. *See, e.g., Winn-Dixie Montgomery, Inc. v. Petterson*, 291 So. 2d 666, 667 (Fla. 1st DCA 1974). Defendant owed Plaintiff a common-law duty to inspect and maintain its store in a reasonably safe condition. *See, e.g., Simmonds-Hewett v. Keaton*, 626 So. 2d 249, 250 (Fla. 4th DCA 1993). Defendant owed Plaintiff a common-law duty to warn Plaintiff of any dangerous conditions that weren't obvious in its store. *See, e.g., Kersul v. Boca Raton Comm. Hosp., Inc.*, 711 So. 2d 234, 234 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1300a].

Section 768.0755 does not prevent Plaintiff from making the allegations of negligence made in this case. However, Plaintiff must prove actual or constructive notice before liability can be imposed on Defendant, and Plaintiff cannot use a negligent mode of operation theory of liability to avoid the issue of notice altogether. Wherefore, this Court **ORDERS:**

Defendant's Motion is DENIED.

* * *

Torts—Negligence—Premises liability—Slip and fall—Transitory foreign substance in business establishment—Store's motion for summary judgment in slip-and-fall case is denied where there is sufficient evidence of constant wet condition in area of accident from which reasonable jury could find that store had actual or constructive notice of dangerous condition

BIYUEH CHOU, Plaintiff, v. NEW YORK MART SUNRISE, INC., Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE19019118. Division 05. December 1, 2022. Martin J. Bidwill, Judge. Counsel: Ben Murphey, Lawlor White & Murphey, LLP, Fort Lauderdale, for Plaintiff. Barry Dubinski, Galloway, Johnson, Tompkins, Burr & Smith, PLC, Fort Lauderdale, for Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Plaintiff alleges she slipped and fell on a wet, dirty, slippery substance on the floor of Defendant's store on March 26, 2019. Defendant moved for summary judgment pursuant to section 768.0755 of the Florida Statutes. The Court finds the summary judgment evidence could allow a reasonable jury to find actual or constructive notice of the alleged dangerous condition at issue.

As to actual notice, there is sufficient evidence in this record that there were constantly wet conditions in the area where the Plaintiff claims she slipped and fell. Defendant used floor mats and blowers in the area where Plaintiff claims she slipped and fell, there was a floor drain in the area, and there was a cleaning crew in Defendant's store all when it was open for business. That evidence is sufficient to allow a reasonable jury to find that Defendant had actual notice of the alleged dangerous condition.

As to constructive notice, there is sufficient evidence that would allow a reasonable juror to find that the dangerous condition existed for such a length of time that the Defendant should have known of the condition and taken action to remedy it. The Court finds there is sufficient evidence to allow a reasonable jury to conclude that the alleged dangerous condition occurred with regularity and was, therefore, foreseeable. The Court finds *Walker v. Winn-Dixie Stores, Inc*, 160 So. 3d 909 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1750a] to be distinguishable from the facts of this case. Wherefore, this Court **ORDERS:**

Defendant's Motion for Summary Judgment is DENIED.

* * *

Insurance—Bad faith—Civil remedy notice—Deficient notice—Insured's CRNs do not satisfy condition precedent to action for first-party bad faith where CRNs cite statutory provisions irrelevant to insurance claim, identify every person associated with or retained by insurer as persons involved with violation, and include 19 conclusory allegations and no supporting facts in section intended to detail facts and circumstances giving rise to claim—No merit to argument that insurer waived CRN defects by not identifying them in response to CRNs—Statute does not require insurer to identify each defect in CRNs

KATHRYN TAPPERT, Plaintiff, v. FLORIDA FAMILY INSURANCE COMPANY, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE-22-007257. December 12, 2022. Michael A. Robinson, Judge. Counsel: Warren D. Diener, The Diener Firm, P.A., Plantation, for Plaintiff. Matthew J. Lavisky, Butler Weihmuller Katz Craig, LLP, Tampa, for Defendant.

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE came before the Court on November 29, 2022 upon Florida Family Insurance Company's ("FFIC") Motion to Dismiss ("the Motion"). The Court has reviewed the Motion and the Response. The Court also heard argument of counsel. For the reasons set out below, the Motion is **GRANTED**.

This is a lawsuit for first-party bad faith under Florida Statute § 624.155. The lawsuit arises out of an insurance claim for property damage. FFIC moves to dismiss, arguing the two Civil Remedy Notices ("CRNs") filed by Plaintiff, and attached to the complaint, do not satisfy the requirements of § 624.155(3) because they did not state with specificity: (1) the statutory provision allegedly violated; (2) the name of any individual involved in the violation; or (3) the facts and circumstances giving rise to the violation.

Section 624.155, which created a cause of action for first-party bad faith, is in derogation of the common law and must be strictly construed. *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1283 (Fla. 2000) [25 Fla. L. Weekly S172a]. "It is a rule of statutory construction that any statute in derogation of the common law requires strict compliance with its provisions by one seeking to avail himself of its benefits." *Florida Steel Corp. v. Adaptable Developments, Inc.,* 503 So. 2d 1232, 1234 (Fla. 1986). A CRN is a statutory condition precedent to a lawsuit for first-party bad faith. § 624.155(3), Fla. Stat. Section 624.155(3) requires:

> (b) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:
>
> 1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
>
> 2. The facts and circumstances giving rise to the violation.
>
> 3. The name of any individual involved in the violation.
>
> 4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
>
> 5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

The " 'kitchen sink' approach does not satisfy the specificity requirements of section 624.155." *Demase v. State Farm Florida Ins. Co.*, 5D21-2078, 2022 WL 16909408, at *5 (Fla. 5th DCA Nov. 14, 2022) [47 Fla. L. Weekly D2318c] (Sasso, J., concurring). Thus, Florida courts have concluded that a CRN that haphazardly lists statutory and insurance policy provisions without regard to whether or not they apply does not comply with the requirements of the statute. *Julien v. United Prop. & Cas. Ins. Co.*, 311 So. 3d 875, 879 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D486d]; *Demase,* 2022 WL 16909408, at *2.

Here, Plaintiff's first CRN identified ten statutes FFIC allegedly violated and the second CRN identified nine. Plaintiff argues that her CRNs are valid because she identified less statutory violations than the CRNs in *Julien* and *Demase.* However, the issue is not the number of statutes alleged to have been violated, but, instead, whether Plaintiff limited her CRN to statutory provisions actually relevant to her allegations. *Gooden v. People's Tr. Ins. Co.,* 336 So. 3d 331, 332 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D749a]. Here, she did not. This is evident from the facts and circumstances sections of the CRNs, which fail to explain how FFIC allegedly violated nine or ten different statutes. Moreover, each CRN alleges that FFIC violated § 626.9541(1)(i)(3)(i), which prohibits failing to timely pay personal injury protection benefits. Personal injury protection benefits plainly have nothing to do with Plaintiff's property insurance claim. *See Demase v. State Farm Florida Ins. Co.*, 2021 WL 3617403 (Fla. 5th J. Cir. July 14, 2021) [29 Fla. L. Weekly Supp. 395a] , *aff'd* 2022 WL 16909408 [47 Fla. L. Weekly D2318c] (granting summary judgment and noting that the CRN identified § 626.9541(1)(i)(3)(i) which "could not possibly apply to this homeowners insurance claim").

In the section to identify the name of any individual involved in the violation, Plaintiff's first CRN identified all adjusters, appraisers, supervisors, management and individuals involved with the claim. The second CRN said the same thing, but added a name. Identifying every person involved in the claim does not satisfy the specificity requirement of § 624.155(3)(b). *See Demase,* 2021 WL 3617403, at *7 ("[I]n the same way the CRN in *Julien* was invalid for including the entire insurance policy, the CRN here is invalid for including every single person "associated with or retained by" State Farm.").

In the section to detail the facts and circumstances giving rise to the alleged violation, each CRN includes 19 conclusory allegations, not supported by any specific fact. Many of the allegations seem to have no relevance to this matter. For example, the CRNs make allegations about "hurricane damages" even though this is not a hurricane claim. And the facts and circumstances section does not explain how FFIC violated the statutes identified in the CRNs. As in *Rousso v. Liberty Surplus Ins. Corp.,* 2010 WL 7367059, at *5 (S.D. Fla. Aug. 13, 2010), the CRNs reflect "a shotgun-blast effort to hit a lot of targets with a single salvo. This approach is contrary to the purpose of the statute."

Plaintiff argues that FFIC waived some of these defects by not identifying them in response to the CRNs. The responses were not attached to the complaint or Plaintiff's response to the motion. However, for purposes of resolving this motion, the Court accepts Plaintiff's representations in the response. Plaintiff concedes FFIC identified some defects in the CRNs. (Resp. at 3.) In any event, Plaintiff cites to nothing in the statutes that require an insurer to respond to a CRN by telling the claimant what is wrong with the CRN. Without such a statutory requirement, Plaintiff's waiver argument is without merit. *Chris Thompson, P.A. v. Geico Indem. Co.*, 347 So. 3d 1, 2 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1588b]. Plaintiff's reliance on *Pin-Pon Corp. v. Landmark Am. Ins. Co.*, 500 F. Supp. 3d 1336 (S.D. Fla. 2020) is unpersuasive for the reasons explained by Judge Sasso in her concurring opinion in *Demase.* 2022 WL 16909408, at *4. And "[t]he [*Bay v. United Services Auto. Ass'n,* 305 So. 3d 294 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2380a]] case does not require an insurer to identify each defect in a CRN or hold that an insurer waives any defect not identified in the response." *Demase,* 2021 WL 3617403, at *10. Thus, the Court rejects Plaintiff's waiver argument.

For the reasons stated, the complaint is **DISMISSED WITH PREJUDICE**.

* * *

Insurance—Bad faith—Premature claims

AMANDA LEIGH HAUPERT, Plaintiff, v. ERNST DUCLOS, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21015866. Division 18. December 6, 2022. Fabienne E. Fahnestock, Judge. Counsel: Harry A. Shevin, Boca Raton, for Plaintiff. Emilio A. Cacace, Fort Lauderdale, for Defendant Progressive American Insurance Company. No appearance for Defendants Ernst Duclos and Sememe Duclos.

ORDER ON DEFENDANT PROGRESSIVE AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS COUNT IV OF PLAINTIFF'S AMENDED COMPLAINT

THIS CAUSE having come on to be heard on December 1, 2022 Defendant Progressive American Insurance Company's Motion to Dismiss Count IV of Plaintiff's Amended Complaint, and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. Plaintiff's Amended Complaint Count IV, Insurance Bad Faith Claim against Progressive American Insurance Company, is dismissed without prejudice as this claim is premature.

* * *

Torts—Automobile accident—Discovery—Failure to comply—Sanctions—Dismissal of action

THERESIA WOODS, INDIVIDUALLY, Plaintiff, v. CHRISTIAN POSADA, ADMINISTRATOR AD LITEM OF THE ESTATE OF JAMES LEONARD HEADRICK, SR., Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2011-CA-054769-XXXX-XX. November 15, 2022. David Dugan, Judge. Counsel: Michael Bross, Bross Law Firm, Melbourne, for Plaintiff. William K. Pratt, ROIG Lawyers, Orlando, for Defendant.

ORDER GRANTING DEFENDANT MOTION TO DISMISS

THIS CAUSE having come before this Court on Defendant's Motion to Dismiss, and after considering the filed motion, the review of Court Docket, and arguments of counsel at the August 10, 2022, hearing, the Court being otherwise advised on the premises, hereby states the following:

BACKGROUND

1. On 12/22/2011 Plaintiff counsel, Paul Bross, on behalf of Plaintiff Theresia Woods filed suit against James Headrick for injuries allegedly occurring in an automobile accident allegedly occurring on 12/22/2007.

2. On 10/10/2011 an Affidavit of Service was filed with the Court. The affidavit indicates that James Headrick was personally served.

3. On 10/19/2011 a letter from James Scott Headrick was filed with the Court. His letter was addressed to Plaintiff's attorney, Paul Bross. The letter indicates that it is in response to the suit filed against James Headrick. The letter points out that he is James Scott Headrick, and he was not involved in an automobile accident on 12/22/2007 and that he believes that the proper individual to be named in the suit was his father, James Headrick. Further the letter indicates that James Headrick passed away on 5/18/2010.

4. On 10/29/2011 Defendant James Headrick filed its First Motion to Dismiss. This Motion points out that the Plaintiff had not served the Defendant James Headrick until 10/3/2012, almost 10 months after the initial pleading in this matter was filed. The Motion points out that Florida Rules of Civil Procedure 1.070(j) requires a defendant to be served within 120 days. Further the Motion points out that James Headrick was not involved in the subject motor vehicle accident and that the owner and operator of the motor vehicle involved in the 12/22/2007 automobile accident was in fact James Leonard Headrick who had passed away on 5/18/2010.

5. On 11/19/2012, nearly one year after the original lawsuit had been filed, Plaintiff filed its First Motion to Amend Complaint. Plaintiff lists the Defendant as "The Estate of James Leonard Headrick".

6. On 11/30/2012 Defendant filed a Motion for Sanctions pursuant to Florida Statute 57.105. The Motion asserted that Defendant was not involved in the subject accident and there was no cause of action against Defendant.

7. On 1/10/2013 Defendant filed a Notice of Hearing scheduling Defendants Motion for Sanctions to occur on 1/30/2013. Also, on 1/10/2013 Defendant filed an Amended Motion for Sanctions, due to scrivener's error.

8. On 1/30/2013 a hearing was held, but no Order was entered.

9. On 2/28/2013 Defendant filed its Amended Notice of Hearing setting for hearing Defendants Motion for Sanctions and Defendants Motion to Dismiss, the hearing was scheduled to occur on 4/15/2013.

10. On 3/26/2013 Plaintiff filed a Motion to Appoint Personal Representative. The Motion indicates the Defendant is "The Estate of James Leonard Headrick". This Motion states that the Plaintiff received an answer/letter from James Scott Headrick stating that he was apparently served since he shares the first and last name of his father, James Leonard Headrick, whom Plaintiff is attempting to

serve. The Motion also states that James Leonard Headrick is deceased. The Motion states that Plaintiff Amended her Complaint to name "The Estate of James Leonard Headrick" as the proper Defendant, pursuant to section 46.021, Fla. Stat. The Motion asked the Court to grant its Motion to Appoint James Scott Headrick as Personal Representative of his father's estate, The Estate of James Leonard Headrick to properly serve the Defendant, The Estate of James Leonard Headrick. Further, the Motion admits The Estate of James Leonard Headrick has not been properly served.

11. On 4/10/2013 Plaintiff set for hearing its Motion to Appoint Personal Representative to occur on 4/15/2013. The Motion indicates the Defendant is "The Estate of James Leonard Headrick".

12. On 5/31/2013 a Notice of Special Appearance and Suggestion of Death was filed. The suggestion of death indicates that James Headrick died on 5/18/2010.

13. On 10/21/2013 a Notice of Special Appearance and Second Motion to Dismiss was filed. This Motion states that a First Motion to Dismiss was filed on behalf of Defendant, James Headrick, on 10/25/2012. That Motion was heard on 4/15/2013. The Court denied the Motion to Dismiss, however, advised Plaintiff's counsel he needed to substitute the personal representative for the estate of James Headrick. The Motion states that a suggestion of death was filed on 5/31/2013. The Motion states that Florida Rules of Civil Procedure 1.260 requires a motion for substitution be filed within 90 days after a party's death is suggested, otherwise, the action shall be dismissed as to the deceased person.

14. On 11/1/2013 Plaintiff filed an Amended Motion to Appoint a Personal Representative to Accept Service of Process. Within this motion a request the Court appoint "Pierre Mommers as the estate of James Leonard Headrick". However, the wherefore paragraph asked the Court for an order appointing James Leonard Headrick as the Personal Representative of the estate of James Leonard Headrick.

15. On 11/14/2013 Plaintiff filed a Notice of Hearing scheduling its Motion to Appoint Personal Representative and Motion to Amend Complaint to occur on 12/18/2013 at 3:45 PM before the Hon. Lisa Davidson.

16. On 11/15/2013 Defendant filed a Notice of Hearing scheduling its Notice of Special Appearance and Second Motion to Dismiss to occur on 12/18/2013 at 3:45 PM before the Hon. Lisa Davidson.

17. On 12/17/2013 plaintiff filed its Second Motion to Amend Complaint and Response to Defendant's Motion to Dismiss. The Defendant is listed as "The Estate of James Leonard Headrick". The Motion states that the Plaintiff is unable to locate the Defendant because he is deceased. Further this Motion states that Defendant has argued that Plaintiff has failed to timely file a Motion for Substitution within 90 days of 5/31/2013, but the Plaintiff argued it had in fact filed the Motion before Defendants filed a suggestion of death, and a hearing was held on or about 4/15/2013, but the Trial Court denied the same because James Headrick Junior did not want to serve as the Personal Representative.

18. Following the 12/18/2013 hearing, on 1/13/2014 an Order was entered on Second Motion to Dismiss and Plaintiff's Motion to Appoint Personal Representative and Motion to Amend Complaint. The Order reserved ruling on the Second Motion to Dismiss and Plaintiff's Motion to Appoint Personal Representative and Motion to Amend Complaint but granted Plaintiff 30 days from the date of the hearing to set up the estate of James Leonard Headrick.

19. On 2/7/2014 Defendant filed an Amended Notice of Hearing, setting for hearing defendants Second Motion to Dismiss to occur on 3/11/2014 at 9:15 AM before the Hon. Lisa Davidson.

20. On 3/6/2014 Plaintiff filed a Notice of Hearing setting for hearing its Order Appointing Administrator Ad Litem and Letters of Administration to occur on 3/11/2014 at 9:15 AM before the Hon. John M. Harris, Judge Harris was the presiding judge over the probate proceedings, probate case number 05-2014-013499.

21. On 3/11/2014 hearing was held at 9:15 AM. Also, on 3/11/2014, after the 9:15 AM hearing, at 1:53 PM, plaintiff filed a Second Amended Motion to Appoint Personal Representative to Accept Service of Process. Within this Motion Plaintiff once again names the Defendant as "The Estate of James Leonard Headrick". The Motion asked for the Court to enter an Order appointing Christian Posada as the personal representative of the estate of James Leonard Headrick. However, the wherefore paragraph asked the Court to enter an Order appointing James Leonard Headrick as the personal representative of the estate of James Leonard Headrick.

22. On 3/12/2014 Plaintiff filed a Notice of Hearing scheduling its Motion to Amend Complaint and Response to Defendant's Motion to Dismiss for hearing to occur on 4/11/2014 at 1:15 PM before the Hon. Lisa Davidson.

23. On 3/13/2014 an Order was entered on Defendants Second Motion to Dismiss heard on 3/11/2014. The Oder indicates that the Second Motion to Dismiss is denied.

24. Thereafter, on 4/11/2014 a hearing was held regarding Plaintiff's Motion to Amend Complaint before the Hon. Lisa Davidson, the Court granted Plaintiff's Motion to Amend Complaint. The Defendant is listed as "The Estate of James Leonard Headrick". This Order was entered on 8/27/2014.

25. On 5/15/2014 Plaintiff filed its Third Motion to Amend Complaint and Substitute Party. The Defendant is listed as "The Estate of James Leonard Headrick". The wherefore paragraph indicates Plaintiff is requesting the Court enter an Order "to substitute the defendant James Headrick for the estate of James Headrick"

26. On 8/27/2014 the Hon. Lisa Davis entered an order from the 4/11/2014 hearing granting Plaintiffs Motion to Amend. The Order indicates the Defendant is "The Estate of James Leonard Headrick"

27. Almost 8 months later, on 4/9/2015, Plaintiff filed proposed Summons to be issued. The Defendant is listed as "James Headrick". The Summons was to be issued to "The Estate of James Leonard Headrick".

28. On 4/21/2015, Plaintiff filed an Ex Parte Motion to Enlarge Time for Service. For the first time in these proceedings, the Defendant is listed as "Christian Posada, Administrator Ad Litem of the estate of James Leonard Headrick Sr." The Motion asked for additional time to complete service. The Motion asserts that the lawsuit was filed on 4/13/2015. 4/13/2015 was the date the Summons was issued. Further the Motion states within paragraph 2 that Plaintiff has been unable to complete service of process and there had been a miscommunication between the Plaintiff's counsel and the Defendant's counsel as Plaintiff was under the impression that Defense counsel was going to accept service of process. As a result, the Plaintiff requires an additional 60 days to effectuate service.

29. On 5/21/2015 a Notice of Filing Proof of Nonservice was filed by Plaintiff. The Defendant is listed as James Headrick. Attached is a Notice is a Return of Nonservice which indicates service was attempted upon the estate of James Headrick.

30. On 6/18/2015 Plaintiff filed a Notice of Hearing, scheduling its Ex Parte Motion to Enlarge Time for Service for hearing to occur on 7/23/2015 at 10 AM before the Hon. George Maxwell. On 6/29/2015 the case was reassigned to the Hon. George Maxwell.

31. There were no court filings between 9/22/2015 and 4/19/2016.

32. On 4/19/2016 a Notice of Special Appearance and Third Motion to Dismiss was filed. This Motion argues that the Court entered an Order dated 9/22/2015 allowing Plaintiff additional 60 days to effectuate service. The Motion points out that Plaintiff had not served the Administrator Ad Litem as required by the Court Order.

33. On 6/24/2016 Defendant set for hearing its Third Motion to

Dismiss, this hearing was scheduled to occur on 7/11/2016 before the Hon. George Maxwell, however it was re-set for 9/8/2016. The 9/8/2016 hearing was cancelled on 9/8/2016 due to Plaintiff counsel illness, it was re-set to occur on 10/25/2016. The 10/25/2016 hearing was cancelled on 10/19/2016 per Judge Maxwell's request, it was re-set for hearing to occur on 11/29/2016 The Notice added to the hearing Plaintiff Motion for Default. However, the Plaintiff Motion for Default does not appear on Court Docket. The 11/29/2016 hearing was cancelled on 11/29/2016, no reason was given. Defendant Third Motion to Dismiss was never argued nor heard, no order has ever been entered.

34. On 6/29/2016 Plaintiff filed a Notice of Filing. The Defendant is listed as the deceased, "James Headrick". The Notice states the Plaintiff is giving notice of filing with this Honorable Court the accepted service of process.

35. On 12/19/2016 an Agreed Order was entered Denying Plaintiff Motion for Default and Ordering Defendant, Christian Posada, Administrator Ad Litem of the Estate of James Leonard Headrick, Sr. to file an Answer and Affirmative Defense.

36. On 12/22/2016, Defendant filed its Answer and Affirmative Defenses to Amended Complaint.

37. On 8/29/2013, 90 days after the Suggestion of Death filing, Plaintiff had not yet filed a Motion to Substitute the Defendant, nor had Plaintiff filed a Motion for Enlargement of Time to Substitute the Defendant.

38. Plaintiff has not yet filed a Motion to Substitute the Defendant, nor had Plaintiff filed a Motion for Enlargement of Time to Substitute the Defendant and an Order Substituting an Administrator Ad Litem nor Personal Representative as party Defendant has never been entered.

39. On 1/9/2017 Defendant filed Request to Produce and Interrogatories to Plaintiff.

40. On 2/22/2017 Plaintiff filed answers to Request to Produce and Interrogatories.

41. On 5/18/2017 a Conditional Guilty Plea for Consent Judgment was filed by attorney of record Paul Bross.

42. On 6/14/2017 a Joint Stipulation for Substitution of Counsel was field by undersigned Roig Lawyers.

43. Thereafter, on 6/22/2017 the Florida Supreme Court entered an Order Suspending Paul Bross from the practice of law.

44. On 3/8/2018 the Florida Supreme Court entered an Amended Petition for Disciplinary Revocation

45. On 8/2/2019 Plaintiff field Notice for Trial.

46. On 9/26/2018 Counsel, Michael Bross, filed Notice of Appearance.

47. On 1/20/2020 Defendant filed Request to Produce and Interrogatories.

48. On 2/3/2020 Plaintiff filed Notice of Filing Answers to Interrogatories, but not actaul responses and no responses to Request to Produce.

49. On 6/11/2020 Defendant filed Supplemental Request to Produce.

50. On 7/13/2020 Plaintiff filed Objections to Defendant Supplemental Request to Produce pursuant to Florida Statute 90.502 (Lawyer-Client Privilege)

51. On 8/6/2020 Defendant filed Motion to Compel upon Plaintiff regarding Plaintiff 7/13/2020 objections to Defendant 6/11/2020 Supplemental Request to Produce. Wherein, Defendant argued the Request to Produce did not pertain to attorney-client materials.

52. On 8/14/2020 Defendant filed Secondary Payor and Collateral Source Request to Produce.

53. On 8/28/2020 Defendant filed Motion to Compel concerning Defendant 1/8/2020 Interrogatories and Request to Produce as Plaintiff had failed to respond.

54. On 9/22/2020 the Court Ordered comply with the Defendant's Motions to Compel dated 8/6/2020 and 8/28/2020 and 9/18/2020. Specifically, Plaintiff was Ordered to provide complete responses to Defendant's 6/12/2020 Request to Produce, Defendant's 1/20/2020 Interrogatories and, Defendant's 1/20/2020 Request to Produce within ten (10) days from the 9/22/2020 hearing. This Order was subsequently entered by the Court on 10/9/2020.

55. On 10/9/2020 Plaintiff filed Response to Pre-Trial Request to Produce dated 1/20/2020. Per Court Order, these responses were due on or before October 2, 2020.

56. On 10/12/2020 Defendant filed Motion to Compel Discovery Responses regarding Defendant 8/14/2020 Secondary Payer and Collateral Source Request to Produce.

57. On 10/13/2020 Plaintiff field Response to Defendant 6/11/2020 Request to Produce. Per Court Order, these responses were due on or before October 2, 2020.

58. On 10/27/2020 Defendant filed Motion to find Christian Posada in Contempt/Motion to Compel Deposition of Christian Posada/Motion to Find Plaintiff in Contempt for Interfering with Defendant Conducting Deposition of Christian Posada and Memorandum of Law in Support Thereof.

59. On 11/4/2020 Defendant filed Request for Admissions.

60. On 1/4/2021 Plaintiff filed late response to Defendant 11/4/2020 Request for Admissions.

61. On 2/24/2021 Defendant filed a Motion to Remove Case from Trial Docket and Motion for Sanctions for Plaintiff's Violation of Multiple Trial Court Orders.

62. On 3/8/2021 Defendant filed Interrogatories, Request for Admissions, and Updated Pretrial Request to Produce.

63. On 3/12/2021 the Court entered an Order Granting Defendant Motion to Strike Case from Trail Docket, but did not rule on Defendant Motion for Sanction, but rather retained jurisdiction to adjudicate that portion of the Defendant Motion.

64. On 4/26/2021 Defendant filed a Motion to Compel response to the 3/8/2021 filed Defendant Interrogatories, Request for Admissions, and Updated Pretrial Request to Produce as Plaintiff had not timely responded or sought an extension of time in which to respond.

65. On 4/30/2021 Plaintiff filed late response to the 3/8/2021 Interrogatories, Request for Admissions, and Updated Pretrial Request to Produce.

66. On 5/11/2021 Defendant filed Amended Motion to Compel Discovery Responses concerning Plaintiff's improper response to the 3/8/2021 Interrogatories and Request for Admissions.

67. On 8/11/2021 the Court entered an Order Granting Defendant's Amended Motion to Compel Discovery Responses and Ordered Plaintiff to provide full and complete responses and disclosure of information requested in Defendant's Amended Motion to Compel Discovery Responses filed on May 26, 2021. Which includes better answers to Defendant Interrogatories and Request for Admissions filed on March 8, 2021.

68. On 8/26/2021 Defendant filed a Motion to Allow Correction of Order Entered 8/11/2021 as Order enterer on 8/11/2021 did not indicate a time limit in which Plaintiff was required to respond.

69. On 10/18/2021 Defendant Notice for Hearing the Motion to Allow Correction of Order Entered 8/11/2021 to occur on 11/8/2021.

70. On 11/5/2021 a Joint Stipulation on Defendant Motion to Compel Discovery Responses was filed with the Court. Wherein Plaintiff agreed to "provide full and complete responses and disclosure without legal objection of information requested in Defendant's Amended Motion to Compel Discovery Responses filed on May 26, 2021, which includes better answers to Defendant Interrogatories and Request for Admissions filed on March 8, 2021, by November 30,

2021."

71. Plaintiff did not comply with the Joint Stipulation and did not provide better response by 11/30/2021.

72. On 12/13/2021 Defendant filed a Second Motion to Allow Correction of Order Entered August 11, 2021, as Plaintiff did not file responses as agreed.

73. On 1/26/2022 a hearing was held concerning Defendant filed a Second Motion to Allow Correction oof Order Entered August 11, 2021. The Court Ordered Plaintiff to provide better and complete responses within 10 days. However, and Order was not entered until 2/9/2022.

74. This Court specifically instructed Plaintiff's counsel that the Court would consider dismissal of the case should Plaintiff fail to comply with the Court Order.

75. Plaintiff failed to provide "better and complete responses" answers to Interrogatories and did not provide any response to Request for Admissions.

76. On 2/22/2022 Defendant filed a Motion for Dismiss as Sanction for Plaintiff Violation of Court Order.

77. On 3/1/2022 Plaintiff filed late response to Request for Admissions. Plaintiff did not file a motion seeking relief from violation of Court Order, nor did Plaintiff file any affidavit evidencing excusable neglect for failing to comply with Court Order.

78. On 8/9/2022 at 10:36 AM Plaintiff filed its Response to Defendant 2/22/22 Motion to Dismiss. Wherein Plaintiff counsel admitted it was in violation of their Court Order and was not aware of said violation until such time as Defendant had filed its Motion to Dismiss. See paragraph 7 of Plaintiff's Response. Further, Plaintiff counsel claimed justification for its failure to comply with this Courts Order due to a health condition. See paragraph 11 of Plaintiff's Response. However, Plaintiff did file admissible evidence or affidavit to verify the health condition claimed was a reason for failure to comply with this court's Order.

79. On 8/10/2022, a hearing was held on Defendant's Motion to Dismiss.

LEGAL ANALYSIS

It is well settled that determining sanctions for discovery violations is committed to the discretion of the trial court and will not be disturbed upon appeal absent an abuse of the sound exercise of that discretion. *See Mercer v. Raine,* 443 So.2d 944, 946 (Fla.1983).

Reviewing courts apply a "reasonableness test" to determine if the trial court has abused its discretion, which provides that if reasonable people could differ as to the propriety of the trial court's action, the action is not unreasonable, and no abuse of discretion has occurred. *See id. (citing Canakaris v. Canakaris,* 382 So.2d 1197 (Fla.1980)).

"A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness." *Mercer,* 443 So.2d at 946.

In *Ham v. Dunmire*, 891 So.2d 492 (Fla. 2004) [30 Fla. L. Weekly S6a], the Florida Supreme Court stated:

> To ensure that a litigant is not unduly punished for failures of counsel, the trial court must consider whether dismissal with prejudice is warranted. In 1994, this Court issued *Kozel v. Ostendorf,* 629 So.2d 817 (Fla.1993) (as clarified Jan. 13, 1994), in which we stated that a dismissal "based solely on the attorney's neglect" in a manner that unduly punishes the litigant "espouses a policy that this Court does not wish to promote." *Id.* at 818.
>
> We articulated a test identifying six factors pertinent in the determination of whether a dismissal with prejudice is a warranted response to an attorney's behavior. These factors require a trial court to consider:1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. *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.* The *Kozel* Court acknowledged that the purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation, and that such purpose "usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible." *Id.*

ORDERED AND ADJUDGED that:

1. Defendant Motion to Dismiss is hereby **GRANTED**.

2. This Court specifically finds that Dismissal of this action is based upon Plaintiff and Plaintiff's Counsel willful, deliberate, and contumacious disregard of the court's prior discovery orders and was not based on any act of negligence or inexperience of counsel, as outlined above.

3. This Court specifically finds that Plaintiff counsel has been previously warned and sanctioned by this Court for Plaintiff counsel violation of prior Court Order, as outlined above.

4. This Court specifically finds that Defendant has been prejudiced in defending this suit and dealing with the multiple issues and delays created by Plaintiff and Plaintiff's Counsel in this case, as outlined above.

5. This Court specifically finds that Plaintiff counsel did not offer any reasonable justification for violation of this Court's Order, as outlined above.

6. This Court specifically finds that Plaintiff Counsel created delay causing significant problems of judicial administration, as outlined above.

7. This Court specifically finds; that this case has been in litigation since 2011 as is outlined completely above; early on Defendant filed a Motion to Dismiss due to Plaintiff filing suit against the wrong individual; Defendant filed multiple motions addressing the improper naming of the Defendant in this case; from 2011 until 8/10/22 (the date of the Motion to Dismiss hearing) Defendant had done all it could to discover fact to resolve this case, as outlined above.

8. The Court finds that dismissal is warranted due to Plaintiff's multiple violations of this Court's Order, specifically against Plaintiff attorneys due to their actions causing deliberate delay and against the Plaintiff herself due to her participation in this case, specifically hiring Plaintiff firm and the providing response to interrogatories, which this Court finds were not prepared in good faith, as outlined above.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Detention—Officer responding to report of unconscious driver in running vehicle parked in driveway acted appropriately in parking patrol vehicle in manner to block defendant's ability to leave—Fact that defendant was awake when officer arrived at scene did not eliminate need to investigate defendant's health—Officer had reasonable suspicion to detain defendant for welfare check and investigation of potential criminal matter based on unconscious condition and odor of alcohol—Motion to suppress is denied

STATE OF FLORIDA, v. JENNIFER ALUISIO, Defendant. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2022 MM 1648A. Division 1. August 11, 2022. Charles Young, Judge. Counsel: Robert Little, Assistant State Attorney, for State. Ralph W. Parnell III, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER having come before the Court on Defendant's Motion to Suppress filed on June 3, 2022, and the Court having heard the evidence and argument of counsel and being otherwise advised in the premises, the Court finds as follows:

FACTS

1. Ms. Novotny, an independent witness called 911 because of concerns about Jennifer Aluisio, the Defendant, being apparently unconscious in Ms. Novotny's driveway while in her car, while the car was running but not moving.

2. Ms. Novotny attempted to awaken Ms. Aluisio but originally was not successful and Ms. Novotny called 911 emergency.

3. While on the phone with 911 Ms. Novotny was able to awaken Ms. Aluisio and Ms. Aluisio smelled alcohol coming from Ms. Aluisio and told her to turn off her car and Ms. Novotny attempted to obtain Ms. Aluisio's keys.

4. Officer Brendan Brown was dispatched to Ms. Novotny's home and was informed that Ms. Aluisio was passed out in the driveway and could not be awakened.

5. When Officer Brown arrived he parked his vehicle behind Ms. Aluisio's car.

6. Officer Brown, upon arrival, stated that he saw that Ms. Aluisio was awake and while exiting his vehicle was approached by Ms. Novotny, whereby Ms. Novotny informed Officer Brown of all that had transpired, including, but not limited to, the smell of alcohol on Ms. Aluisio.

7. Officer Brown approached Ms. Aluisio and began to inquire as to Ms. Aluisio's condition.

8. Upon speaking with Ms. Aluisio, Officer Brown indicated he immediately detected several signs of impairment regarding Ms. Aluisio.

ARGUMENT BY COUNSEL

Counsel for Ms. Aluisio filed a Motion to Suppress putting forth the allegation that the certain statements and physical evidence obtained by Officer Brown should be suppressed because there was an unlawful detention, seizure, and because some evidence was from a subsequent illegal search of the Defendant and the Defendant's vehicle. Counsel for Ms. Aluisio alleges in the Motion to Suppress that Officer Brown by parking his vehicle behind Ms. Aluisio was an unlawful detention.

Counsel for the State argues that actions of Officer Brown did not violate any rights held by Ms. Aluisio and there was no unlawful detention in this matter. Additionally, counsel for the State argues that Ms. Novotny executed a citizen's arrest.

COURT DECISION

The Court conducted a hearing on August 10, 2022 on the Defendant's Motion to Suppress. The Court finds as follows:

1. The first encounter with the Defendant was by Ms. Novotny in Ms. Novotny's driveway.

2. The Defendant was unconscious and the car was running.

3. Officer Brown did not stop the Defendant.

4. Officer Brown did park his vehicle so the ability for the Defendant to leave would be impeded.

5. Officer Brown acted appropriately in order to ascertain whether the Defendant was experiencing an emergency situation.

6. The fact that the Defendant was awake upon the arrival of Officer Brown does not in and of itself cause a situation whereby Officer Brown should not further investigate the health situation of the Defendant, given the totality of the information and circumstances surrounding Officer Brown's initial encounter with the Defendant.

7. Before Officer Brown could even further investigate the health concerns which precipitated the 911 call and the dispatch of Officer Brown, Officer Brown was informed that while the Defendant was awake, Ms. Novotny tried to take her keys to keep her from driving and smelled alcohol about the Defendant.

8. Officer Brown, given the circumstances and information provided had reasonable suspicion to then investigate the situation as a welfare check as will as a potential criminal matter and therefore a temporary detention in order to ascertain was appropriate.

Therefore Officer Brown's initial parking of his vehicle was not an unlawful detention given the information provided regarding an unconscious driver in a vehicle. Likewise, Officer Brown has no obligation to move the vehicle after the initial detention as there was sufficient evidence provided to Officer Brown that authorized him to continue the encounter as it moved from community caretaker activity to an investigation as to whether a crime had been or was about to be committed by the Defendant.

At no stage of the actions by Officer Brown were the constitutional rights of the Defendant violated.

The Motion to Suppress is hereby Denied

* * *

Insurance—Automobile—Windshield repair—Appraisal—Under terms of policy, completion of appraisal process that was invoked prior to initiation of litigation was condition precedent to that litigation, irrespective of whether litigation is breach of contract action or action for declaratory judgment—On reconsideration, motion to dismiss complaint for declaratory relief is granted

ACCUSAFE AUTO GLASS, a/a/o Shannon Anderson, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 35238 COCI. December 13, 2022. Robert A. Sanders, Jr., Judge. Counsel: Donald J. Masten, LLC, Orlando, for Plaintiff. Joseph T. Kissane and Michael Paul Orta, Cole Scott & Kissane, Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION

THIS CAUSE came to be heard upon Defendant's Motion for Reconsideration, on November 28, 2022, and the Court having entertained arguments of counsel, reviewed memorandum and pertinent case law, and being otherwise fully informed in the premises, finds as follows:

BACKGROUND

Progressive's insured had a policy during the relevant time that included comprehensive coverage for damage to the vehicle. The vehicle sustained damage to the windshield during an applicable coverage period. Progressive's insured and Plaintiff thereafter agreed

to have the damaged windshield replaced pursuant to an assignment of benefits executed in favor of Plaintiff. Neither Progressive's Insured nor Plaintiff contacted Progressive before the windshield was replaced. Instead, Plaintiff replaced the windshield, and then sent an invoice to Progressive ("Invoice") for a unilaterally determined price. Progressive's Insured signed the Invoice authorizing the glass repairs and assigning to Plaintiff any and all benefits from the insurer providing coverage for the repaired vehicle.

When Progressive received the invoice, Progressive promptly confirmed coverage for the loss, issued payment for an amount less than was invoiced, and sent a letter to its Insured and Plaintiff advising them that Progressive disputed the amount to repair the loss and demanded an appraisal of the loss pursuant to the Policy. Plaintiff did not respond to Progressive's demand for an appraisal. Instead, Plaintiff filed a complaint it subsequently amended to the subject Amended Complaint for Declaratory Relief.

In response to the initial lawsuit, Progressive filed a Motion to Dismiss or Alternatively to Stay and Compel Appraisal. In response to Plaintiff's Amended Complaint, Progressive filed a Motion to Dismiss same. This Court denied Defendant's Motion to Dismiss on July 8, 2022.

On November 4, 2022, the Fifth District Court of Appeal issued its opinion in the matter of *NCI, LLC F/K/A Auto Glass Store LLC A/A/O Dora Noe v. Progressive Select Insurance Company,* 47 Fla. L. Weekly D2235f. Defendant subsequently filed the subject Motion for Reconsideration based upon the opinion issued by the Fifth District Court of Appeal, as well as an opinion issued on the same day by the Second District Court of Appeal in the matter of *Progressive American Insurance Company v. Hillsborough Insurance Recovery Center, LLC a/a/o Joel Wolf, Ernessa Dennis Johnson, and Juan Gil,* 47 Fla. L. Weekly D2265a. This Court subsequently heard oral arguments on Defendant's motion on November 28, 2022.

POLICY LANGUAGE AT ISSUE

Progressive's policy of insurance provides, in pertinent parts, as follows:

APPRAISAL

If **we** cannot agree with **you** on the amount of a loss, then **we** or **you** may demand an appraisal of the loss. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraiser will determine the amount of loss. If they fail to agree, the disagreement will be submitted to a qualified and impartial umpire chosen by the appraisers. If the two appraisers are unable to agree upon an umpire within 15 days, **we** or **you** may request that a judge of a court of record, in the county where **you** reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. **You** will pay **your** appraiser's fees and expenses. **We** will pay **our** appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between **us** and **you.** Neither **we** nor **you** waive any rights under this policy by agreeing to an appraisal.

LEGAL ACTION AGAINST US

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

ANALYSIS

The November 4, 2022 decision from the Fifth District Court of Appeal held, "NCI's argument that there is not yet a "disagreement" sufficient to trigger appraisal rings especially hollow. NCI replaced the insured's windshield, then invoiced Progressive for its work. Progressive acknowledged coverage and paid less than NCI demanded. NCI then sued Progressive, alleging it had failed to pay all the benefits due." The appraisal process is designed to determine the amount of the loss and suing for more money is sufficient to show there is a disagreement over the amount owed." (*NCI, LLC F/K/A Auto Glass Store LLC A/A/O Dora Noe v. Progressive Select Insurance Company,* 47 Fla. L. Weekly D2235f) The underlying facts in the instant case are identical. Plaintiff here replaced Progressive's insured's windshield pursuant to an assignment of benefits, then invoiced Progressive for its work. Progressive then acknowledged coverage and paid less than Plaintiff demanded. At or about the same time, Progressive sent pre-suit correspondence to Plaintiff wherein Progressive advised it was invoking the appraisal provision. In response Plaintiff then sued Progressive. As was true in that decision, filing suit over the claim is sufficient to show there is indeed a disagreement over the amount owed and the claim is ripe for appraisal.

The Court further noted that the subject appraisal provision, which is the same one present in the instant matter, allows either party to unilaterally initiate appraisal proceedings. *Id.* The Fifth also noted in its opinion that, The Policy contains a clause entitled, "Legal Action Against Us." Which states that "**[w]e** may not be sued unless there is full compliance with the terms of this policy. *Id.* That language does not differentiate between breach of contract actions and declaratory actions and is present in the subject policy. That provision makes completion of appraisal, once invoked, a condition precedent to bringing an action against Progressive on the underlying claim.

Further, the Fifth District considered several arguments against the enforceability of appraisal, and found that none had merit, including the declaratory judgment count which it said was, "Inextricably intertwined with its breach of contract claim." (*Id*. at Footnote 2) The Court also noted, "We accord great deference, however, to a trial court's dismissal of a declaratory judgment action, and we review this decision for an abuse of discretion. *Id.* See *Palumbo v. Moore* 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D489b]. Ultimately, the Fifth District found that the trial court was correct in rejecting the Plaintiff's arguments relating to the appraisal provisions validity, the existence of an appraisable issue, and the absence of waiver, and that dismissal of the action without prejudice was a proper remedy. *Id.*

Additionally, on November 4, 2022, the Second District Court of Appeals reiterated the enforceability of appraisal provisions in insurance policies in the context of windshield claims. Notably, the Court held that postloss assignees have a legal obligation to comply with the contractually mandated appraisal provision in the insurance policies. (*Progressive American Insurance Company v. Hillsborough Insurance Recovery Center, LLC a/a/o Joel Wolf, Ernessa Dennis Johnson, and Juan Gil,* 47 Fla. L. Weekly D2265a) The Court further held, "Once appraisal was properly invoked, this dispute was ripe for appraisal—a process wherein any errors in valuation of the loss which the trial court mistook for bad faith would be resolved by selected appraisers". *Id.*

The Second District Court of Appeals further reiterated that courts are not to rewrite insurance policies,.[1] The Court further held, "The appraisal provision at issue in the underlying cases, as written, does not require good faith negotiation... In fact, nowhere in the three insurance policies is there a provision concerning the nature of negotiations between the parties before either the insured or the insurer invokes appraisal based upon a dispute as to the amount of the loss." *Id.*

While the Amended Complaint for Declaratory Relief may state a different cause of action than the complaints in those cases, the underlying insurance policies and their appraisal provisions are identical and the decisions are binding upon this court.

CONCLUSION

This Court is bound by the decisions of the Fifth District Court of Appeals decision in *NCI, LLC F/K/A Auto Glass Store LLC A/A/O Dora Noe v. Progressive Select Insurance Company,* 47 Fla. L. Weekly D2235f as well as the Second District Court of Appeals decision in *Progressive American Insurance Company v. Hillsborough Insurance Recovery Center, LLC a/a/o Joel Wolf, Ernessa Dennis Johnson, and Juan Gil,* 47 Fla. L. Weekly D2265a. The underlying dispute in this matter relates to the same issues as these decisions, and regardless of the merits of any of

the underlying questions posed by Plaintiff's Amended Complaint for Declaratory Relief, this Court must rule consistently with the Fifth and Second District Courts of Appeals given the identical policy language at issue and virtually identical underlying fact patterns.

Those cases, read in concert with the underlying policy and other Florida law relating to appraisal, stand for the proposition that once Progressive invoked appraisal, completing appraisal became a condition precedent to bringing or maintaining any action on a claim.[2] As such, and consistent with both the Fifth District Court of Appeals and the Second District Court of Appeals decisions, reconsideration of the July 8, 2022 denial of Defendant's Motion to Dismiss Plaintiff's Amended Complaint for Declaratory Relief is appropriate in this case as appraisal was invoked prior to the onset of litigation. Further, since appraisal was not completed prior to the onset of litigation, dismissal of the action is proper.

Regardless of questions or concerns related to the equity of the matter, the forums for addressing these conclusions and applications of Florida law lay in either the appropriate appellate court or the Florida legislature, as this Court is bound by the aforementioned decisions issued on November 4, 2022.

Based on the foregoing it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Reconsideration is hereby **GRANTED.**

2. Plaintiff's Amended Complaint for Declaratory Relief is **DISMISSED WITHOUT PREJUDICE** to allow the parties to comply with the appraisal provision and terms of the policy.

3. Plaintiff's ore tenus motion seeking leave to file an amended complaint is to be reduced to writing and set for hearing. Plaintiff has 30 days to file its written motion to amend complaint.

4. The Clerk is directed to leave the matter **OPEN** on the docket until such time as this Court has heard argument on Plaintiff's motion to amend complaint to be filed within the next 30 days.

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[1]"Under Florida law, insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc. v. U.S. Fid. & Guar.* Co., 913 So. 2d 528, 532 (Fla. 2005) [30 Fla. L. Weekly S633a]. But "courts may not 'rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.' " *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So. 2d 1245, 1248 (Fla. 1986)). Nor can they "rewrite a contract to relieve a party from an 'apparent hardship of an improvident bargain' " or "use equity to remedy a situation the court perceives to be unfair." *Oreal v. Steven Kwartin, P.A.,* 189 So. 3d 964, 966 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D796a] (quoting *Dickerson Fla., Inc. v. McPeek,* 651 So. 2d 186, 187 (Fla. 4th DCA 1995) [36 Fla. L. Weekly D1131a]). (*Progressive American Insurance Company v. Hillsborough Insurance Recovery Center, LLC a/a/o Joel Wolf, Ernessa Dennis Johnson, and Juan Gil,* 47 Fla. L. Weekly D2265a)

[2]Neither the 5th or 2nd DCA in its November 4, 2022 decisions made a distinction between breach of contract or declaratory judgment actions with respect to completion of appraisal being a condition precedent to filing suit.

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order postponing depositions of insurer's corporate representative and adjuster until after hearing on insurer's motion for summary judgment is granted—Summary judgment motion involves purely legal questions of validity of demand letter and whether insurer properly reimbursed bills based on 2007 limiting charge

UNIVERSITY DIAGNOSTIC INSTITUTE, a/a/o Orlando Mercado, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-003506-O (71). Civil Division. December 13, 2022. Amy J. Carter, Judge. Counsel: David Edwards, Reifkind, Thompson & Rudzinski, LLP, Ft. Lauderdale, for Plaintiff. Albert J. Sabates, Progressive PIP House Counsel, Maitland, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTION FOR PROTECTIVE ORDER

THIS CAUSE having come before the Court for consideration, and the Court being otherwise advised in the premises, it is hereupon,

It is ordered that Plaintiff shall not schedule Defendant's corporate representative and/or litigation adjuster for deposition until after the Court rules upon Defendant's Motion for Summary Judgment.

It is further ordered that Defendant shall not be compelled to answer any of the supplemental discovery propounded by Plaintiff.

Generally, discovery should be completed before a Motion for Summary Judgment is heard, "[h]owever, the general principle of law applies only when future discovery might create a disputed issue of material fact." *A & B Discount Lumber & Supply, Inc. v. Mitchell,* 799 So. 2d 301, 303 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2405b]. When "future discovery would not yield any new information that the trial court either did not already know, or needed to make its ruling," summary judgment is appropriate. *Estate of Herrera v. Berlo Indus., Inc.,* 840 So. 2d 272, 273 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b]. Further, when "discovery would not have unearthed any material facts necessary for the resolution of this issue," a Motion for Summary Judgment before the close of discovery can be properly granted. *Barco Holdings, LLC v. Terminal Inv. Corp.,* 967 So. 2d 281, 288 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2314a]. Lastly, "[w]hen the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and that such discovery is not likely to produce a genuine issue of material facts, discovery should be ended." *Colby v. Ellis,* 562 So. 2d 356, 357 (Fla. 2d DCA 1990) (citation omitted).

The issues in the present case—whether Defendant properly paid Plaintiff's bills based on the 2007 Limiting Charge and whether Plaintiff failed to serve a valid demand letter pursuant to F.S. 627.736(10)—involve questions of law to be adjudicated by way of summary judgment, which require no fact discovery. *See Jones v. Utica Mut. Ins. Co.,* 463 So. 2d 1153, 1157 (Fla. 1985) "(It is well settled that the construction of an insurance policy is a question of law for the court"). The issues raised in Defendant's summary judgment involve statutory and contractual interpretation. Depositions of Defendant's adjuster and/or corporate representative are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence on these issues. See Fla. R. Civ. P. 1.280(b)(1). Wherefore, the Court Grants Defendant's Motion.

* * *

Insurance—Personal injury protection—Declaratory action—Dismissal—There is no basis for action for declaratory relief regarding lawfulness of insurer's hybrid method of reimbursement where lawfulness has been established by Florida Supreme Court in *MRI Associates of Tampa*

FLORIDA WELLNESS & REHABILITATION CENTER OF HOMESTEAD, a/a/o Hely Ferrigny, Petitioner, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Respondent. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CC-007845-O (75). Civil Division. December 5, 2022. Andrew A. Bain, Judge. Counsel: Thomas J. Wenzel, Steinger, Greene & Feiner, Ft. Lauderdale, for Plaintiff. Alberto J. Sabates, Progressive PIP House Counsel, Maitland, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS AND/OR STRIKE PLAINTIFF'S PETITION FOR DECLARATORY RELIEF

THIS CAUSE having come before the Court for consideration, and the Court being otherwise advised in the premises, it is hereupon,

"In interpreting the statute, we [must] follow the 'supremacy-of-text principle'—namely, the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.' " *Forrester v. Sch. Bd. of Sumter Cnty.*, 316 So. 3d 774, 776 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D930a] (*quoting Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020)) [46 Fla. L. Weekly S9a]). "The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense." *Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022) [47 Fla. L. Weekly S134a] (citation omitted).

The Court in looking at the four corners of the complaint finds that

there is no basis for an action for declaratory relief in light of the Florida Supreme Court's interpretation of § 627.736(5)(a)1., and § 627.136(5)(a)5., Fla. Stat. in *MRI Associates of Tampa, Inc. v. State Farm Mutual Automobile Insurance Co.,* 334 So. 3d 577 (Fla. 2021) [46 Fla. L. Weekly S379a]), *reh'g denied sub nom.* MRI ASSOCIATES OF TAMPA, INC., ETC. Petitioner(s) v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Respondent(s), SC18-1390, 2022 WL 168291 (Fla. Jan. 19, 2022), and *cert. denied*, 212 L. Ed. 2d 582 (2022)(finding that a limitation based on a schedule of maximum charges establishes a ceiling but not a floor). The Plaintiff's Complaint cannot point to any provision in Florida's Motor Vehicle No-Fault law or Defendant's policy of insurance that would prohibit the Defendant's method of reimbursement in the instant case or distinguish the High Court's ruling in *MRI Associates of Tampa, Inc.*

The Plaintiff relies on *Hands On Chiropractic PL v. GEICO Gen. Ins. Co.,* 327 So. 3d 439, 443 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2023a], reh'g denied (Oct. 8, 2021)(There is nothing in the applicable statute or Geico's policy that allows it to pay 80 percent of the billed amount. It must either pay the amount allowed based on the applicable fee schedule (80 percent of 200 percent) or, if the billed amount is less than the amount allowed, it is to be paid in full.). The Plaintiff, then ask to the Court to look at the Certified Question before the Florida Supreme Court from the United States Court Appeals for the Eleventh Circuit in saying there is a question about the hybrid payment structure under § 627.736, Fla. Stat. (If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer *may* pay the amount of the charge submitted.); *see also, Revival Chiropractic LLC on behalf of Padin v. Allstate Ins. Co.,* 21-10559, 2022 WL 1799759, at *3 (11th Cir. June 2, 2022).

However, neither the Eleventh Circuit nor the Fifth DCA even discuss the holdings in *MRI Associates of Tampa, Inc.* when they said, "This notice provision—providing that 'an insurer may limit payment' if the policy contains notice that 'the insurer may limit payment pursuant to the schedule of charges'—cannot be reconciled with the argument that an election to use the limitations of the schedule of maximum charges precludes an insurer's reliance on the other statutory factors for determining the reasonableness of reimbursements. The permissive nature of the statutory notice language does not in any way signal that the insurer will be so constrained by such an election." *MRI Associates of Tampa, Inc.,* 334 So. 3d at 584 (Fla. 2021); *see also, Geico Indem. Co. v. Affinity Healthcare Ctr. at Waterford Lakes, PL,* 336 So. 3d 404, 406 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D713e].

The only DCA to discuss this issue in connection with the holdings in *MRI Associates of Tampa, Inc.* is the Second DCA in saying, "[o]ur supreme court has rejected this notion and made clear that the schedule of maximum charges set forth in section 627.736(5)(a)1. provide 'an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates.' citing *MRI Associates of Tampa, Inc.,* 334 So. 3d. at 585 (emphasis added). And as the court confirmed, 'an election to use the limitations of the schedule of maximum charges [does not] preclude[ ] an insurer's reliance on the other statutory factors for determining the reasonableness of reimbursements.' *Id.* at 584." *Progressive Am. Ins. Co. v. Back on Track, LLC,* 342 So. 3d 779, 789 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1438a]. Therefore, it is ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED.

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order postponing depositions and discovery responses until after hearing on insurer's motion for summary judgment is granted—Summary judgment motion involves purely legal questions of validity of demand letter, application of 2007 limiting charge, and whether damages are de minimis

ADVANCED DIAGNOSTIC GROUP, a/a/o Trinity Mullins, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-005194-O (71). Civil Division. October 14, 2022. Amy J. Carter, Judge. Counsel: Kurt Wilson, Reifkind, Thompson & Rudzinski, LLP, Ft. Lauderdale, for Plaintiff. Alberto J. Sabates, Progressive PIP House Counsel, Maitland, for Defendant.

ORDER GRANTING DEFENDANT'S SECOND AMENDED MOTION FOR PROTECTIVE ORDER AND DENYING PLAINTIFF'S MOTION TO COMPEL RESPONSES TO SUPPLMENTAL WRITTEN DISCOVERY AND AMENDED MOTION TO COMPEL DEPOSITION

THIS CAUSE having come before the Court for consideration, and the Court being otherwise advised in the premises, it is hereupon,

It is ordered that Plaintiff shall not schedule Defendant's corporate representative and/or litigation adjuster for deposition until after the Court rules upon the Motions for Summary Judgment.

It is further ordered that Defendant shall not be compelled to answer any of the supplemental discovery propounded by Plaintiff including Plaintiff's supplemental request for admissions regarding underpayment of CPT Code 72148.

Generally, discovery should be completed before a Motion for Summary Judgment is heard, "[h]owever, the general principle of law applies only when future discovery might create a disputed issue of material fact." *A & B Discount Lumber & Supply, Inc. v. Mitchell,* 799 So. 2d 301, 303 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2405b]. When "future discovery would not yield any new information that the trial court either did not already know, or needed to make its ruling," summary judgment is appropriate. *Estate of Herrera v. Berlo Indus., Inc.,* 840 So. 2d 272, 273 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b]. Further, when "discovery would not have unearthed any material facts necessary for the resolution of this issue," a Motion for Summary Judgment before the close of discovery can be properly granted. *Barco Holdings, LLC v. Terminal Inv. Corp.,* 967 So. 2d 281, 288 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2314a]. Lastly, "[w]hen the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and that such discovery is not likely to produce a genuine issue of material facts, discovery should be ended." *Colby v. Ellis,* 562 So. 2d 356, 357 (Fla. 2d DCA 1990) (citation omitted).

The issues in the present case, whether Defendant properly paid Plaintiff's bills based on the 2007 Limiting Charge, whether Plaintiff's damages are De Minimis and whether Plaintiff failed to serve a valid demand letter pursuant to F.S. 627.736(10) involve questions of law to be adjudicated by way of summary judgment, which require no fact discovery. *See Jones v. Utica Mut. Ins. Co.,* 463 So. 2d 1153, 1157 (Fla. 1985) "(It is well settled that the construction of an insurance policy is a question of law for the court."). The parties' summary judgment issues involve statutory and contractual interpretation. Depositions of Defendant's adjuster and/or corporate representative are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence on these issues. See Fla. R. Civ. P. 1.280(b)(1). Wherefore, the Court Grants Defendant's Motion and denies Plaintiff's Motions.

* * *

Debt collection—Attorney's fees—Prevailing party—Mutuality or reciprocity of obligation—Defendant who prevailed as result of voluntary dismissal of plaintiff's action for account stated seeking monies due on credit card account was entitled to award of attorney's fees under attorney's fees provision of underlying card agreement, made reciprocal to apply to defendant pursuant to section 57.105(7)—Plaintiff's argument that card agreement's choice-of-law provision applying laws of South Dakota does not permit reciprocity of attorney's fees is rejected—Plaintiff did not attach card agreement to complaint, operated under Florida law for entirety of action, and did not assert that South Dakota law applied to action until post-dismissal response to motion for fees and costs

DEPARTMENT STORES NATIONAL BANK, Plaintiff, v. STACY S. ASHLEY, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2021-CC-6380. December 5, 2022. Kevin Kohl, Judge. Counsel: Drew Linen, RAS Lavrar, Plantation, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS

THIS CAUSE came before the Court during an evidentiary hearing on November 15, 2022, on Defendant's Motion for Attorney Fees and Costs, and the Court having reviewed the file, heard argument from counsel, and being otherwise fully advised in the premises, hereby finds:

Plaintiff filed a one-count Account Stated action against Defendant to collect monies allegedly owed on a credit card account. At trial, the Plaintiff took a voluntary dismissal, and the Court subsequently dismissed the action in Defendant's favor. Defendant timely moved as prevailing party for an award of attorney fees and costs pursuant to the Card Agreement between the parties and Florida Statute §57.105(7). In response, Plaintiff relied on the holding in *Giles v. Portfolio Recovery Associates, LLC*, 317 So. 3d 1287 (Fla. 1st DCA 2022) [46 Fla. L. Weekly D1354a] for the contention that the Card Agreement's choice-of-law provision applying the laws of South Dakota does not permit reciprocity of attorney's fees and therefore, Defendant is not entitled to recovery his attorney fees under the Card Agreement.

The Court finds *Giles* both unpersuasive and inapposite given that the Florida Supreme Court together with all other District Courts of Appeal unequivocally hold that a party must plead and prove the application of foreign law. *Mills v. Barker*, 664 So. 2d 1054 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D2643a]; *Columbian Nat'l Life Ins. Co. v. Lanigan*, 19 So. 2d 67, 68 (Fla. 1944) ("The general rule is that when the law of a foreign state is relied on as governing a given transaction it must be pleaded and proved as any other issue of fact. . ."); *Schubot v. Schubot*, 363 So. 2d 841 (Fla. 4th DCA 1978) ("The law of the foreign state cannot be the basis for a trial court's ruling unless such law has been raised through the pleadings."); *Coyne v. Coyne*, 325 So. 2d 407 (Fla. 3d DCA 1976); *See Motzer v. Tanner*, 561 So. 2d 1336, 1337-38 (Fla. 5th DCA 1990) (the phrase "must be pled" is to be construed in accordance with Florida Rule of Civil Procedure 1.100 that qualifies complaints, answers, and counterclaims as pleadings."); *see also Stockman v. Downs*, 573 So.2d 835 (Fla. 1991) (finding that attorney's fees "must be pled" and that "[a] party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him.")

In this case, Plaintiff did not attach the Card Agreement to its Complaint and did not plead and prove that South Dakota law applied in this action. Plaintiff operated under Florida law during the entirety of this action and did not assert the Card Agreement's choice-of-law provision until its post-dismissal response to Defendant's motion for attorney fees and costs. Because Plaintiff did not plead and prove reliance on South Dakota law, the matter is determined by Florida law.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion for Attorney Fees and Costs is granted. Plaintiff's Motion for Protective Order is denied**.** Defendant's Motion for Sanctions is denied as moot.

* * *

Insurance—Personal injury protection—Demand letter—Sufficiency—Medical provider cannot recover benefits for office visit where pre-suit demand letter claimed overdue benefits for diagnostic services, but not for office visit

ANGELS DIAGNOSTIC GROUP, INC., a/a/o Maikel Rodriguez, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-024280-SP-25. Section CG03. November 8, 2022. Patricia Marino Pedraza, Judge. Counsel: Adriana de Armas, Pacin Levine, PA, Miami, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON SUMMARY JUDGMENT REGARDING PRE-SUIT DEMAND

THIS CAUSE came before the Court on Allstate's Motion for Summary Judgment or Disposition as to Plaintiff's Deficient Pre-suit Demand and Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses Regarding Defective Pre-suit Demand Letter; and the Court, having reviewed the Motions, having heard argument of Counsel on November 2, 2022, and being sufficiently advised in the premises, finds as follows:

FACTS

The Plaintiff rendered medical services to Maikel Rodriguez on February 26, 2018 in the total amount of $2,850. See Exhibit B to Affidavit of Adjuster. Plaintiff submitted one set of bills for diagnostic services and a second for an office visit. Allstate reimbursed Plaintiff in the total amount of $717.04. See *id.* Thereafter, Plaintiff submitted a pre-suit demand letter, claiming a total of $2,000 remaining overdue for the first set of bills (the diagnostic services) but not for the second bill for the office visit (CPT Code 99204). As it stands today, Plaintiff has not submitted a pre-suit demand letter for the office visit.

Plaintiff initiated litigation, filing a Complaint that claimed $70.00 in damages. While it is not explicitly stated in the Complaint, $70 is the difference between 100% and 80% of the billed amount for CPT Code 99204—the one service for which Plaintiff did not submit a pre-suit demand letter. The record reflects that Plaintiff's sole claim in this suit is for additional benefits for CPT Code 99204.

ANALYSIS

The PIP Statute is designed to ensure the "swift payment of PIP benefits." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.,* 961 So.2d 328, 331-32 (Fla. 2007) [32 Fla. L. Weekly S453a] *(quoting State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So.2d 1067, 1077 (Fla. 2006) [31 Fla. L. Weekly S358a]). Section 627.736(10), Fla. Stat. (2017), ("Section (10)") effectuates this purpose by obligating would-be Plaintiffs to submit a letter before they can file suit, advising the insurer of any claims that remain overdue, thereby providing insurers one last chance to pay any overdue benefits and avoid a lawsuit and exposure for fees. *MRI Assocs. of America, LLC (Ebba Register) v. State Farm Fire and Casualty Co.,* 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b].

Section 10(b)(3) provides:

> The notice must. . . state with specificity:. . . an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) . . . may be used as the itemized statement.

Paragraph (5)(d) provides that bills for PIP benefits must be submitted on approved CMS 1500 forms and must comply with applicable billing and coding guidelines.

In the instant case, Plaintiff cannot recover benefits regarding CPT Code 99204 because it did not serve a pre-suit demand to recover benefits for that specific service. In other words, the pre-suit demand provided Allstate no pre-suit notice that this lawsuit would concern CPT Code 99204.

CONCLUSION

Since Allstate was deprived of notice and an opportunity to cure the only service that is the subject of this litigation (i.e., CPT Code 99204), the Court finds that Plaintiff is barred from recovering additional benefits for that service.

THEREFORE, IT IS HEREWITH ORDERED AND ADJUDGED that:

1. Allstate's Motion for Summary Judgment regarding Deficient Demand is GRANTED and Plaintiff's Motion for Summary Judgment regarding Allstate's Presuit Demand Affirmative Defenses is DENIED.

2. The instant lawsuit was prematurely filed and is therefore herewith dismissed.

3. Plaintiff shall go hence without day.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where medical provider billed amount that is less than 200% of applicable fee schedule but more than 80% of 200% of that fee schedule, insurer was entitled to reimburse provider at 80% of reasonable charge or 80% of 200% of fee schedule

HOMESTEAD CHIROPRACTIC CLINIC, a/a/o Alejandro Ramirez, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Civil Division. Case No. 21-007427 SP 23. August 31, 2022. Natalie Moore, Judge. Counsel: Vincent Joseph Rutigliano, Rosenberg & Rosenberg PA, Hollywood, for Plaintiff. Giannina G. Maselli, Law Offices of Terry M. Torres & Associates, Doral, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This case came before the Court on July 6, 2022, on Plaintiff's Motion for Partial Summary Judgment. The Court heard the arguments of the parties and considered the applicable law. It is hereby

ORDERED and ADJUDGED as follows:

Plaintiff, HOMESTEAD CHIROPRACTIC CLINIC, rendered treatment to Alejandro Ramirez for injuries after a car accident that occurred on January 3, 2020. Mr. Ramirez had a policy for automobile insurance with Defendant, Infinity Auto Insurance Company ("Infinity"), that included personal injury protection ("PIP") benefits. Mr. Ramirez assigned those benefits to Plaintiff, and Plaintiff submitted bills for treatment to Defendant. Defendant made payment; Plaintiff believed the payment of those bills to be insufficient; so this suit began. Plaintiff filed a two-count statement of claim. The first count alleges breach of contract. The second count is an action for declaratory judgment. In the statement of claim, Plaintiff asks the Court to "decree that [Florida Statute] §627.736 [*sic*] compels the Defendant to remit payment for charges that are less than 200% of the applicable Medicare Part B Fee Schedule unless the amount billed is also less than 80% of the 200% of the applicable Medicare Part B Fee Schedule, at which point Defendant may pay the fill amount of the charge." Plaintiff has filed a "Motion for Partial Summary Judgment" which seeks resolution of the declaratory judgment count of the statement of claim.[1]

Pursuant to Florida Rule of Civil Procedure 1.510(a) "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Florida has adopted almost in its entirety Federal Rule of Civil Procedure 56. In applying 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.

Plaintiff's motion has a statement of facts that lays out the relevant information. Each assertion is supported by the exhibits attached to the motion. The facts are:

1. One of the codes Plaintiff billed for was 99204.

2. Plaintiff billed $345.00 for code 99204.

3. 200% of the Medicare Fee Schedule for code 99204 is $361.58.[2]

4. 80% of 200% of the Medicare Fee Schedule for code 99204 is $289.26.

5. Defendant paid Plaintiff $276.00 which is 80% of the $345.00 charge.

Defendant did not file a timely response to the motion for summary judgment, thus these facts are deemed admitted.[3]

The purpose of the PIP statute is to "provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption." *Geico v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147, 152 (Fla. 2013) [38 Fla. L. Weekly S517a]. Section 627.736(1), Florida Statutes, requires insurers to provide coverage for 80% of all reasonable expenses for medically necessary services related to use of an automobile. Section 627.736(5), Florida Statutes, provides two ways to determine how much an insurer must reimburse a provider for these services. First, it provides a non-exhaustive list of factors an insurer can consider in determining if a charge is reasonable. This allows insurers to analyze the reasonableness of a bill it receives and then pay 80% of a reasonable charge. Second, the statute provides insurers with the ability to limit reimbursements to a schedule of maximum charges. This limitation is "an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates." *MRI Assoc. of Tampa, Inc. v. State Farm Mut. Auto Ins. Co.,* 334 So. 3d 577, 585 (Fla. 2021) [46 Fla. L. Weekly S379a]. The two methods to determine reimbursement rates are not mutually exclusive. The schedule of maximum charges allows an insurer to limit what it will pay, but the fee schedule "establishes a ceiling, not a floor." *Id.* at 585.

In this case, the provider charged $345. This charge is less than 200% of the Medicare Fee Schedule but more than 80% of 200% of the Medicare Fee Schedule. Defendant reimbursed the provider at 80% of the charge, consistent with sections 627.736(1) and 627.736(5)(a)(1), Florida Statutes.

Plaintiff asks this Court to decree that Defendant cannot pay 80% of the billed amount, but instead it must pay pursuant to the fee schedule. Terming the payment "80% of the billed amount" and then arguing that the statute does not provide for using "80% of the billed amount" as a methodology for determining reimbursement is misleading. The "billed amount" is the charge submitted to the insurer. A physician may charge only a reasonable amount for services provided. Fla. Stat. § 627.736(5)(a). No one has contested the reasonableness of the provider's charge of $345, and as providers may only submit reasonable charges, the billed amount must be considered a reasonable charge. And payment of 80% of a reasonable charge is proper.

Plaintiff submits that Defendant "elected" the fee schedule and, therefore, must pay pursuant to that fee schedule. Neither the statute nor the contract compel this conclusion. It is now settled law that the PIP statute does not limit insurers to one payment methodology or another. The contract in this case does not indicate that the insurer will determine reimbursement according to the fee schedule, to the exclusion of any other methodology. The PIP endorsement of the contract (which is an exhibit attached to Plaintiff's motion) states that it will pay "80% of medical expenses" and defines medical expenses

as "reasonable expenses" for medical services. The contract elects to *limit* reimbursements, indicating that payments *shall not exceed* the fee schedule identified in the PIP statute. The contract does not mandate payment pursuant to the fee schedule; it mandates payment of 80% of the reasonable medical expenses, and in no case, more than the fee schedule.

Plaintiff points to several cases in support of its argument. Before the Supreme Court decided *MRI II*, a body of cases held that when an insurer elected to utilize the fee schedule, an insurer must pay according to that fee schedule unless the amount billed is less than the amount the fee schedule allows. *Geico Indemnity Company v. Accident & Injury Clinic, Inc. a/a/o Frank Irizarry,* 290 So. 3d 980 (Fla. 5th DCA 2020) [46 Fla. L. Weekly D3045b], *Geico Indemnity Company v. Muransky Chiropractic, P.A.,* 323 So. 3d 742, 744-745 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a], *Hands On Chiropractic PL v. GEICO General Insurance Co.,* 327 So. 3d 439 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2023a]. Each of these cases addresses the factual scenario where the providers charge is *less than 80% of 200% of the Medicare Fee Schedule,* a situation not at issue here. That fact led those courts to look to section 627.736(5)(a)(5), Florida Statutes, which provides that if provider bills an amount less than the amount allowed by the fee schedule, the insurer may pay the amount of the charge submitted.

More importantly, the Florida Supreme Court decision in *MRI II* holding that an insurer can simultaneously use the "reasonable charge" method for calculating reimbursements and elect the "schedule of maximum charges" limitation severely undermines the conclusion in these cases. In *Progressive American Insurance Company v. Back On Track, LLC a/a/o Ophelia Bailey,* No. 2D21-541 (Fla. 2nd DCA Jul. 1, 2022) [47 Fla. L. Weekly D1438a] the court held that an insurer was allowed to pay 80% of the billed amount and there is no requirement to pay the billed amount at 100% because that reimbursement complied with the mandate to pay 80% of a reasonable charge. The court certified conflict with *Geico Indemnity Co. v. Affinity Healthcare Center at Waterford Lakes, PL,* 336 So. 3d 404 (Fla. 5th DCA) [47 Fla. L. Weekly D713e]. In *Affinity,* the billed amount was more than 80% of 200% of the applicable fee schedule. The court found that the trial court "properly rejected Geico's argument that it was only required to pay 80% of the billed amount" and that "it should have ordered Geico to pay 80% of 200% of the applicable fee schedule." The opinion does not address the implications of *MRI II* and does not reference any particular contractual language that might have led the court to its conclusion. Because there is inter-district conflict, and the Third District has yet to address this issue, this Court cannot be bound to either ruling.

This Court concludes that, as a result of the specific contractual language here and based on the statute and the applicable law, when a provider charges an amount that is less than 200% of the applicable fee schedule, but more than 80% of 200% of that fee schedule, an insurer may reimburse that provider at 80% of the reasonable charge or at 80% of 200% of the applicable fee schedule.

Plaintiff shall set this case for status within 30 days to determine if final judgment is proper.

[1]Plaintiff further asks the Court to grant judgment as to the amount due and owing if the Court resolves the declaratory judgment count in its favor.

[2]Section 627.736(5)(a)(1) allows an insurer to limit reimbursement to 80% of a schedule of maximum. The maximum charge applicable to the code in this case is 200% of the allowable amount under the participating physicians fee schedule of Medicare Part B (the "Medicare Fee Schedule").

[3]Plaintiff urges the Court to conclude that because no timely response was filed, the Defendant cannot make any argument at all or admits all arguments made by Plaintiff. Florida Rule of Civil Procedure 1.510 states that when asserting that a fact cannot be or is genuinely disputed a party must support that assertion by citing to parts of the record or by showing that the record does not establish the existence or non-existence of a genuine dispute. The rule requires a non-movant to serve a response that includes the non-movants supporting factual position at least 20 days before hearing. Defendant's responsive filing was untimely. The Court denied Defendant's motion to continue the hearing and declined to consider the materials cited to in the response. The Court has accepted all facts asserted by Plaintiff, and not found any dispute of fact. The argument of Defendant, and the finding of this Court, are that the law and the Plaintiff's own materials do not support the conclusion urged by Plaintiff.

* * *

Landlord-tenant—Commercial premises—Eviction—Failure to deposit rent into court registry—Landlord entitled to immediate judgment for possession of premises where tenants failed to make court-ordered rent deposits into court registry

GATOR 5505 NW 7TH AVE, LLC, Plaintiff, v. DANIEL AGNEW, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-014180-CC-20, Section CL02. December 15, 2022. Jacqueline Woodward, Judge. Counsel: Mark A. Goldstein, Miami, for Plaintiff. Berbeth Foster, Denise Ghartey, and Hegel Michel Laurent, for Defendants.

DEFAULT FINAL JUDGMENT OF POSSESSION

This action came before the Court upon Plaintiff's Motion for Final Default Judgment of Eviction and the Court being fully advised in the premises, it is

Ordered as follows:

1. Plaintiff/landlord filed this action to evict the Defendants tenants from a commercial premises.

2. The Defendants filed an Answer and on February 17, 2022, after a rent determination hearing where all parties were present, the Court ordered a deposit of $12,569.46 in past due rent Plus the court fees by 2/24/22. In addition the Court ordered the Defendants to deposit rent of $3,769.74 plus court fees into the court registry by the first day of each month. As shown by the Court docket, the Defendants failed to deposit any rent into the court registry during the months of October, November and December.

2/23/22	16338.00	Short 1.92	-1.92
4/4/22	3706.64	Short 69.10	-71.02
5/2/22	3706.64	Short 69.10	-140.12
6/3/22	3572.20	Short 197.54	-337.66
No deposit in July	0	Short 3769.74	-4107.40
No deposit in August	0	Short 3769.74	-7877.14
9/14/22	2233.99	Short 1535.75	-9412.89
9/20/22	770.94		-8641.95
No deposit in October	0	Short 3769.74	-12,411.49
No deposit in November	0	Short 3769.74	-16,181.23
No deposit in December prior to Motion for final judgment	0	Short 3769.74	-19,950.97
12/14/22	6298.03	Make up payments	-13,652.94
12/15/22	4524.63	Make up payments	-9,128.31

3. A Defendant tenant is required to deposit the rent into the court registry to assert any defense other than payment. *Stanley v. Quest Intern. Inv., Inc.,* 50 So.3d 672, 674 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2636a].

4. Section 83.232, Fla. Stat., was enacted to prevent delinquent tenants from unjustly enriching themselves at their landlord's expense by occupying the premises rent-free while their landlord sues to evict them. *Premici v. United Growth Properties, L.P.,* 648 So. 2d 1241,

1244 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D228c].

5. Pursuant to Section 83.232, Fla. Stat., since the Defendants failed to make the Court Ordered deposit the Plaintiff is entitled to an immediate judgment for possession of the premises. *Park Adult Residential Facility, Inc. v. Dan Designs, Inc.,* 36 So.3d 811 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D1192a]; *Kosoy Kendall Assocs. LLC v. Los Latinos Rest., Inc.,* 10 So. 3d 1168 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1075a].

6. Based on the foregoing, Plaintiff's Motion is granted. Plaintiff Gator 5505 NW 7th Ave, LLC, shall recover from Defendants Daniel Agnew, Isaiah Thomas, and Dantrail Felton possession of the real property located at 5505-5507 NW 7th Avenue, Miami, Florida 33127, for which let Writ of Possession issue forthwith.

* * *

Insurance—Personal injury protection—Attorney's fees—No merit to argument that post-suit payment of benefits does not constitute confession of judgment entitling medical provider to attorney's fees because payment was made under medical payment provision of policy but suit sought only PIP benefits—Complaint is sufficiently broad to assert claim for medical payment benefits—Insurer cannot raise choice of law defense that was not raised in pleadings following confession of judgment

OPEN MRI OF MIAMI-DADE, LTD., a/a/o Lynda Louis-Smith, Plaintiff, v. PROGRESSIVE CHOICE INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-014908-SP-23. Section ND05. March 24, 2022. Chiaka Ihekwaba, Judge. Counsel: Kenneth J. Dorchak, Buchalter Hoffman and Dorchak, North Miami, for Plaintiff. Lynne French Davis, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF FINAL SUMMARY JUDGMENT AND MOTION FOR ATTORNEY'S FEES AND COSTS

THIS MATTER having come before the Court on January 10, 2022 and on March 3, 2022 on the Plaintiff's Motion for Entry of Final Summary Judgment and Motion for Attorney's Fees and costs and after heard the argument of counsel and otherwise being fully advised of the premises thereof it is hereby ORDERED AND ADJUDGED that:

UNDISPUTED FACTS

1. This matter concerns a claim for assigned insurance benefits arising out of an automobile accident involving Lynda Louis-smith which occurred on 11/11/2010.

2. The Defendant issued a policy of insurance which provided benefits for payment of medical expenses to Lynda Louis-Smith which policy was in full force and effect.

3. On 01/26/2011 the Plaintiff provided medically necessary and related services to Lynda Louis-Smith.

4. Plaintiff received from Lynda Louis-Smith an assignment of her benefits under the policy on insurance including Medical Payments benefits.

3. Plaintiff submitted a bill to the Defendant in the amount of $1,850.00.

4. The Defendant failed to issue payment.

5. This lawsuit was filed on 07/13/2011.

6. On or about 9/11/2013 the Defendant issued payment to the Plaintiff in the amount of $1,226.60. In making the payment Defendant issued an explanation of benefits which expressly referenced Section 627.736(5), Fla. Stat., which is part of the Florida No-Fault law.

7. Plaintiff filed the instant motion asserting that the payment constituted a confession of judgment thereby entitling it to a judgment and to an award of reasonable attorney's fees and costs.

ISSUES

8. Defendant asserts that the amount paid was paid under the Medical Payments provision of the policy and were not PIP benefits. The Defendant further argues that the complaint solely sought PIP benefits and that since the complaint did not expressly assert a claim for Medical Payments that there can be no confession of judgment.

9. The Defendant further argues California law should apply and that since there is no PIP under California law such defeats the Plaintiff's claim for PIP benefits as well as the Plaintiff's claim for attorney's fees.

10. As to the argument raised regarding the complaint being limited to a claim for PIP benefits to the exclusion of a claim of Medical Payments benefits the Plaintiff responded by arguing that the complaint was broadly drafted and was not limited to a claim for PIP benefits. As to the choice of law argument the Plaintiff argues that this issue was waived by the failure of the Defendant to plead it and the failure of the Defendant to present the court with sufficient information for the court to conduct a choice of law analysis.

ANALYSIS

11. A review of the complaint supports the Plaintiff 's argument that the complaint was not limited to a claim for PIP benefits. Paragraph 2 of the complaint broadly alleges that this was an action for "breach of an insurance contract." Paragraph 6 asserts that all times material hereto that the patient was "covered by a policy of automobile insurance including coverages required by the Florida No-Fault Law." Lastly the prayer for relief generally seeks "damages" and such does not expressly limit itself to PIP benefit.

The Court concludes that the use of the term "including" is not a term of limitation as suggested by the Defendant's argument and that the complaint is sufficiently broad to assert a claim for unpaid benefits under the policy including the type paid by the Defendant. *See Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 459 (7th Cir. 2006) (stating that use of the participle "including" generally implies an illustrative application) (citing Black's Law Dictionary 687 (5th ed.1979)); *In re Glunk*, 342 B.R. 717, 729 (Bankr.E.D.Pa.2006) (holding that the use of the participle "including" in 11 U.S.C. § 707(a) indicates that "the three enumerated grounds for dismissal [for lack of a good-faith filing] are illustrative and not exhaustive"); *See also Tarantola v. William B. Henghold, M.D, P.A.*, 214 So. 3d 726, 727 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D543a]—[a]s written, the trial court's temporary injunction generally restricts appellant from practicing "dermatological medicine" because the participial phrase "including Mohs surgery" is not one of limitation citing Black's Law Dictionary (10th ed. 2014) ("The participle including typically indicates a partial list the plaintiff asserted five tort claims, including slander and libel. But some drafters use phrases such as including without limitation and including but not limited to—which mean the same thing.").

12. As to the choice of law issue the Court agrees that the Defendant has failed to properly raise such issue in its pleadings and in response to the Plaintiff's motion and that by virtue of the confession of judgment the Defendant cannot now assert such as a defense as it has effectively been waived. The Defendant has failed to present this Court with sufficient information for this court to conduct a choice of law analysis. The Defendant has filed nothing in opposition to the Plaintiff's motion other than its memorandum of law filed after the initial January 10, 2022 hearing. Foreign law is a fact to be pleaded and proved; and when the contrary is not alleged, the law of the sister state will be assumed to be the same as Florida law. *Collins v. Collins*, 160 Fla. 732, 36 So.2d 417, 417 (1948). *See also Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998), *certified question answered*, 734 So. 2d 1038 (Fla. 1999) [24 Fla. L. Weekly S283a]. While Florida courts are required to take judicial notice of the common law and statutes of all sister states, such judicial notice can only be taken after one party has raised the issue of foreign law through the pleadings,

thereby providing the other party with reasonable notice. *Movielab, Inc. v. Davis*, 217 So.2d 890 (Fla. 3d DCA 1969). In the matter of *Schubot v. Schubot*, 363 So. 2d 841 (Fla. 4th DCA 1978), *dismissed*, 378 So. 2d 348 (Fla. 1979) the Fourth District Court held that the trial court's reliance on California's community property law was improper where such was not properly raised in the pleadings. *See also Platypus Wear, Inc. v. Horizonte Fabricacao Distribuicao Importacao Exportacao LTDA.*, 07-21827-CIV, 2010 WL 11442639, at *2 (S.D. Fla. June 21, 2010)—under Eleventh Circuit precedent, when a party does not allege in a pleading that foreign law (i.e., the law of a sister state or of a another nation) applies, Florida law will generally be assumed to apply.

Lastly, the Defendant's argument that Florida Law does not apply is in conflict with the Defendant's very own Explanation of Benefits which expressly referenced Florida law.

ACCORDING the Plaintiff Motion is GRANTED.

This Court hereby enters final judgment against the Defendant and in favor of the Plaintiff for the amount of $1,226.60 which amount has already been paid and accepted.

The Court finds that the Plaintiff is entitled to an award of reasonable attorney's fees and costs. The Court shall retain jurisdiction over this matter to determine the reasonable amount of such attorney's fees and costs.

* * *

Landlord-tenant—Eviction—Notice—Defects—Notices to terminate month-to-month tenancy are fatally defective for giving less than sixty days' notice and for attempting to terminate tenancy in middle of monthly period—Motion to dismiss granted

ALANA OGLESBY, Plaintiff, v. KIYANCA CRAWFORD, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-037939-CC-23. Section ND01. November 1, 2022. Myriam Lehr, Judge. Counsel: Alana Oglesby, Pro se, West Park, Plaintiff. Chinaza Ihekwaba, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND ORDER OF DISMISSAL

THIS CAUSE came before the Court on October 26, 2022, on Defendant's Motion to Determine Rent and Defendant's Motion to Dismiss [DE #7, 17], having heard argument at hearing, reviewing the file and pertinent case law, and being otherwise fully advised, the Court makes the following findings:

1. The Defendant is a Miami Dade Housing Choice Voucher Program (Section 8) participant. The Defendant has no rental obligation to the landlord and therefore there is no rent deposit requirement.

2. Plaintiff filed this Eviction Complaint on September 23, 2022 based on two defective notices to terminate the Defendant's month-to-month tenancy.

3. The Plaintiff's first notice dated July 22, 2022 informed the Defendant that she had to vacate the property by August 26, 2022, thus providing the Defendant 35 days' notice.

4. The Plaintiff's second notice, titled a 60-Day Notice, dated September 6, 2022, informed the Defendant that she had to vacate the property by September 22, 2022, thus providing the Defendant only 16 days' notice.

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

6. 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).

7. Section 17-03(a) of the Code of Ordinances of Miami-Dade County, Florida states:

A residential tenancy without a specific duration in which the rent is payable on a monthly basis may be terminated by either the landlord or tenant by giving not less than 60 days' written notice prior to the end of any monthly period.

8. Plaintiff's notices are defective because they fail to provide the 60 days required under Section 17-03(a).

9. In addition, Plaintiff's notices are defective because they attempt to terminate the month-to-month tenancy in the middle of the monthly period.

It is ORDERED AND ADJUDGED:

1. The Defendant's Motion to Dismiss is GRANTED.
2. The case is DISMISSED.

* * *

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Invalid or unlawful claims—Entry of summary judgment on exhaustion defense is precluded, where medical provider has established genuine issues of material fact regarding whether bills submitted by another provider and paid by insurer were for therapy services that were not lawfully rendered and services that were not related to accident or medically necessary—On reconsideration, court recognizes that it erred in entering summary judgment on exhaustion defense in favor of insurer on grounds that provider did not plead bad faith

MANUEL V. FEIJOO, M.D., a/a/o Yanisleydys Sopedra, et al., Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-011468-SP-26. Section SD05. October 25, 2022. Michaelle Gonzalez-Paulson, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gales, for Plaintiff. Andrea Harris, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR REHEARING ON CROSS MOTIONS FOR SUMMARY JUDGMENT RE: BENEFITS EXHAUSTED

This matter having come before the Court on Plaintiffs' (MANUEL V. FEIJOO, M.D., and MANUEL V. FEIJOO, M.D., P.A., a/a/o YANISLEYDYS SOPEDRA) motion for rehearing, which was timely filed pursuant to Rule 1.530, Fla.R.Civ.P., after the entry of summary judgment in favor of Defendant on the parties' Cross Motions for Summary Judgment regarding the 'benefits exhausted' defense. In its motion for rehearing, Plaintiff asks this court to reconsider its earlier order dated July 27, 2022, granting summary judgment for Defendant and in support of its motion Plaintiff argues the existence of various issues of fact, which are discussed below.

BACKGROUND & PROCEDURAL HISTORY

This is an action seeking to recover unpaid medical bills which are due and owing pursuant to an insurance policy issued by Defendant, and which are borne out of an auto accident that occurred on July 17, 2017, in which the insured patient, Yanisleydy Sopedra, was injured. The resulting medical bills were submitted to Defendant for payment. When Defendant refused to remit payment, Plaintiff filed the instant action. In defense of this action, Defendant asserted an affirmative defense indicating that the $10,000 policy limits were exhausted by the payment of other medical bills and as a result there were no policy benefits remaining to satisfy Plaintiff's claim.

Thereafter, Plaintiff timely served a reply to Defendant's 'benefits exhausted' defense and alleged that the PIP benefits could not be exhausted because PIP benefits cannot be exhausted via payment of unlawful medical bills, nor by the payment of invalid claims. Plaintiff also alleged in its reply that Defendant acted in bad faith when it attempted to exhaust the policy by paying unlawful or invalid claims.

Plaintiff argues that this is not a case where an insurer simply paid valid medical bills out of order. Rather, Plaintiff contends that this is a case where the Defendant paid unlawful medical bills that neither

Defendant nor the insured would ever owe because the medical care was (according to Plaintiff) unlawfully rendered, which would make those medical bills invalid as matter of law. Specifically, Plaintiff contends that Defendant paid medical bills for unlawful and unlicensed medical care; that Defendant paid for charges that were false and misleading, (in violation of Fla. Stat. 627.736(5)(b)(1)(c)), and that any payments made towards invalid or unlawful claims are gratuitous and cannot be deducted from the $10,000 policy limits. See, *Coral Imaging v. Geico,* 955 So. 2d 11 (Fla. 3rd DCA 2006) [31 Fla. L. Weekly D2478a]. Defendant disputes these assertions and contends that its payments were intended to satisfy its obligation under the insurance policy.

THE CROSS MOTIONS FOR SUMMARY JUDGMENT

On August 25, 2020, Defendant served its Motion for Final Summary Judgment regarding its 'benefits exhausted' defense. In support of its motion, Defendant relied on: (a) the affidavit of its claims adjuster, Ms. Zunilda De La Cruz; and (b) a summary of payments (i.e., a PIP pay-out log) showing that it paid out $10,000 in medical bills, but without the checks supporting the information contained in the PIP log.

On April 7, 2022, Plaintiff timely served its Response to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment as to the 'benefits exhausted' defense. In support of its position, Plaintiff relied on: (a) the Affidavit of Dr. Manuel V. Feijoo, M.D.; (b) the March 10, 2022, deposition transcript of Defendant's Corporate Representative Zunlida De La Cruz; (c) the pre-suit EUO transcript of the insured patient, Yanisleydy Sopedra; and (d) the Affidavit of Plaintiff's billing clerk, Anielka Castillo. The Summary Judgment evidence is discussed below.

Affidavit of Manuel V. Feijoo, M.D.

In his sworn affidavit dated April 7, 2022, Dr. Feijoo testified that he provided medical care to Sopedra in his office on July 18, 2017, and again on September 1, 2017. The two HCFA forms submitted by Dr. Feijoo indicate that the medical services described therein were actually provided by Plaintiff Feijoo, and that the insured patient was referred to Dr. Feijoo by a non-party medical clinic known as 'We Care Medical.' In his affidavit, Dr. Feijoo testified that he only provided the medical care represented in his HCFA forms for dates of service July 18 and Sept 1, 2017, and that he did not provide nor supervise any other medical care at his facility nor at the 'We Care Medical' facility relative to Ms. Sopedra.

The court record also includes a 30-page set of medical bills (HCFA forms) submitted by non-party We Care Medical seeking payment in the amount of $14,692.92 for medical services allegedly provided to the same insured patient (Sopedra) for the same claim. Upon receipt of the 30-page set of HCFA forms from We Care Medical, Defendant United Auto paid $9,442 to that facility. However, that 30-page set of HCFA forms submitted to Defendant by We Care Medical states that Plaintiff Feijoo, provided all of the medical services referenced in those HCFA forms because We Care Medical placed Dr. Feijoo's name in Box 31 of every single one its HCFA forms. Plaintiff contends that placing Dr. Feijoo's name on those bills was a false and misleading statement because it served to mislead Defendant United Auto into believing that the medical care described in the 30-page set of HCFA forms from We Care Medical was either provided by or supervised by Dr Feijoo, when in fact Dr. Feijoo clearly and unequivocally testified via Affidavit that he had nothing to do with the medical care provided by or at We Care Medical. Defendant offers nothing to dispute Dr. Feijoo's affidavit testimony.

Under Florida law, PIP benefits cannot be used to pay for therapy services, unless those therapy services are provided by a licensed physical therapist or provided by a physical therapist's assistant who is directly supervised by a physician. See, *Geico v. Beacon Health* 298 So. 3d 1235 (Fla 3rd DCA 2020) [45 Fla. L. Weekly D437a]. Therapy that is provided by an unlicensed or unsupervised LMT is not lawfully rendered as a matter of law and United Auto was never required to pay those bills, and neither was the insured. *Beacon Health*, supra. See also, Florida Statutes 480.033(3); 486.161; 486.028; 486.021(11); and 627.736(5)(d).

As a result**,** there appears to be a genuine issue of material fact regarding whether or not the medical bills submitted by We Care Medical were tantamount to a false and misleading statement in violation of F.S. section 627.736(5)(b)(1)(c), or if the medical care reflected in those bills was unlawfully rendered. If so, then those medical bills would not be compensible.

Additionally, Dr. Feijoo's affidavit also establishes that the therapy services provided after September 30, 2017, would not be reasonable, related to the accident, nor medically necessary because Dr. Feijoo's prescription and his affidavit both indicate that therapy should have concluded by the end of September 2017, which gives rise to another issue of material fact regarding whether or not Defendant exhausted the policy by paying invalid or unlawful claims, and whether Defendant paid for medical care that was neither related to the accident nor medically necessary.

Deposition of Defendant's Corporate Representative

The deposition of Defendant's corporate representative, Zunilda De La Cruz, taken on March 10, 2022, establishes that (i) Defendant United Auto paid $9,442 to non-party We Care Medical for 'therapy' services; (ii) Defendant United Auto did not know if We Care Medical (a non-doctor owned facility) had a Medical Director; (iii) Defendant did not know if the person who rendered the therapy services at We Care Medical was licensed to provide therapy without supervision; (iv) Defendant knew that the CPT codes billed by We Care Medical required at least 2 hours of inpatient time to administer just the timed CPT codes (plus additional time for the other therapies); (v) that many of the CPT codes billed by We Care Medical required a modifier in order to be billed in compliance with F.S. section 627.736(5)(d), but none of the bills submitted by We Care Medical contained a CPT modifier on the HCFA forms; (vi) and the insured patient allegedly received therapy services at We Care Medical which far exceeded the scope of Dr. Feijoo's therapy prescription. In sum, the deposition of Defendant's corporate representative gives rise to genuine issues of material fact regarding whether or not Defendant properly exhausted the policy.

The EUO Transcript of the Insured Patient Yanisleydy Sopedra

The EUO of the insured patient shows that: (i) some of the treatment she received was massage therapy (which is not compensable under PIP); (ii) the therapy visits lasted just one hour; and (iii) the therapy visits went beyond the scope of the therapy prescription. Again, these facts serve to demonstrate the existence of genuine issues of material fact regarding whether or not Defendant properly exhausted the policy.

Summary Judgment Arguments

On May 23, 2022, this Court heard argument on the parties' cross motions for summary judgment, and reviewed the evidence filed in support of, and in opposition to, the cross motions for summary judgment. Two months later, the District Court published its decision in *United Services Auto. Ass'n v. Less Inst. Physicians*, 344 So.3d 557 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1556a], which reiterates the axiom that a PIP insurer cannot exhaust PIP benefits by paying invalid or illegal PIP claims, and that a Plaintiff must plead bad faith exhaustion in order to challenge the manner in which PIP benefits are exhausted.

The *Lesspine Institute* decision on exhaustion of benefits was premised solely on bad faith claims handling, and it did not involve

exhaustion of benefits based on the payment of invalid claims (as in the instant case). In *Lesspine Institute*, the medical provider complained that the insurer improperly exhausted the policy by not paying claims in the order in which they were received. But, (unlike the instant case) the provider in *Lesspine Institute* never pled 'bad faith exhaustion' and unlike the instant case there were no facts or allegations indicating that the insurer paid invalid or unlawful claims. See, *Lesspine Institute* supra.

The medical provider in *Lesspine Institute* simply argued that the defendant insurer acted in bad faith when it skipped over its bill and paid other valid claims which were received after the plaintiff's bill in that case (i.e. the English Rule). *Id.* Hence, the recent *Lesspine Institute* decision on exhaustion of benefits was premised solely on bad faith claims handling by paying claims out of order, and it did not involve exhaustion of benefits based on the payment of invalid or unlawful claims (as in the instant case).

This court's Order dated July 27, 2022, granting summary judgment for Defendant indicated that its decision to deny Plaintiff's motion and to grant Defendant's motion was because Plaintiff failed to plead 'bad faith exhaustion' as discussed in the recent *Lesspine Institute* decision. However, a closer review of the pleadings in the instant case reveals that Plaintiff did in fact plead 'bad faith exhaustion' as found in Plaintiff's Reply (a 'reply' is a pleading; see Rule 1.100(a)), which was filed on December 18, 2019, in response to Defendant's affirmative defense alleging 'benefits exhausted.' In fact, Plaintiff's Reply states that ". . .one or more of the medical bills paid by Defendant were . . . not properly billed, was unlawfully rendered, . . .and otherwise not payable." Plaintiff's Reply also states that Defendant acted in bad faith, and that Defendant failed to act as a good steward of the limited amount of medical benefits available for payment of medical bills, etc.

The Feijoo affidavit, coupled with the EUO of Sopedra; the deposition transcript of Defendant's corporate representative; the Affidavit of Anielka Castillo, together with Plaintiff's Reply, collectively demonstrate the existence of multiple issues of material fact precluding entry of summary judgment at this point.

An issue is genuine if "a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C401a] (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* (quoting *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505). The Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in the party's favor. *See, Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C640a].

It is axiomatic that PIP benefits cannot be exhausted by the payment of unlawful medical care nor by paying invalid claims. Payments for invalid or unlawful claims cannot be deducted from the $10,000 PIP benefits. See *State Farm v. Roberto-Rivera Morales, M.D. a/a/o Thomas Mayeko Coklee*, 24 Fla. L. Weekly Supp. 101a (11th Circ. App. Div. 2016) ("the trial court shall deduct the admittedly gratuitous payments . . . [a]ny amount remaining on the policy not exceeding the statutory limits of $10,000 shall be awarded.").

Additionally, Defendant's payment of invalid or unlawful claims despite the information available to it could be seen as Defendant acting in bad faith, which itself creates another issue of material fact precluding summary judgment.

'Bad faith exhaustion' of benefits is usually manifested when an insurer exhausts PIP benefits by paying *valid* claims out of order such that a bill which should have been paid goes unpaid because the insurer failed to pay the bills in the order in which they were received, possibly because the insurer was waiting for supporting documentation (which is what happened in the *Lesspine Institute* case, supra). As stated above, an insurer is not responsible for paying unlawful or invalid claims and neither is the insured, and therefore PIP benefits can never be exhausted by the payment of unlawful or invalid claims. Bad faith exhaustion can also happen when a PIP insurer pays bills it did not owe in order to avoid paying bills submitted by other providers, or when it pays bills that should have been denied based on information available to it.

Medical bills for therapy services rendered by an LMT without the required license or supervision are unlawful and invalid. *Beacon Health*, supra. See also, *Coral Imaging*, supra. Florida law provides that "[o]nce the PIP benefits are exhausted through the ***payment of valid claims***, an insurer has no further liability on unresolved, pending claims." *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.,* 137 So.3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]. While the insurance company "remains free to pay medical providers for charges that are untimely or otherwise submitted in express contravention of the statute, such payments should not be considered a 'payment' under the PIP policy." See, *Coral Imaging,* supra. Such payments "must be characterized as 'gratuitous,' and should not be considered as having been made against the limits of the PIP policy." See, *Ocean Harbor Casualty Ins. Co. v. Medical Specialist of Tampa Bay,* 26, Fla. L. Weekly Supp. 534a, Fla. 6th Cir. App. 2013, (where a circuit appellate court found payments above the schedule of maximum charges by a Defendant were gratuitous payments and thus could not be deducted from the limits of the PIP policy.). See also, *Luis E. Grau, M.D., P.A. a/a/o Ana Chang v. Windhaven Insurance Company*, 26 Fla L. Weekly Supp. 659a, Miami-Dade County Court, J. Cohn (Oct. 11, 2018).

Defendant's payment of medical bills to We Care Medical does not transform invalid claims into valid claims, and Plaintiff has established the existence of multiple issues of fact regarding the validity of those claims because medical bills from unlicensed medical providers are invalid claims.

While bad faith is required to force payments in excess of $10,000 worth of valid claims, invalid claims must be subtracted from the $10,000 policy limits, and do not count. See, *Coral Imaging.* See also, *State Farm v. Morales* (*Coklee),* supra. Defendant claims that but for Dr. Feijoo's affidavit filed during this litigation, it would have no knowledge that it may have paid invalid or unlawful claims. However, under Florida law, PIP insurers who reap the vast financial benefits of mandatory insurance coverage are required by law to verify the claim within 30-days to confirm if the claim is payable, or not. See, *United Auto v. Stat Technologies,* 787 So. 2d 920 (Fla. 3rd DCA 2001) [26 Fla. L. Weekly D1237b], and *Pacheco v. Fortune Insurance Company,* 695 So. 2d 394 (Fla. 3rd DCA 1999) [22 Fla. L. Weekly D1076a]. If it is subsequently proven that Defendant actually paid an invalid or unlawful claim, then Defendant's remedy is to recover the money it paid to those underserving medical providers because their medical bills were invalid and/or unlawful.

In sum, Plaintiff has established that there are multiple issues of material fact in this case regarding the propriety of Defendant's 'benefits exhausted' defense and Plaintiff is entitled to proceed towards trial and attempt to prove that Defendant improperly exhausted the policy by paying invalid or unlawful claims which it did not owe, and Defendant may attempt to prove that it properly exhausted the available PIP benefits. Accordingly, summary judgment is improper on this record, at this point.

CONCLUSION

The summary judgment evidence presented by Plaintiff and discussed above demonstrates, the existence of multiple genuine issues of

material fact regarding whether or not Defendant properly exhausted the policy. Accordingly, Plaintiff's Motion for Rehearing regarding the Cross Motions for Summary Judgment as to the 'benefits exhausted' defense, is hereby GRANTED; the Order dated July 27, 2022, is hereby vacated and both cross motions for summary judgment are hereby DENIED.

* * *

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Motion to dismiss debt collection action is granted where plaintiff did not register and obtain consumer collection agency license from Office of Financial Regulation before filing suit

PERSOLVE RECOVERIES, LLC, Plaintiff, v. SALLY ECHEVERRIA SANABRIA, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-022284-CC-05. Section CC04. November 18, 2022. Diana Gonzalez-Whyte, Judge. Counsel: Michael L. Gold, Walters, Levine DeGrave, Tampa, for Plaintiff. Willie J. Brice, Loan Lawyers, LLC, Ft. Lauderale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO PLAINTIFF'S COMPLAINT AND MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY ONLY FOR THE COUNTERCLAIM

THIS CAUSE came before the Court for hearing on October 27, 2022 on Defendant's **Motion for Final Summary Judgment as to Plaintiff's Complaint and Motion for Summary Judgment as to Liability only for the Counterclaim**. Based upon the Motion, the Response, the arguments and representations of counsel, and the Court, being otherwise advised in the premises, finds as follows:

The Court finds that the plain language of Florida Statute Section 559.553 in the present case is clear and prohibits a consumer collection agency from debt collection practices in the State without "***first***" registering with and obtaining a consumer collection agency license from the Florida Office of Financial Regulation. Here, Plaintiff first instituted this suit, then obtained its license.

It is, therefore, **ORDERED AND ADJUDGED** that the Defendant's **Motion for Final Summary Judgment as to Plaintiff's Complaint And Motion For Summary Judgment As To Liability Only For The Counterclaim** is **GRANTED** based upon Plaintiff's failure to "first register" and obtain a consumer collection agency license from the Florida Office of Financial Regulation with the state before instituting this suit. The Plaintiff shall take nothing from this action and the Defendant shall go hence without day.

The Court will set this matter for trial on Defendant's damages against Plaintiff on Defendant's counterclaim.

* * *

Corporations—Standing to sue

OASIS MEDICAL CENTER CORP., Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-022119-SP-25. Section CG03. February 10, 2022. Patricia Marino Pedraza, Judge. Counsel: Annie Madeline Mur, Mur Law Group, PLLC, Doral, for Plaintiff. Robert Phaneuf, Law Offices of Terry M. Torres & Associates, Doral, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the Court, and the Court being otherwise fully advised in the premises, it is hereby:

ORDERED and ADJUDGED that:

1. The Defendant's Motion to Dismiss is granted.
2. The Plaintiff has 30 days from the date of entry of this order to come into compliance with the applicable corporate filings to maintain its standing to bring suit.

* * *

Insurance—Automobile—Motion to dismiss is denied where complaint states claim for breach of contract—Insurer's payment letter cannot be considered on motion to dismiss where complaint does not incorporate letter, and insurer did not file or authenticate it—Venue—Motion to transfer venue is denied where insurer has not provided affidavit or other sworn proof in support of motion and has not proven substantial inconvenience or undue expense

MOBILE AUTO GLASS REPAIR, LLC, a/a/o Lorelei Cox, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-105536. Division J. October 6, 2022. J. Logan Murphy, Judge. Counsel: Kaitlin E. Fox, FL Legal Group, Tampa, for Plaintiff. Leonor M. Lagomasino, Miami, for Defendant.

ORDER DENYING MOTION TO DISMISS AND GRANTING IN PART DEFENDANT'S MOTION FOR PROTECTIVE ORDER

BEFORE THE COURT are State Farm Mutual Automobile Insurance Company's Motion to Dismiss the Complaint, and Defendant's Motion for Protective Order to Stay Discovery Pending Resolution of Motion to Dismiss. Plaintiff responded, and the parties appeared for a hearing on October 6, 2022.

Construing its allegations in the light most favorable to Plaintiff, the complaint adequately states a claim for breach of contract. *See Brooke v. Shumaker, Loop & Kendrick, LLP*, 828 So. 2d 1078, 1080 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2323d] ("In ruling on a motion to dismiss, the trial court must confine itself to the four corners of the complaint, accept the allegations of the complaint as true, and construe the allegations in the light most favorable to the plaintiff."). And I disagree with State Farm that the complaint incorporates its payment letter in a manner allowing the letter to be considered on a motion to dismiss. *See generally One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]; *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a]. In any event, State Farm did not file or authenticate the letter.

State Farm's alternative motion to transfer venue is likewise denied. In a motion to transfer venue under section 47.122, it is the defendant's "burden to plead and prove that venue is improper." *Loiaconi v. Gulf Stream Seafood, Inc.*, 830 So. 2d 908, 910 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2535b]. While the Court has "broad discretion" to address venue, "the party challenging venue must provide a sufficient factual basis for the exercise of that discretion." *Id.* To sustain its burden and overcome plaintiff's venue selection, "the defendant must submit affidavits or other sworn proof" that will "shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice." *Fla. Health Sci. Ctr. v. Elsenheimer*, 952 So. 2d 575, 578 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D624b]; *Eggers v. Eggers*, 776 So. 2d 1096, 1098 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D438a].

"Proper to granting a change in venue," the defendant must also prove, and the trial court must find, "substantial inconvenience or undue expense" requiring a change of venue. *Brown v. Nagelhout*, 84 So. 3d 304, 311 (Fla. 2012) [37 Fla. L. Weekly S225a]; *Fast v. Nelson*, 22 So. 3d 109, 110 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1919a] (citing *Kirchhoff v. Scott*, 736 So. 2d 786, 788 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1618b]); *Safety Nat'l Cas. Corp. v. Fla. Mun. Ins. Tr.*, 818 So. 2d 612, 613 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1172c].

State Farm has not provided any affidavit or other sworn proof in support of its motion. (The filed affidavit is not executed.) Nor has it proven "substantial inconvenience or undue expense." *Brown*, 84 So. 3d at 311.

Accordingly,

1. State Farm Mutual Automobile Insurance Company's Motion to Dismiss the Complaint is DENIED.

2. Defendant shall answer the complaint within 15 days.

3. Defendant's Motion for Protective Order to Stay Discovery Pending Resolution of Motion to Dismiss is GRANTED in part.

4. Defendant shall respond to all pending discovery within 30 days.

* * *

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Motion for summary judgment based on exhaustion of benefits is granted where insurer's affidavit attests to authenticity of PIP log and other evidence of exhaustion, and medical provider failed to file any timely opposing evidence—No merit to argument that insurer was required to produce copies of cleared checks in order to maintain exhaustion defense

FLORIDA PHYSICAL MEDICINE, LLC, a/a/o Nicholas Farell, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-107847. Division S. December 1, 2022. Jack Gutman, Judge. Counsel: Walter Reynoso, Daly & Barber, P.A., Plantation, for Plaintiff. Daniella Mogg, Sentry Insurance Company Staff Counsel, Stevens Point, Wisconsin, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on October 19, 2022 upon Defendant's Motion for Final Summary Judgment, and having heard arguments from counsel, and otherwise being advised in the premises, this Court hereby finds as follows:

1. This is a Personal Injury Protection ("PIP") lawsuit brought by Florida Physical Medicine, LLC a/a/o Nicholas Farell ("Plaintiff") against Peak Property and Casualty Insurance Corporation ("Defendant") for alleged breach of contract.

2. On February 2, 2018, Nicholas Farell ("Assignor") obtained an automobile policy of insurance from Defendant.

3. On May 6, 2018, Assignor was involved in a motor vehicle accident. Assignor timely sought treatment for injuries sustained as a result of the accident.

4. On May 21, 2018, Defendant received two medical bills totaling $34,559.21 from Medical Center of Trinity for treatment rendered to Assignor on May 6, 2018 and May 7, 2018. Following application of Assignor's deductible, Defendant issued two Explanations of Benefits along with payment totaling $10,000.00 to Medical Center of Trinity. An exhaustion letter was mailed to Medical Center of Trinity and Assignor's attorney of record regarding payment issued up to policy limits.

5. On May 29, 2018, Defendant received one medical bill totaling $800.00 from Plaintiff for treatment rendered to assignor on May 14, 2018. Defendant issued an Explanation of Benefits denying payment to Plaintiff based on the exhaustion of benefits.

6. On May 10, 2021, Defendant received a Demand Letter pursuant to 627.736(10) Fla. Stat. from Plaintiff seeking payment totaling $3,200.00. In response, Defendant denied payment based on the exhaustion of benefits. This lawsuit followed.

7. On March 11, 2022, Defendant filed its Answer, Affirmative Defenses, and Demand for Jury Trial in response to Plaintiff's Amended Complaint alleging exhaustion of benefits, among other affirmative defenses.

8. On May 17, 2022, Defendant filed its Response to Plaintiff's Supplemental Request for Production and produced several claim documents to Plaintiff, including copies of all Explanations of Benefits issued by Defendant and a PIP log.

9. On August 22, 2022, Defendant filed its Motion for Final Summary Judgment ("Motion") as to exhaustion of benefits. Attached to its Motion was the Affidavit of Martha Segura attesting to the copies of the policy of insurance, PIP log, notice of exhaustion, and response to Plaintiff's demand letter. Defendant's Affiant stated that the benefits available for this claim were paid to policy limits.

10. The central issue in this case involves the denial of benefits upon Defendant's receipt of Plaintiff's medical bill. Specifically, Plaintiff argued during hearing that since Defendant did not produce copies of cleared checks to Medical Center of Trinity, there was no evidence that Defendant exhausted the PIP benefits available for Assignor. Plaintiff maintained that a formal request for copies of cleared checks was propounded on January 19, 2022 which was never responded to by Defendant.

11. It is well-settled that exhaustion of PIP benefits extinguishes a provider's right to further payment. *Northwoods Sports Med. v. State Farm. Mut. Ins. Co.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]. This Court finds that the Affidavit attached to Defendant's Motion provided sworn testimony as to the authenticity of the PIP log and other evidence of exhaustion. This Court also notes that Plaintiff failed to file any timely evidence in opposition to Defendant's Motion.

12. In addition, this Court rejects Plaintiff's argument that copies of cleared checks are required in order for Defendant to maintain a defense of exhaustion. Regarding Plaintiff's contention that Defendant failed to respond to Plaintiff's request for such copies, this Court notes that the request was propounded upon Dairyland Insurance Company, a party which was dropped from this lawsuit on February 9, 2022. A formal discovery request for such copies was never propounded on Defendant.

Considering the above facts and law, it is hereby **ORDERED AND ADJUDGED**:

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

2. The Court enters Final Judgment in favor of Defendant. Plaintiff shall take nothing by this action and Defendant shall go hence without a day.

3. Defendant's Motion for Sanctions Pursuant to Section 57.105 of the Florida Statutes is **DENIED**. This Court does not believe Plaintiff's conduct during this lawsuit rose to the level of frivolous required under the statute.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Medical provider that filed action for PIP benefits despite having received full and timely payment of pre-suit demand knew or should have known that its claim was not supported by material facts and application of then-existing law—No merit to argument that provider was actually claiming that it was entitled to payment of full billed amount where allegation that full billed amount was due was not raised until provider faced sanctions, and demand letter did not request full billed amount—No merit to argument that provider presented claim for full billed amount as good faith argument for extension or modification of law

PHYSICIANS GROUP, LLC, a/a/o Markese Golden, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-049193. Division J. December 5, 2022. J. Logan Murphy, Judge. Counsel: Joseph Shaffer, Irvin & Petty, for Plaintiff. Steven T. Sock, Dutton Law Group, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SANCTIONS

BEFORE THE COURT is Defendant's Motion for Sanctions Pursuant to Florida Statute 57.105, filed September 8, 2021. Plaintiff did not file a response, but both parties appeared for a hearing on November 28, 2022. During the hearing, Plaintiff moved for a continuance of the hearing to file additional evidence. Upon consider-

ation, Plaintiff's motion for a continuance is denied, and Defendant's motion for sanctions is granted because Plaintiff knew or should have known that its claim was not supported by the material facts or law.

I. FACTUAL AND PROCEDURAL BACKGROUND.

On February 15, 2019, Markese Golden was injured in a car accident while insured by First Acceptance.[1] He visited Physicians Group for medical services, later assigning his First Acceptance policy benefits to them.[2] As required by § 627.736(10), Physicians Group sent First Acceptance a document titled, "Written Notice of Intent to Initiate Litigation."[3] Paragraph 1(b) of the Notice asks First Acceptance to "remit payment in the amount of $847.51."[4] The demand letter also adds, "If there is additional coverage, then my client demands payment of 100% of the difference between the billed amount and the amount paid up to the point of exhaustion."[5] Twenty-eight days after receiving the demand letter, First Acceptance issued payment of $847.51, plus interest, penalties, and postage.[6]

On May 3, 2021, Physicians Group filed a complaint seeking "unpaid PIP benefits"[7] of "up to $500.00 dollars."[8] In its answer, First Acceptance alleged that it had fully paid the amount requested in the demand letter within 30 days of receiving it.[9] One week after filing its answer, First Acceptance sent a safe-harbor letter to Physicians Group asking it to withdraw the claim because it had been fully paid. Physicians Group did not respond.

After some discovery, First Acceptance filed a motion for sanctions under § 57.105, followed by a motion for summary judgment arguing that it had fully paid the pre-suit demand. The motion for summary judgment was supported by Robin Varnedoe's affidavit and records showing the pre-suit demand was fully paid. Physicians Group did not file a response as required by Florida Rule of Civil Procedure 1.510(c)(5),[10] choosing instead to move to strike Varnedoe's affidavit. Physicians Group has never presented any evidence in support of its claims or in opposition to First Acceptance's defenses.

Following a hearing, I granted summary judgment to First Acceptance, finding it undisputed that First Acceptance had complied with the pre-suit demand and fully paid Physicians Group. *See* § 627.736(10)(d), Fla. Stat. ("If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, . . . no action may be brought against the insurer."). At the hearing, Physicians Group offered no evidence, nor did it suggest that contrary evidence may exist. It did, however, move for a continuance to pursue additional, unspecified discovery. I denied that motion.

First Acceptance then set its § 57.105 motion for hearing on November 28, 2022. At the hearing, First Acceptance relied on evidence in the record. Once again, Physicians Group did not file a response and presented no evidence in support of its position. Indeed, it candidly admitted that First Acceptance timely and fully paid its pre-suit demand. Physicians Group's only argument was that it had demanded and then alleged that First Acceptance was obligated to pay 100% of the billed amounts less than 80% of the fee schedule.[11] And once again, it asked for a continuance to present additional evidence—a motion I took under advisement.

II. STANDARD.

Because the motion for sanctions is based on a statute, we start with the statute's text. *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946-47 (Fla. 2020) [46 Fla. L. Weekly S9a].

> (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.
>
> . . . .
>
> (3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:
>
> (a) Under paragraph 1(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.
>
> (b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

§ 57.105, Fla. Stat.

"The statute is 'intended to address frivolous pleadings,' " but it should not "cast a chilling effect on use of the courts." *Soto v. Carrollwood Village Phase II Homeowners Ass'n, Inc.*, 326 So. 3d 1181, 1184 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1974a] (quoting *Peyton v. Horner*, 920 So. 2d 180, 183 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D462a]); *Stevenson v. Rutherford*, 440 So. 2d 28, 29 (Fla. 4th DCA 1983). To that effect, "section 57.105 should not be construed to discourage a party from pursuing a colorable claim . . . ." *Swan Landing Dev., LLC v. First Tennessee Bank Nat'l Ass'n*, 97 So. 3d 326, 328-29 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2225a]. And it must be applied with restraint "to ensure that it serves the purpose for which it was intended." *Bridgestone/Firestone, Inc. v. Herron*, 828 So. 2d 414, 419 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2173a].

Awarding § 57.105 sanctions is within the trial court's discretion. *Swan Landing*, 97 So. 3d at 328. But a finding of entitlement must be based upon "substantial, competent evidence presented at the hearing . . . or otherwise before the court and in the record." *Mason v. Highlands Cnty. Bd. of Cty. Comm'rs*, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1061a]. The same holds true for any finding of "good faith" under subsection (3). *Ferdie v. Isaacson*, 8 So. 3d 1246, 1250 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D898a].

III. DISCUSSION.

Preliminarily, I find no basis to continue the hearing to give Physicians Group an opportunity to present additional evidence in response to the motion. This case is 20 months old, yet Physicians Group has never been able to produce any evidence in support of its position that First Acceptance failed to pay or underpaid PIP benefits. If such evidence existed, Physicians Group was obligated by Rule 1.510(c)(5) to present it in response to the summary judgment motion, but it did not. Physicians Group will not "suffer[ ] injustice" by declining to extend to nearly two years the time it has had to collect supporting evidence, and the alleged need for a continuance was clearly foreseeable. *Vollmer v. Key Dev. Props., Inc.*, 966 So. 2d 1022, 1029 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2505a]. *See Krock v. Rozinsky*, 78 So. 3d 38, 42 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D130a] (affirming trial court's order denying a continuance of trial where request was made just four days before the final hearing and the cause of the request was "clearly foreseeable").

On the merits of the motion, substantial, competent evidence in the record shows (1) Physicians Group demanded $847.51 in overdue benefits; (2) First Acceptance paid the full amount of the demand, plus interest, penalty, and postage; and (3) Physicians Group nevertheless filed suit, ignoring First Acceptance's correspondence alerting it to the fact that the demand had been fully paid. Physicians Group's claim

therefore "was not supported by the material facts necessary to establish the claim." § 57.105(1)(a). And because § 627.736(10)(d) precludes suit after full payment of a demand, the claim was not "supported by the application of then-existing law to those material facts." § 57.105(1)(b).

Physicians Group cannot now avoid sanctions by arguing that it was actually claiming that it was entitled to the full "billed amount," as required by § 627.736(5). First, the allegation was never mentioned—not in the complaint and not at the summary judgment hearing—until Physicians Group faced the prospect of sanctions. Second, Physicians Group never send a demand letter stating the exact amount due under its "billed amount" argument. A § 627.736(10) demand letter must "state with specificity . . . an itemized statement specifying each *exact amount* . . . claimed to be due." *See* § 627.736(10)(b)(3) (emphasis added). The law "requires precision in a demand letter by its requirement of an 'itemized statement specifying each exact amount.' " *MRI Assocs. of Am., LLC v. State Farm Fire & Cas. Co.*, 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]. *See Chris Thompson, P.A. v. GEICO Indem. Co.*, 347 So. 3d 1 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1588b]; *Rivera v. State Farm Mut. Auto. Ins. Co.*, 317 So. 3d 197, 205 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]. The precision requirement discourages the type of "gamesmanship" now waged by Physicians Group. The provider specified the past due amount as $847.51—not some amorphous "billed amount," of which it has not identified an exact number or presented any evidence in support.

I therefore find that Physicians Group's attorney knew or should have known that its claim when initially presented to the court, and until the time summary judgment was granted, was not supported by the material facts necessary to establish the claim, and would not be supported by the application of then-existing law to those material facts. § 57.105(1)(a), (1)(b).

In passing, Physicians Group argued that it cannot be subject to sanctions because it presented the claim as a good faith extension or modification of the law. *See* § 57.105(3)(a). For many of the reasons stated above, that argument is unpersuasive. In particular, Physicians Group cannot now argue that it was seeking the "billed amount" when it did not raise that issue in its complaint, and when it was fully paid for all amounts it demanded of First Acceptance before filing suit. Physicians Group has not presented or pointed to any record evidence establishing good faith. *Ferdie*, 8 So. 3d at 1250.

Accordingly,

1. Defendant's Motion for Sanctions Pursuant to Florida Statute 57.105 is GRANTED.

2. Defendant First Acceptance Insurance Company, Inc. is ENTITLED to recover a reasonable attorney's fee, including prejudgment interest, to be paid in equal parts by the Plaintiff, Physicians Group, LLC, and the attorney for Plaintiff, Irvin & Petty, P.A.[12]

3. The parties shall confer concerning the amount of the award within 14 days of this order. If the parties are unable to reach an agreement on the amount of fees to be paid, First Acceptance shall set the matter for an evidentiary hearing.

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[1]Compl. ¶¶ 7, 8.

[2]*Id.* ¶¶ 13, 15-16.

[3]Doc. 32 at 6.

[4]*Id.* At the § 57.105 hearing, Physicians Group conceded that First Acceptance was "lawfully entitled to pay pursuant to the alternative *Medicare Fee Schedule*," as allowed by the Notice and permitted by § 627.736(5)(a)(1)(a).

[5]Doc. 32 at 6.

[6]*Id.* at 4 ¶ 17; *id.* at 139.

[7]Compl. at 1. (Doc. 4)

[8]*Id.* ¶ 1.

[9]Answer at 3.

[10]By administrative order, all PIP cases filed after October 1, 2015, are governed by the Rules of Civil Procedure. 13th Jud. Cir. Admin. Order S-2022-003 ¶ 11(A) (eff. Jan. 6, 2022).

[11]*See* § 627.736(5)(a); *Progressive Am. Ins. Co. v. Back on Track, LLC*, 342 So. 3d 779 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1438a]; *Geico Indem. Co. v. Affinity Healthcare Ctr. at Waterford Lakes, PL*, 336 So. 3d 404 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D713e]; *Hands on Chiropractic PL v. GEICO Gen. Ins. Co.*, 327 So. 3d 439 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2023a]; *Geico Indem. Co. v. Muransky Chiropractic P.A.*, 323 So. 3d 742 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a].

[12]Because I find the claim was both not supported by the material facts, and not supported by the application of then-existing law to those facts, § 57.105(3)(c) does not apply, and the statute requires the fee to be paid by both Plaintiff and its attorney.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Demand for appraisal is ripe where postloss conditions are met, insurer has had opportunity to investigate claim, and there is disagreement regarding amount of loss—No merit to argument that appraisal clause is ambiguous because it does not direct appraisers how to proceed to determine cost of windshield replacement—Provision contains more than enough procedural context for appraisal to proceed, and appraisers do not require court guidance on how to calculate cost of replacement—Dismissal without prejudice of complaint for breach of contract and declaratory judgment is appropriate where plaintiff is not contesting enforceability of appraisal clause, merely contesting manner in which appraisal is to proceed

RUMO AUTO GLASS, LLC, a/a/o Yamaris Roman Cruz, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-098308. Division J. December 8, 2022. J. Logan Murphy, Judge. Counsel: Juan Croussett, Christopher Ligori & Associates, Tampa, for Plaintiff. Lisa M. Lewis, Cole, Scott, & Kissane, P.A., Tampa, for Defendant.

ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT Defendant's Motion to Dismiss, or Alternatively Motion to Stay Discovery, Compel Appraisal. Plaintiff responded, and Defendant filed a supplemental memorandum before the September 13, 2022 hearing. Upon consideration, the motion to dismiss is granted.

I. INTRODUCTION.

This is a dispute over whether Plaintiff Rumo Auto Glass, LLC must participate in appraisal before bringing its breach of contract and declaratory judgment claims against State Farm. As alleged in the complaint, Rumo acquired Yamaris Roman Cruz's rights under a State Farm insurance policy. After replacing Cruz's windshield, Rumo sent State Farm an invoice for $1,348.17. State Farm responded with a letter enclosing a check for $534.02—the amount State Farm contends it must pay under the policy. Because Rumo makes much of the provision under which State Farm paid—and because the parties' rights and obligations are controlled by the policy—the language under which State Farm chose to tender its payment is reproduced here:

> **Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage.**
>
> 1. ***We*** have the right to choose to settle with ***you*** or the owner of the ***covered vehicle*** in one of the following ways:
>
> a. We have the right to choose one of the following to determine the cost to repair the ***covered vehicle;***
>
> b. A bid or repair estimate approved by us;
>
> ***You*** agree with ***us*** that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.
>
> ***You*** also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replacement glass.

State Farm Letter (Aug. 28, 2021); *see* Form 9810A at 32.

The letter, however, misquotes part of the policy and omits paragraph 1.a.(1)(c) of that section. With the omitted language incorporated, the relevant portion of the State Farm policy reads:

Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage.

1. ***We*** have the right to choose to settle with ***you*** or the owner of the ***covered vehicle*** in one of the following ways:

a. Pay the cost to repair the ***covered vehicle*** minus any applicable deductible.

(1) ***We*** have the right to choose one of the following to determine the cost to repair the ***covered vehicle***:

(a) The cost agreed to by both the owner of the ***covered vehicle*** and ***us***;

(b) A bid or repair estimate approved by ***us***; or

(c) A repair estimate that is written based upon or adjusted to:

(i) the prevailing competitive price;

(ii) the lower of paintless dent repair pricing established by an agreement ***we*** have with a third party or the paintless dent repair price that is competitive in the market; or

(iii) a combination of (i) and (ii) above

The prevailing competitive price means prices charged by a majority of the repair market in the area where the ***covered vehicle*** is to be repaired as determined by a survey made by ***us***. If asked, ***we*** will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the ***covered vehicle*** to its pre-loss condition.

You agree with ***us*** that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

Policy Form 9810A at 32-33. According to its coverage letter, State Farm chose to pay under paragraph 1.a.(1)(b): "a bid or repair estimate approved by ***us***."

Noting a disagreement between the parties on the amount of the claim, State Farm invoked appraisal under the following provision of the Form 6910A Amendatory Endorsement:

6910A AMENDATORY ENDORSEMENT

1. PHYSICAL DAMAGE COVERAGES

Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage

The following is added:

If there is a disagreement as to the cost of repair, replacement, or recalibration of glass, an appraisal will be used as the first step toward resolution. Appraisal will follow the rules and procedures as listed below:

a. The owner and ***we*** will each select a competent appraiser.

b. The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or ***we*** may petition a court that has jurisdiction to select the third appraiser.

c. Each party will pay the cost of its own appraiser, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.

d. The appraisers shall only determine the cost of repair, replacement, and recalibration of glass. Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class-representative basis.

e. A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they arrived at their appraisal, will be binding on the owner of the ***covered vehicle*** and ***us***.

f. ***We*** and ***you*** do not waive any rights by submitting to an appraisal.

State Farm Letter at 2 (Aug. 28, 2021).[1] State Farm then chose its appraiser and asked Rumo to do the same. There is no dispute that State Farm invoked appraisal by sending the August 28 letter. But instead of complying with the request, Rumo sued.

Rumo's complaint has two counts. First, Rumo contends that State Farm breached the policy by underpaying the invoice. Count I alleges (¶ 15) that the estimate on which State Farm paid Rumo's claim "is not an estimate at all and therefore cannot be a basis for payment because the State Farm 'estimate' is not a bid or repair estimate as contemplated by the subject policy." Instead, Rumo claims, State Farm should have paid the "prevailing competitive price" according to section 1.a.(1)(c) of the collision coverage limit. Compl. ¶¶ 17, 19. Though not entirely clear on this point, Count II appears to seeks a judgment declaring the appraisal provision "ambiguous and unclear." Compl. ¶ 30. Specifically, Rumo contends (¶ 30) "the policy is ambiguous as to how the appraisers should proceed in determining the cost to replace the subject windshield." The declaratory judgment action also appears to seek a declaration mirroring the breach of contract claim—that State Farm "is required to pay . . . the prevailing competitive price." Compl. ¶ 40. It is "inextricably intertwined" with the breach of contract claim. *NCI*, 2022 WL 16702296, at *2 n.2.

State Farm moves to dismiss the complaint or to stay discovery and compel appraisal. Its motion, supporting documentation, supplemental memoranda, and supplemental authority run to 750 pages over a dozen filings.[2] Distilled, State Farm contends its appraisal clause is valid and enforceable, and Rumo was obligated by the policy to participate in appraisal before filing suit, because the only dispute is over the value of Rumo's claim.

In opposition to appraisal, Rumo confines its arguments to specific points. First, it argues the complaint sufficiently alleges a breach of contract, so the complaint should not be dismissed. Second, Rumo contends that its declaratory judgment action precludes dismissal because it alleges (1) the appraisal clause is ambiguous and (2) the appraisal clause does not provide appraisers with adequate procedures. Each argument is addressed in turn.

II. DISCUSSION.

A. Appraisal is ripe.

"Before compelling appraisal, a trial court must determine whether the demand for appraisal is ripe." *Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC*, ___ So. 3d ___, 47 Fla. L. Weekly D2265, 2022 WL 16703249, at *3 (Fla. 2d DCA Nov. 4, 2022) [47 Fla. L. Weekly D2265a] (citing *Am. Cap. Assur. Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n*, 306 So. 3d 1238, 1240 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2463a], *review granted*, SC20-1766, 2021 WL 416684 (Fla. Feb. 8, 2021)). An appraisal demand is ripe "where postloss conditions are met, 'the insurer has a reasonable opportunity to investigate and adjust the claim,' and there is disagreement regarding the value of the property or the amount of loss." *Leeward Bay*, 306 So. 3d at 1240 (quoting *Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342, 344 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1436a]). "Once the trial court makes the preliminary ripeness determination, motions to compel appraisal 'should be granted whenever the parties have agreed to [appraisal] and the court entertains no doubts that such an agreement was made.' " *Hillsborough Ins. Recovery*, 2022 WL 16703249, at *3 (quoting *People's Tr. Ins. Co. v. Marzouka*, 320 So. 3d 945, 947-48 (Fla. 3d

DCA 2021) [46 Fla. L. Weekly D1155a]) (alteration in original).

Rumo does not contest the ripeness of State Farm's demand, and for good reason. There is no dispute postloss conditions are met, State Farm had an opportunity to investigate the claim, and State Farm's appraisal letter demonstrates a disagreement regarding the amount of loss existed before Rumo sued.

B. The appraisal clause is not ambiguous.

Instead, Rumo attacks the viability of the clause, itself. Appraisal provisions are creatures of contract and dependent on the language of the contract in which they are found. *NCI, LLC v. Progressive Select Ins. Co.*, ___ So. 3d ___, 47 Fla. L. Weekly D2235f, 2022 WL 16702296, at *2 (Fla. 5th DCA Nov. 4, 2022) (quoting *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2020a]). For that reason, a dispute is appraisable if (1) there is a valid written agreement for appraisal; (2) an appraisable issue exists; and (3) no party has waived their right to appraisal. *See NCI*, 2022 WL 16702296, at *2 (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]).

In its response to State Farm's motion, Rumo contends the appraisal provision is "ambiguous and unclear." But it does not mean ambiguous in the traditional sense. Rumo has not pointed to any contractual provision that is "susceptible to more than one reasonable interpretation." *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785 (Fla. 2004) [29 Fla. L. Weekly S774a] (quoting *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003) [28 Fla. L. Weekly S307d]); *see Mendota Ins. Co. v. At Home Auto Glass*, 346 So. 3d 96, 99 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1018b]. Instead, Rumo contends (¶ 11) the appraisal clause should not be enforceable because it does not direct the appraisers how to "proceed in determining the cost to replace the subject windshield."

But like the appraisal provision in *NCI*, this one "is neither ambiguous nor unenforceable because it omits essential procedural terms." *NCI*, 2022 WL 16702296, at *3. Appraisal is an "informal process" that does not require the quasi-judicial procedures of arbitration. *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762, 765 (Fla. 2002) [27 Fla. L. Weekly S1028a]; *see Progressive Am. Ins. Co. v. Glassmetics, LLC*, 343 So. 3d 613, 623 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b]. And the Form 6910A appraisal provision contains more than enough procedural context for appraisal to proceed. *See NCI*, 2022 WL 16702296, at *4.

Going a bit deeper, Rumo contends that the appraisers do not have sufficient direction because they are not permitted to decide which of the policy's three settlement procedures applies. It believes "the best evidence rule" should apply to appraisal, and the appraisers should be required to establish the prevailing competitive price before issuing an appraisal award.

First, the best evidence rule has nothing to do with how appraisal should proceed or the evidence to be considered by appraisers. It is an evidentiary rule grounded in the principle that courts prefer original evidence over reproductions. *See* § 90.952, Fla. Stat.; *T.D.W. v. State*, 137 So. 3d 574, 575-76 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D901a].

Second, fettering appraisers runs contrary not only to the plain language of the policy, but also to the purpose of appraisal. Under the governing appraisal provision, the appraisers "only determine the cost of repair, replacement, and recalibration of glass." How they do so is up to the appraisers, and Rumo is unable to point to any authority supporting the proposition that the Court must first provide guidance on how to calculate the cost of repair or replacement. *See Glassmetics*, 343 So. 3d at 622 ("[T]he appraisal process is an informal one. . . . Appraisers generally are chosen for and expected to act on their own skill and knowledge relating to the matters being appraised.") (quoting *Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n, Inc.*, 117 So. 3d 1226, 1229-30 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1507c]). In fact, Rumo does not cite to a single piece of authority in support of its analysis.[3] Preventing the appraisers from reaching the amount of loss because State Farm had different options for paying the claim would "render the appraisal process meaningless." *Branco*, 148 So. 3d at 492.

Even if the appraisers' evaluation depended on the resolution of the policy language, their determination of the value of the claim does not constitute a coverage question, which would otherwise be outside their purview. *J.J.F. of Palm Beach, Inc. v. State Farm Fire & Cas. Co.*, 634 So. 2d 1089, 1090 (Fla. 4th DCA 1994). When the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, appraisers decide the amount to be paid—not the courts. *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a]; *Fla. Ins. Guar. Ass'n, Inc. v. Lustre*, 163 So. 3d 624, 628 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D968a]; *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n*, 125 So. 3d 846, 854 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D820a]; *J.J.F. of Palm Beach*, 634 So. 2d at 1091.[4]

C. Dismissal without prejudice is appropriate.

When it is undisputed that a party did not comply with a controlling appraisal obligation, "[d]ismissal without prejudice [is] a proper remedy." *NCI*, 2022 WL 16702296, at *6. The Court is not required to defer ruling on the motion to compel appraisal until resolution of the declaratory judgment action. Rumo is not contesting the "enforceability of the appraisal" clause and other provisions as in *Progressive American Insurance Company v. Dr. Car Glass, LLC*, 327 So. 3d 447 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2030c]. It is, instead, merely contesting the manner in which the appraisal is to proceed by using arguments that have been rejected in other cases. *See supra* § II.B. *Cf. Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1286 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a] (holding a declaratory judgment action is moot when it raises a settled question of law); *Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3d DCA 1981) (holding trial court did not abuse its discretion by dismissing dec action concerning lease where plaintiff failed to raise any doubt as to the meaning of the contested clause).

Motions to compel must be granted "whenever the parties have agreed to [appraisal] *and the court entertains no doubts that such an agreement was made*." *People's Trust Ins. Co. v. Marzouka*, 320 So. 3d 945, 947-48 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a] (quoting *Preferred Mut. Ins. Co. v. Martinez*, 643 So. 2d 1101, 1103 (Fla. 3d DCA 1994)) (emphasis and alteration in original). Where it is "clear" the parties disagree merely over the amount of loss and an agreement for appraisal exists, appraisal is "required." *Marzouka*, 320 So. 3d at 948.

Even if Rumo had argued its declaratory judgment action should be resolved before the Court decides the appraisal issue (it did not), the Court would decline to exercise jurisdiction at this time. The Court has discretion to control the order in which an appraisal and coverage determination proceeds. *See Marzouka*, 320 So. 3d at 948 ("However, trial court ordinarily have the discretion to decide the order in which appraisal and coverage determinations are made."); *Admiralty House, Inc.*, 66 So. 3d at 344 (citing *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc.*, 48 So. 3d 188, 191-92 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2586a]).

Rumo argues that because it properly alleged a claim for breach of contract, its claim cannot be dismissed. But here, the affirmative defense raised by State Farm of failure to comply with a condition precedent appears on the face of Rumo's complaint, its attachments,

and the policy. *See Kidwell Grp., LLC v. Am. Integrity Ins. Co. of Fla.*, 347 So. 3d 501, 505 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1910a]. Dismissal is therefore warranted. *NCI*, 2022 WL 16702296, at 6.

Accordingly,

1. Defendant's Motion to Dismiss, or Alternatively Motion to Stay Discovery, Compel Appraisal is GRANTED.

2. The Complaint is DISMISSED without prejudice and without leave to amend.

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[1]Rumo omitted Form 6910A from the policy attached to its complaint. But because Rumo incorporated and relies on the policy (which would include any endorsements) in its complaint, the Court may consider Form 6910A on a motion to dismiss. *One Call Prop. Servs. Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]. State Farm filed a certified copy of Form 6910A on December 21, 2021 (Doc. 18), and the policy number on the Form 6910A matches the number alleged in the complaint. In any event, Rumo does not contest the inclusion of Form 6910A in the policy.

[2]To state what should be obvious: This is not helpful. *See Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. . . . [I]t is not the function of the Court to rebrief an appeal."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

[3]This, too, is not helpful.

[4]*Cf. Williamson v. Chubb Indem. Ins. Co.*, No. 11-cv-6476, 2012 WL 760838, at *4 (E.D. Pa. Mar. 8, 2012) ("Estimating the dollar value of a loss presupposes a judgment of what repairs are necessary to recoup from the loss. Appraisers could not perform their duties if they were prohibited from opining on these matters. . . . [T]o say such disputes are sufficient to negate the appraisal provision in the policy would effectively eliminate appraisal as a workable method of alternative dispute resolution.") (as quoted in *Branco*, 148 So. 3d at 491-92); *UrbCamCom/WSU I, LLC v. Lexington Ins. Co.*, No. 12-CV-15686, 2014 WL 1652201, at *6 (E.D. Mich. Apr. 23, 2014) (approvingly citing *Williamson*, and holding that dispute regarding necessary repairs, and length of time, to reopen building goes to "amount of loss," which falls squarely within ambit of appraisal); *Correnti v. Merchs. Preferred Ins. Co.*, Civ. No. 12-6303, 2013 WL 373273, at *2 (E.D. Pa. Jan. 31, 2013) (determining that as dispute was over "extent of damage," it was dispute regarding "amount of loss," and, thereby, required appraisal); *Sydney v. Pac. Indem. Co.*, Civil Action No. 12-1897, 2012 WL 3135529, at *3 (E.D. Pa. Aug. 1, 2012) ("A disagreement as to the scope of the repairs and replacements needed to remedy a loss is still within the purview of the appraisal clause."). All of these cases were cited in *Branco*.

* * *

Criminal law—Driving under influence—Evidence—Breath test results—In prosecution for DUI by driving with unlawful breath alcohol level, state was not required to present expert testimony using retrograde extrapolation to relate back defendant's breath alcohol level to time of driving in order for test results to be admissible—Defendant's breath test results standing alone are sufficient to convict him of DUBAL if results were properly obtained within reasonable period of time after driving—Trial court did not err in admitting breath test results where lapse of two hours and 47 minutes between accident and breath test was reasonable period of time, and probative value of results was not substantially outweighed by potential for unfair prejudice or confusion—No error in allowing trooper to testify as to his observations of defendant's physical appearance and demeanor during investigation where testimony was relevant to show that there was alcohol in defendant's system at time of driving, and probative value of testimony was not outweighed by danger of unfair prejudice or confusion—Motions for renewed judgment of acquittal and for new trial are denied

STATE OF FLORIDA, v. WILLIAM TRAVIS HARWOOD, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Criminal Division. Case No. 21-CT-007880. Division E. October 18, 2022. John N. Conrad, Judge. Counsel: Nathan Keith Waters and Shanna B. Schultz, Assistant State Attorneys, and Susan Lopez, State Attorney, Tampa, for Plaintiff. Richard Escobar, Escobar & Associates, P.A., Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RENEWED JUDGMENT OF ACQUITTAL AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

THIS MATTER having come before the Court for hearing on August 15, 2022, pursuant to Defendant's Motion for Renewed Judgment of Acquittal and Motion for New Trial filed on May 31, 2022, and the Court having reviewed the Motions and considered the legal arguments presented by counsel for the State and Defendant at the hearing, as well as having considered Defendant's Supplemental Memorandum of Law filed on August 31, 2022, and the State's Response Memorandum of Law filed on September 8, 2022, and being otherwise fully advised in this matter, the Court hereby **FINDS** and **ORDERS** as follows:

FACTUAL BACKGROUND

Defendant was found guilty of Driving Under the Influence With Property Damage ("DUI") following a jury trial that concluded on May 18, 2022. The following evidence was presented by the State during the trial. On June 30, 2021, at around 2:01 a.m., Defendant was driving a white Chevy Trax when he was involved in an accident with another vehicle at the intersection of State Road 60 ("S.R. 60") and St. Cloud Avenue located in Hillsborough County, Florida. Brian Hairston, a trooper with the Florida Highway Patrol, was dispatched to the accident scene and arrived at 3:01 a.m. Upon arrival, Trooper Hairston observed a red, Mini-Cooper blocking lanes of traffic on S.R. 60, as well as a white, Chevy Trax located on the northwest corner of the intersection. During his investigation, Trooper Hairston determined that Defendant was driving the Chevy Trax when the accident occurred. As a result of the accident, both vehicles became inoperable and had to be removed from the scene by a tow truck.

As part of his investigation, Trooper Hairston spoke with two deputies who were already on scene when he arrived, and then spoke with Defendant about the accident. During his contact with Defendant, Trooper Hairston observed Defendant to have "watery, bloodshot eyes; the odor of alcoholic beverages emanating from his breath; and speech that was slow and slurred." Trooper Hairston testified that based on his training and experience, these observations led him to believe that "he (referring to Defendant) possibly was under the influence of alcohol." Trooper Hairston advised Defendant that he would be conducting a DUI investigation and asked Defendant if he would be willing to perform field sobriety exercises, to which Defendant initially agreed. However, at the beginning of the exercises, Defendant complained about having sustained an ankle injury during the accident and indicated he would be physically unable to perform the exercises. At that point, Trooper Hairston discontinued the exercises and made the decision to arrest Defendant for DUI based upon the totality of his investigation. At no time during his testimony, or at any point during the trial, did the Court allow the State to present any testimony regarding the issue of impairment.[1]

Following his arrest, Defendant was transported to Central Breath Testing ("CBT") and after a 20-minute observation conducted by Trooper Hairston, Defendant provided two, breath samples for testing. The first breath sample was taken at 4:48 a.m. and produced a result of .104 grams of alcohol per 210 liters of breath. The second sample was taken at 4:52 a.m. and produced a result of .109 grams of alcohol per 210 liters of breath. During the trial, the breath test affidavit reflecting these breath test results was admitted into evidence and Defendant is not contesting the accuracy of these breath test results. While conducting the 20-minute observation, Trooper Hairston testified that Defendant admitted to consuming alcohol at Raccoon's Bar and Grill in Valrico, but did not indicate when he had consumed his last drink. During Trooper Hairston's testimony, the

State also introduced, without objection, a 13 minute video showing Defendant's demeanor and behavior while in the backseat of the Trooper's patrol car on the way to CBT.

The State presented testimony from four other witnesses during their case-in-chief. Natalie Clemmer testified she was a childhood friend of Defendant and was a passenger in his vehicle at the time of the accident. Ms. Clemmer testified that Defendant was driving the Chevy Trax at the time of the accident. Ms. Clemmer testified she saw a green light when Defendant was entering the intersection. Brynne Campbell was the driver of the red, Mini Cooper involved in the accident and testified that she was stopped at a red light on St. Cloud right before the accident. She stated the weather was perfectly clear that evening and that there were no other vehicles at the intersection while she was waiting at the light. When the light turned green, Ms. Campbell checked her surroundings and then proceeded into the middle of the intersection when she was struck by the vehicle being operated by Defendant. Ms. Campbell stated that she did not see Defendant's vehicle prior to the accident. During her testimony, the State introduced several photographs showing the damage to Ms. Campbell's vehicle caused by the crash. Ms. Campbell testified that her car had to be towed from the scene and got "totaled" because of the accident.

The State also presented testimony from two witnesses employed with the Hillsborough County Sheriff's Office ("HCSO"). Francesca Mason testified she is employed with HCSO as a certified, breath test operator and was the person who administered the breath tests to Defendant on June 30, 2021. Ms. Mason stated that the breath tests were conducted using an instrument known as the Intoxilyzer 8000 and were performed in accordance with Florida Department of Law Enforcement rules and regulations. The State also called Haley Dendy, who testified she is the CBT supervisor and agency inspector for HCSO. She indicated her responsibilities include the maintenance and monthly inspection of the HCSO breath test instruments. During her testimony, Ms. Dendy described the process and procedures that HCSO follows in order to properly maintain their breath test instruments. With regard to the Intoxilyzer 8000 used to test Defendant's breath in this case, Ms. Dendy testified she performed a monthly inspection on this instrument on both June 2, 2021 and July 14, 2021. On each of these dates, the instrument passed inspection. Ms. Dendy further testified that based upon these inspections, she believed the Intoxilyzer used to test Defendant's breath on June 30, 2021 was operating correctly and produced reliable results. When questioned during cross-examination, neither Ms. Mason nor Ms. Dendy could testify as to what Defendant's specific, breath-alcohol level was at the time of the accident.

The State's Theory of Prosecution

Under Florida Standard Criminal Jury Instruction 28.1, in order to prove the general crime of DUI, the State must prove the following two elements beyond a reasonable doubt: 1) Defendant drove or was in actual physical control of a vehicle; and 2) While driving or in actual physical control of the vehicle, Defendant a) was under the influence of alcoholic beverages to the extent that his normal faculties were impaired; or b) had a breath alcohol level of .08 or more grams of alcohol per 210 liters of breath.[2] In this case, the State decided to prosecute Defendant for Driving Under the Influence With Property Damage based solely on the theory that Defendant had a breath alcohol level of .08 or higher at the time of driving. This theory of prosecution is more commonly referred to DUBAL (Driving with an Unlawful Breath Alcohol Level) and creates strict liability for someone driving with an unlawful blood or breath-alcohol level. Under this theory of prosecution, if the State proves DUBAL beyond a reasonable doubt, the issue of impairment becomes moot. *See Tyner v. State*, 805 So. 2d 862 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2203a].

LEGAL ANALYSIS

The legal arguments raised by Defendant in both Motions essentially relate to the same, two issues:[3] The first issue is whether the State, in order to prove the crime of DUBAL, was required to present expert testimony, using retrograde extrapolation, to establish that Defendant's breath-alcohol level, at the time of driving, was .08 or more grams of alcohol per 210 liters of breath. The defense argues that the foundation for this requirement were historical changes to the DUI statutes and changes made in 2016 by the Florida Supreme Court to Standard Criminal Jury Instruction 28.1 and 28.1(a), which deleted language instructing the jury that proof of a blood or breath-alcohol level of .08 or higher was prima facie evidence of impairment. The defense suggests that the removal of this presumption of impairment language now imposes upon the State the legal burden to prove a specific blood or breath-alcohol level at the time of driving in order to establish the crime of DUBAL. Based on this interpretation, Defendant argues that evidence of his breath test results obtained approximately 2 hours and 47 minutes after the time of driving, without presenting expert testimony to establish his breath-alcohol level at the exact time of driving, is insufficient, as a matter of law, to prove Defendant guilty of DUBAL beyond a reasonable doubt. Defendant further argues that given the lapse of time between the time of driving and when the breath test results were produced, evidence of these results, standing alone, without introducing expert testimony extrapolating these results to a specific breath-alcohol level at the time of driving, is irrelevant and inadmissible, under Florida Statutes, sections 90.401 and 90.402, in proving the crime of DUBAL. Alternatively, Defendant argues that if otherwise admissible, the probative value of the breath test results was substantially outweighed by the danger of unfair prejudice under Florida Statutes, section 90.403.[4]

The second issue is whether Trooper Hairston's observations of Defendant's physical appearance and demeanor, at the time of the incident and following,[5] were properly admitted into evidence in order to prove that Defendant committed the crime of DUBAL.[6] The defense argues that this testimony related solely to the issue of impairment, and therefore, was irrelevant and inadmissible under Florida Statutes, sections 90.401 and 90.402. Alternatively, Defendant argues that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice under Florida Statutes, section 90.403.

In response to Defendant's Motions, the State argues that there is no existing case law in Florida that requires the State, in a DUBAL prosecution, to present expert testimony, using retrograde extrapolation, to relate back a defendant's blood or breath-alcohol level to the exact time of driving. On the contrary, the State argues that existing case law supports the admissibility of Defendant's breath tests if the tests were conducted within a reasonable period of time after Defendant was driving. The State asserts it has met that burden in this case and that the issue is simply one that goes to the weight of the evidence and not its admissibility. The State also argues that there is no case law prohibiting it from presenting other evidence, besides Defendant's breath test results, to prove a DUBAL offense. This would include the testimony of Trooper Hairston regarding his observations of Defendant's physical appearance and demeanor following the accident.

I. Legal Standards Applicable to Defendant's Motions

Although the Defendant's Motions present essentially the same legal arguments, the Court must use different legal standards in ruling upon a motion for judgment of acquittal and a motion for new trial. *See Geibel v. State*, 817 So. 2d 1042, 1044 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1327b] (indicating "[t]here is a distinction between the 'sufficiency of the evidence' standard, used in determining

whether a judgment of acquittal is appropriate, and the 'weight of the evidence' standard used in evaluating a motion for new trial").

Under Florida Rule of Criminal Procedure 3.380, a judgment of acquittal shall be granted by a court on motion of a defendant when "the court is of the opinion that the evidence is insufficient to warrant a conviction." The "sufficiency of evidence" standard "is a test of whether the evidence presented is legally adequate to permit a verdict." *Geibel*, 817 So. 2d at 1044. "Generally, a motion for judgment of acquittal should be denied if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." *Shrader v. State*, 278 So. 3d 270, 276 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2158b] (internal quotations and citation omitted).

Under Florida Rule of Criminal Procedure 3.600(a)(2), "[t]he court shall grant a new trial only if: . . . (2) the verdict is contrary to law or the weight of the evidence." The "weight of the evidence" standard "tests whether a greater amount of credible evidence supports one side of an issue or the other." *Geibel*, 817 So. 2d at 1044. When reviewing a motion for new trial under Rule 3.600, "on the ground that the verdict is contrary to the weight of the evidence, the trial court acts as a 'safety valve' by granting a new trial where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict." *Id.* (citation omitted). "Thus, this rule 'enables the trial judge to weigh the evidence and to determine the credibility of witnesses so as to act, in effect, as an additional juror.' " *Id.* (citations omitted).

II. Legislative History/Intent of the DUI/DUBAL Statutes

In analyzing the issues raised in Defendant's Motion, it is helpful to review the legislative history regarding the DUI and DUBAL statutes. This history was clearly set forth in *State v. Rolle*, 560 So. 2d 1154 (Fla. 1990). In his majority opinion, Chief Justice Ehrlich wrote the following:

> In determining whether the challenged statute and jury instruction constitute a permissive inference or an unconstitutional presumption, a review of the relevant history of chapter 316 is both instructive and enlightening. Prior to 1974, driving under the influence (DUI) could be proven in only one way, by proof of impairment. § 316.028(1), Fla.Stat. (1973). In 1974, the legislature created the offense of driving with an unlawful blood-alcohol level (DUBAL). Ch. 74-384, § 1, Laws of Fla. (codified at § 316.028(3), Fla.Stat. (Supp.1974)). At that time, DUBAL was clearly a separate offense from DUI. It was located in a separate paragraph of the statute from DUI, and contained separate, and lesser penalties for conviction. *Compare* § 316.028(1), (2), Fla.Stat. (Supp.1974) *with* § 316.028(3)-(4), Fla.Stat. (Supp.1974). Under this statutory scheme, if the state could not prove impairment the defendant could still be convicted of DUBAL. This Court upheld DUBAL against constitutional attack in *Roberts v. State,* 329 So.2d 296 (Fla.1976).
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> However, in 1982 the statutory landscape changed dramatically. The legislature substantially reworded the statute, consolidating DUI and DUBAL and providing identical penalties for conviction. Ch. 82-155, § 2, Laws of Fla. (codified at § 316.193(1)(a)-(b), Fla.Stat. (Supp.1982)). It is this statutory framework which concerns us today. Section 316.193(1), Florida Statutes (1985), provides:
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> > A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:
> >
> > (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that his normal faculties are impaired [DUI]; or
> >
> > (b) The person has a blood-alcohol level of 0.10 percent or higher [DUBAL].
>
> It is clear that this statute now creates one offense, driving under the influence, which may be proven in either of two ways: (a) by proof of impairment, or (b) by proof of a blood-alcohol level of 0.10 percent or higher. Because proof of either (a) or (b) is sufficient, if the state proves beyond a reasonable doubt that the defendant was "driving or in actual physical control of a vehicle within this state," and had a blood-alcohol level of 0.10 percent or higher, then the state need not prove impairment. However, if the state cannot prove that the defendant had a blood-alcohol level of 0.10 percent or higher, it may still obtain a conviction if it can prove impairment beyond a reasonable doubt.

Rolle, 560 So. 2d at 1154-1155 (footnote omitted). The important distinction arising from a prosecution under the DUBAL statute is that it creates a "strict liability theory" to enable the State to obtain a conviction in a DUI case. This eliminates the need for the State to prove impairment beyond a reasonable doubt, as well as eliminating the need for a presumption of impairment when a Defendant's blood or breath-alcohol level is .08 or higher.

III. Did historical changes to the DUI statutes and changes to the Florida Standard Jury Instruction for DUI in 2016, which eliminated the language regarding a presumption of impairment when a Defendant's breath alcohol level was .08 or higher, effectively overrule *Haas v. State* and other existing case law?

Defendant argues that legislative changes to the DUI statutes have rendered various cases, including *Haas v. State*, 597 So. 2d 770 (Fla. 1992), inapplicable to the case at hand. In his Supplemental Memorandum of Law, Defendant attached copies of the DUI statutes from 1973 (§316.028); 1974 (§316.028); 1981 (§316.193); and 1982 (§316.193). The 1982 version combined the crimes of DUI by impairment and DUBAL into one statute. The Court finds that none of these statutes have any direct relevance in addressing Defendant's argument regarding the need for expert testimony in a DUBAL case, or whether Trooper Hairston's observations of Defendant was irrelevant and inadmissible evidence.

The Court further notes that the relevant statute regarding a presumption of impairment based on an unlawful blood or breath-alcohol level is Florida Statutes, Section 316.1934(2)(c). The Court has reviewed the statutory history of this statute from 1987 to the present, and finds there have been no substantive changes of significance that would have altered any of the controlling case law. By way of comparison, the 1987 version of Florida Statutes, Section 316.1934(2)(c), read as follows:

> If there was at that time 0.10 or more by weight of alcohol in the person's blood, that fact shall be prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired. Moreover, such person who has a blood alcohol level of 0.10 percent or above is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood alcohol level.

The current language in Florida Statutes, Section 316.1934(2)(c), reads as follows:

> If there was at that time a blood-alcohol or breath-alcohol level of 0.08 or higher, that fact is prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired. Moreover, such person who has a blood-alcohol level or breath-alcohol level of 0.08 or higher is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood-alcohol or breath-alcohol level.

It is clear to the Court that these two versions of the statute are nearly identical and that the legislative intent to impose strict liability for DUBAL offenses in 1987 is the same intent that exists under the statute today. Accordingly, the Court finds that there is nothing in the amendment history of the DUI statutes to support Defendant's legal

arguments.

The Court will next address Defendant's argument that changes made to the Florida Standard Jury Instructions relating to DUI offenses in 2016 effectively overruled existing case law.[7] Defendant specifically argues in his Supplemental Memorandum that when "there is a change in the law, the jury instructions are typically updated to reflect that change and ensure verdicts are in compliance with the law. Accordingly, there was a significant change to the jury instruction for DUI in 2016." In this 2016 amendment, the Florida Supreme Court removed the following language from the Instructions:

> If you find from the evidence that while driving or in actual physical control of a motor vehicle, the defendant had a blood or breath-alcohol level of .08 or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired. But this evidence may be contradicted or rebutted by other evidence demonstrating that the defendant was not under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired.

192 So. 3d at 1193. In articulating the reason for this change, the Court stated: "It is not necessary to instruct on the 'prima facie evidence of impairment' in § 316.1934(2)(c), Fla. Stat., if the State charged the defendant with driving with a blood or breath-alcohol level of .08 or over. In those cases, if the jury finds that the defendant drove with an unlawful blood or breath-alcohol level, impairment becomes moot. *Tyner v. State*, 805 So.2d 862 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2203a]." *Id.*

At the time of this 2016 amendment, the issue regarding the admissibility of blood or breath-alcohol test results without requiring retrograde extrapolation was controlled by the Florida Supreme Court opinion in *Haas v. State*, 597 So. 2d 770 (Fla. 1992).[8] In *Haas*, the Florida Supreme Court reviewed a district court opinion that certified "the question of whether a blood-alcohol level test result must be related back to the time of the offense in order to convict of driving under the influence (DUI) in either an impairment ***or an unlawful blood-alcohol level (DUBAL) case***." 597 So. 2d at 771 (emphasis added). The defendant in *Haas* argued "that even if the results of the [blood-alcohol] test were properly admitted, it cannot be the basis for convicting him under the DUBAL alternative of the statute in the absence of expert testimony extrapolating the results of the test to the time at which he was driving." *Id.* at 772. The *Haas* Court noted that, while the Court in *Miller v. State*, 597 So. 2d 767 (Fla. 1991) had "recently held that an expert witness could testify concerning the results of the defendant's blood-alcohol level test even though the witness was unable to state what the blood-alcohol level was at the time the defendant was operating the vehicle," the *Miller* decision did not decide the question of "whether the admission of the test results was sufficient either by itself or in conjunction with other evidence to sustain a conviction in a DUBAL case." *Id.*[9]

In reaching its decision, the *Haas* Court reviewed the manner in which other states had addressed the extrapolation issue in various contexts. *Id.* at 772-774. Of particular note, the *Haas* Court discussed the opinion in *State v. Taylor*, 566 A.2d 172 (N.H. 1989). *Id.* at 772-773. In *Taylor*, the court stated:

> Extrapolation, however, requires evidence that the State will rarely be able to acquire because of the defendant's constitutional right to remain silent. Extrapolation requires evidence as to when, and in what amounts, the defendant consumed the alcohol prior to driving. Without this information, which is wholly within the defendant's knowledge in the vast majority of cases, extrapolation of blood alcohol content back to the time of driving becomes an impossible task. The legislature could not have intended to place such an impossible burden on the State.

Taylor, 566 A.2d at 175-176.[10] The *Taylor* court also recognized that extrapolation would require knowledge of the amount of food the Defendant consumed at the time of consuming alcohol, information that is also likely to be wholly within a defendant's knowledge. Beside the challenges of obtaining the information needed for extrapolation, any information obtained from a defendant would arguably be completely self-serving, and therefore, potentially unreliable.

Ultimately, in considering the statutory scheme in Florida, the *Haas* Court concluded that "the legislature obviously knew that the blood-alcohol test could not be conducted while the accused person was driving. In attempting to combat the scourge of drunk driving, we do not believe the legislature intended to place upon the State the difficult and often impossible burden of extrapolation as a condition precedent to conviction under the DUBAL statute." 597 So. 2d at 774.

The Court went on to state:

> [W]e interpret Florida's statutory scheme to mean that the test results shall be prima facie evidence that the accused had the same blood-alcohol level at the time of his operation of the vehicle. Properly obtained test results which reflect a blood-alcohol level of 0.10 or more, **standing alone**, constitute circumstantial evidence upon which the finder of fact may (but is not required to) convict the accused driver of DUI either by impairment or DUBAL.

Id. (emphasis added). The Court further added that "[t]he accused is at liberty to seek to demonstrate through cross-examination or the introduction of other evidence that the test results do not accurately reflect his or her blood-alcohol level at the time the vehicle was being operated." *Id*. at 774-775.

It is clear to this Court that the *Haas* decision establishes two foundational principles in a prosecution under the DUBAL statute. The first is that the State is not required to present expert testimony, using retrograde extrapolation, to relate back a defendant's blood or breath-alcohol level to the time of driving in order for the test results to be admissible. The second is that a defendant's blood or breath-alcohol test results, standing alone, are sufficient to convict an individual of DUBAL, assuming the test results were properly obtained within a reasonable period of time after the time of driving.

During the hearing on these Motions, defense counsel argued that the 2016 amendment to the Florida Standard Jury Instruction for DUI effectively eliminated the controlling authority imposed under the *Haas* decision regarding the sufficiency of blood or breath-alcohol test results in proving a DUBAL offense. By removing the presumption of impairment language from the Instruction, defense counsel argued that the Florida Supreme Court intended to require the State to specifically prove the Defendant's breath-alcohol level at the time of driving. In suggesting that the concurring/dissenting opinions of today become the laws of tomorrow, defense counsel urged this Court to adopt the opinion of Justice Kogan in the *Haas* case, concurring in part and dissenting in part, as the proper legal authority to apply in this case. In this opinion, Justice Kogan wrote the following:

> Today, the majority effectively creates a presumption that a person's blood-alcohol level is the same several hours after the fact as it was when an alleged DUBAL offense occurred. Yet, all available scientific and medical evidence is directly to the contrary. Thus, under the majority's analysis, the State is being relieved of its burden of proving beyond a reasonable doubt the element of driving with an unlawful blood-alcohol level. This apparently is so even if an expert testifies that reasonable doubt existed as to the defendant's blood alcohol at the time in question. In essence, the majority says that any record support for DUBAL is sufficient to sustain a conviction, even if a reasonable doubt has not been eliminated by the State.
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> This conclusion is contrary to the most basic conception of due process embodied in both article I, section 9 of the Florida Constitution and the Fourteenth Amendment of the federal Constitution. One

> of the most fundamental components of due process is the requirement that the state must prove criminal guilt beyond a reasonable doubt. In the context of DUBAL cases, the majority opinion simply eliminates this centuries-old requirement of Anglo-American law, and it does so for no rationale I can discern other than simple expedience.

Haas, 597 So. 2d at 775-776 (Kogan, J., concurring in part, dissenting in part).

However, Justice Kogan's opinion fails to address the conclusion reached in the majority opinion that in enacting this strict liability statute, the legislature did not intend to place upon the State the "difficult and often impossible burden of extrapolation" in DUBAL cases. Contrary to Defendant's argument, this Court concludes that this 2016 amendment to the DUI jury instruction was actually an affirmation by the Florida Supreme Court of existing case law, such as *Miller* and *Haas*. It is clear this amendment eliminated language that would only be applicable in an impairment case and therefore, would have no effect on existing case law relating to DUBAL cases. It is also clear that in any case where the State is able to prove DUBAL beyond a reasonable doubt, even if the State is also proceeding under an impairment theory, the issue of impairment becomes moot and the instruction would be unnecessary.[11] Additionally, as previously noted, the Court could find no legislative changes to the DUI statutes that would have prompted the Supreme Court to amend the jury instruction.

Although the defense urges the Court to follow the concurrence/dissent opinion in *Haas*, this Court must follow the law as established by binding precedent. The concurrence/dissent opinion is not the binding law established by the *Haas* case. Additionally, the Florida Supreme Court "does not intentionally overrule itself sub silentio." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) [27 Fla. L. Weekly S122a]. This Court does not believe the Florida Supreme Court would have used an amendment to a jury instruction, without mentioning the *Miller* or *Haas* cases, or addressing the specific issue of what constitutes sufficient proof in a DUBAL case, to overrule existing case law.

The Court is also relying on *Clark v. State*, 315 So. 3d 776 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D758a]. In *Clark*, which occurred after the 2016 amendment, the Court cited *Miller* favorably with regard to the admission of the blood alcohol level ("BAL") without extrapolation: "While the State could not relate the BAL back to the time of the accident, it was still admissible, and its weight and credibility was properly determined by the jury." *Id*. at 779-780.

Defendant further asserted during the hearing that the Supreme Court eliminated the presumption language in the jury instruction because it was "offensive to our constitutional due process rights." However, Defendant has not specifically asserted or alleged in either Motion that proof of a DUBAL offense, without requiring retrograde extrapolation of blood or breath-alcohol test results to the time of driving, is unconstitutional as a matter of law or as applied to the facts of this case. Therefore, the Court rejects any "constitutional, due process argument" as not being properly raised or preserved with the Court, and therefore, denies any relief based on the alleged unconstitutionality of the statute.

In summary, it is clear to the Court that under current Florida law, in any case where the State is able to prove beyond a reasonable doubt that a defendant drove with an unlawful blood or breath-alcohol level, that person would be guilty of DUI regardless of whether they were impaired or not. The essential predicate for the admissibility of any blood or breath test would be that the test was performed within a reasonable period of time after the time of driving. In these DUBAL cases, impairment becomes a moot issue and any instruction on the "prima facie evidence of impairment" is unnecessary. Because this Court has concluded that the Florida Supreme Court did not change existing case law through the 2016 amendment to the Florida Standard Jury Instruction for DUI, the Court will follow the *Miller* and *Haas* decisions as the controlling legal authority in making its decision in this case.

IV. Did the Court commit error, by admitting into evidence, Defendant's breath test results, taken approximately 2 hours and 47 minutes after the time of driving, without requiring the State to present expert testimony, using retrograde extrapolation, to prove Defendant's specific breath-alcohol level at the time of driving?

Defendant argues that the State failed to present any testimony or evidence to prove that Defendant's breath-alcohol level was .08 or more grams of alcohol per 210 liters of breath at the specific time Defendant was driving. As noted above, Defendant predicates this argument on two grounds: (1) that the State was required to present expert testimony, using retrograde extrapolation, to prove Defendant's breath-alcohol level at the exact time of driving; and (2) that given the lapse of time between the time of driving and when the breath-alcohol tests were performed, the test results were irrelevant and inadmissible because they did not prove Defendant's breath-alcohol level at the time of driving. Alternatively, Defendant argues that the probative value of these breath test results was substantially outweighed by the danger of unfair prejudice. The Court finds each of these arguments to be without merit.

In addressing Defendant's argument that in order to prove the crime of DUBAL, the State must present expert testimony, using retrograde extrapolation, to establish a Defendant's unlawful breath-alcohol level at the time of driving, the Court finds that the Florida Supreme Court decision in *Haas* is controlling on this issue. Based upon the *Haas* decision (discussed in depth previously), and the complete lack of case law in Florida to the contrary, the Court finds that Defendant's breath test results were properly admitted in this case without requiring the State to present expert testimony, using retrograde extrapolation, to prove Defendant's specific breath-alcohol level at the time of driving. The Court also finds that this evidence, standing alone, would be sufficient to convict Defendant.

Defendant's second argument suggests that the passage of approximately 2 hours and 47 minutes, from the time of driving and when the breath tests were performed, renders the breath tests irrelevant to prove Defendant's breath-alcohol level at the time of driving. The general rule of law in Florida is that breath tests are admissible if they are conducted within a reasonable time after the time of driving, even if it the test results are not related back to the time of driving. *See Miller*, 597 So. 2d at 770 (finding that "the inability of the State to 'relate back' blood-alcohol evidence to the time the defendant was driving a vehicle is a question of credibility and weight-of-the-evidence, not of admissibility, provided the test is conducted within a reasonable time after the defendant is stopped"). The *Miller* Court also stated that "[c]learly, there are circumstances under which evidence of blood-alcohol content would be relevant and probative even though a significant amount of time has passed after the defendant was stopped and even where the state cannot establish probable blood-alcohol content at the time the defendant was in control of the vehicle." 597 So. 2d at 769. Both *Miller* and *Haas* considered alcohol tests performed one hour and twenty minutes after the time of driving. *See Haas*, 597 So. 2d at 772 (discussing its reasoning in *Miller* stating "[w]e reasoned that because the test was conducted within a reasonable period of time following the incident in question, the probative value of its results outweighed the potential for prejudice or confusion").

Other cases addressing this timing issue include *State v. Banoub*, 700 So. 2d 44 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D2104a] (reversing order suppressing results of blood-alcohol test concluding "the delay of approximately four hours between the driving and the testing [was] not unreasonable" where "reasons for the delay

include[d] time spent at the scene of the arrest for identification by witnesses to the accident, travel to Central Breath Testing and to the hospital, the required observation time before breath testing, and time spent at the hospital waiting for medical personnel to draw the blood"); *Clark v. State*, 315 So. 3d 776 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D758a] (involving a blood sample taken one hour and fifteen minutes after the driving incident); and *Gallagher v. State*, 606 So. 2d 1236 (Fla. 3d DCA 1992) (involving "[b]lood samples taken approximately 46, 90, and 142 minutes after the accident").

After reviewing the specific facts of this case, which included the investigation of the traffic accident, the transport of Defendant to Central Breath Testing, and the required 20 minute observation prior to the breath test, the Court finds that the time lapse of approximately 2 hours and 47 minutes between the time of Defendant's driving/accident and when the breath-alcohol tests were conducted, was a reasonable period of time. The Court further finds that the probative value of this evidence is not substantially outweighed by the potential for unfair prejudice or confusion. As these cases illustrate, the issue regarding breath test results generally goes to the weight of the evidence and not its admissibility. Defendant had a full and fair opportunity during trial to cross-examine the State's witnesses and to introduce any other evidence regarding this issue. As the facts of this case indicate, during cross-examination, defense counsel asked both Ms. Mason and Ms. Dendy if they could testify regarding Defendant's breath alcohol level at the time of driving and both stated "No." However, this testimony would directly relate to the weight a jury would give to the breath test evidence and not its admissibility. For these reasons, the Court finds that Defendant's breath test results, submitted in the form of a breath test affidavit, were properly admitted in this case, and that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

V. Did the Court commit error, by admitting into evidence, Trooper Hairston's testimony regarding his observations of Defendant's Physical Appearance and Demeanor during his investigation?

The Court next considers Defendant's argument regarding the impropriety of the Court admitting Trooper Hairston's testimony regarding his observations of Defendant's physical appearance and demeanor during his investigation. Defendant argues that any such testimony should not have been allowed because it is irrelevant in proving that Defendant was driving with an unlawful breath-alcohol level (DUBAL). Alternatively, Defendant argues that the probative value of this testimony was substantially outweighed by the danger of unfair prejudice. For the reasons stated below, the Court finds these arguments to be without merit.

As noted above, the *Haas* court concluded that under "Florida's Statutory scheme . . . test results shall be prima facie evidence that the accused had the same blood-alcohol level at the time of his operation of the vehicle" and that, when "[p]roperly obtained," such test results "standing alone, constitute circumstantial evidence upon which the finder of fact may (but is not required to) convict the accused driver of DUI either by impairment of DUBAL," 597 So. 2d at 774. The Court further indicated "[t]he accused is at liberty to seek to demonstrate through cross-examination or the introduction of other evidence that the test results do not accurately reflect his or her blood-alcohol level at the time the vehicle was being operated." *Id.* at 774-775.

This Court believes that the *Haas*[12] decision recognizes that blood or breath test results are not the only evidence that can be introduced in a DUBAL case to prove or disprove an individual's blood or breath-alcohol level at the time of driving. If Defendant desired to present evidence during the trial to disprove his lack of unlawful breath-alcohol level at the time of driving, such as lack of an odor of alcohol, lack of slurred speech, or excellent performance on field sobriety exercises, the Court would be required, under *Haas*, to give him the liberty "to demonstrate through cross-examination or the introduction of other evidence that the test results do not accurately reflect his or her blood-alcohol level at the time the vehicle was being operated". See *Haas*, 597 So. 2d at 774-775. Alternatively, in recognizing the right of a defendant to present evidence that would discredit the reliability of blood or breath test results, this Court believes the *Haas* decision also supports the right of the State present other evidence that is relevant to corroborate a defendant's blood or breath-alcohol level at the time of driving.

The Court will also be guided by Fifth District Court of Appeal decision in *Vitiello v. State*, 281 So. 3d 554 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2480e]. In *Vitiello*, the court held that a doctor's estimation of the defendant's breath alcohol level was admissible even though he did not know the time of defendant's last meal or last drink. *Id.* The Court stated: "Dr. Goldberger conceded that, similar to the elimination rate, many variables could affect when a person has finished absorbing alcohol, including the time of the person's last drink, how much they drank, and when they ate last. Dr. Goldberger admitted that he did not know the time of Vitiello's last meal or drink. However, he did not perform his calculations in a vacuum**—he also considered the reports of law enforcement, including their description of Vitiello's performance on the field sobriety tests, and the depositions of the other passengers, all of which confirmed his estimation of Vitiello's BAC**." *Id.* at 558 (emphasis added).

The importance of the *Vitiello* decision is that the Court recognized that physical traits or behavior of an individual, displayed through performance of field sobriety exercises, constitute other evidence that is probative in determining the individual's breath-alcohol level at the time of driving. If this evidence is relevant to an expert in giving an opinion regarding an individual's breath-alcohol level at the time of driving, the same or similar evidence is also relevant and admissible for the jury's consideration of the same issue. Although the case at hand does not include Defendant's performance of field sobriety exercises, the Court believes that specific observations made by Trooper Hairston during his investigation regarding Defendant's physical appearance and demeanor[13] are relevant to the issue of whether Defendant was driving with an unlawful breath-alcohol level.

Defendant further argues that Trooper Hairston's testimony was only relevant to prove impairment, which was not an issue in this case, and that the Court committed error in allowing this testimony. However, the admissibility of evidence as to one issue does not automatically disqualify that evidence from being relevant as to other issues. The Court allowed the State to present this testimony in order to show there was alcohol in Defendant's system at the time of driving. Physiological changes resulting from alcohol consumption, that are outwardly displayed by an individual's appearance and behavior, are not only relevant to show the presence of alcohol in a person's system, but potentially the amount of alcohol the person has consumed. Accordingly, this Court concludes that Trooper Hairston's testimony regarding his observations of Defendant was relevant and properly admitted in this case. The Court further finds that the probative value of this testimony was not outweighed by the danger of unfair prejudice or confusion.

CONCLUSION

Based on the foregoing, with regard to Defendant's Motion for Renewed Judgment of Acquittal, the Court concludes that the evidence presented by the State in this case was legally adequate to permit a verdict of guilty. Consistent with the *Haas* decision, the Court specifically finds that Defendant's breath test results of .104 and .109, lawfully obtained after the time of driving, constitute sufficient evidence, standing alone, to support the jury's verdict of guilty. Using

the test set forth in *Shrader*, the Court finds that, "after viewing the evidence in the light most favorable to the State," the jury in this case "could find the existence of the elements of the crime beyond a reasonable doubt." As such, Defendant's Motion for Renewed Judgment of Acquittal is hereby **DENIED**.

Furthermore, with regard to Defendant's Motion for New Trial, the Court concludes that the verdict in this case is not contrary to the weight of the evidence and that the weight of the evidence presented at trial supports the jury's verdict of guilty in this case. As such, Defendant's Motion for New Trial is hereby **DENIED**.

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[1]The Court did allow Trooper Hairston to testify, over Defendant's objection, that he arrested Defendant for "driving under the influence of alcohol."

[2]When the charge also involves an allegation of property damage, the State must further prove, beyond a reasonable doubt, that "[a]s a result of operating the vehicle, defendant caused or contributed to causing damage to the property" of the alleged victim.

[3]The Motions are nearly identical. The only differences are the cases cited setting forth the legal standards applicable to each Motion and formatting differences regarding the numbers/letters used to denote each section.

[4]The State's evidence in this case regarding Defendant's breath-alcohol level at the time of driving included the breath test results obtained at CBT approximately 2 hours, 47 minutes after the accident occurred, as well as Trooper Hairston's testimony regarding his investigation of the accident and his personal observations of Defendant during the incident.

[5]The Court allowed Trooper Hairston to testify regarding his observations that Defendant had watery, bloodshot eyes; the odor of alcoholic beverages emanating from his breath; and speech that was slow and slurred. The State also admitted a video of Defendant's behavior in the back of the Trooper's patrol car during the drive to CBT.

[6]Although this evidence is typically admitted in a DUI case to prove impairment, the Court ruled that this evidence was equally admissible in this case as probative of whether there was alcohol in Defendant's system at the time of driving.

[7]See *In re Standard Jury Instruction in Criminal Cases—Report No. 2015-07*, 192 So. 3d 1190 (Fla. 2016) [41 Fla. L. Weekly S219a].

[8]Haas was convicted of DUI Manslaughter and DUI Causing Serious Bodily Injury after the jury rendered a special verdict finding him guilty of both counts by driving with a blood-alcohol level of .10 or higher. The issue on appeal "was whether the trial court erred in not granting Haas's motion for judgment of acquittal of counts I and III because there was no direct evidence to establish his blood-alcohol level at the time of driving." *Id*. at 772.

[9]In *Miller*, the Court, after considering approaches taken in the line of cases "exemplified by *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990)" and "[t]he other line of cases . . . exemplified by *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989)," ultimately favored the approach found in the *Kubik* line of cases. 597 So. 2d at 769-770. The *Miller* Court indicated:

> While we see merit in both of the approaches above, we believe that the spirit underlying Florida's drunk-driving laws as well as practical considerations favor the approach taken in *Kubik*. In other words, the inability of the State to "relate back" blood-alcohol evidence to the time the defendant was driving a vehicle is a question of credibility and weight-of-the-evidence, not admissibility, provided the test is conducted within a reasonable time after the defendant is stopped.

Id. at 770. Defendant's Motions attempt to rely on *Miller*, but argue as supporting authority the section discussing the *Desmond* line of cases. *See* Def.'s Mot. for Renewed Judgment of Acquittal § IV.A. (May 31, 2022); Def.'s Mot. for New Trial § II.G. As noted above, the *Miller* Court did not adopt the approach taken by the *Desmond* line of cases.

[10]The *Taylor* court explicitly rejected the legal argument that Defendant is requesting the Court to adopt in this case. 566 A.2d at 175. The court stated:

> Since a test cannot reflect a defendant's blood alcohol content at precisely the moment he was driving, were we to follow the defendant's reasoning, no test could ever be prima facie, **or stand alone as**, evidence of intoxication at the time of driving, since the State would always be required to present further evidence to prove a nexus between the test result and the defendant's blood alcohol content at the moment he was driving. Such a result is contrary to RSA 265:89 (Supp. 1988) which allows for evidence of blood alcohol content above a certain level, "shown by a test of . . . breath, blood, or urine," to be considered prima facie evidence of intoxication.

Id at 175 (emphasis added) (omission in original).

[11]The Court also notes that this amendment left intact two other presumptions relating to blood or breath-alcohol levels that are "in excess of .05 but less than .08" and ".05 or less". If Defendant's argument was correct, all of the presumptions contained in the instruction at the time of the 2016 amendment would be subject to the same standard of requiring the State to relate back these blood or breath-alcohol test results, using retrograde extrapolation, to the time of driving, in order for these tests results to be probative and relevant. The fact that the Florida Supreme Court left these presumptions unchanged in the instruction, without any language clarifying or limiting their applicability, is further justification for this Court to conclude that Defendant's argument is without merit.

[12]In *Haas*, the Court set forth the underlying evidence of the case that included the defendant driving on the wrong side of the road, being combative at the scene, and smelling of alcohol. 597 So. 2d at 771.

[13]As stated earlier, Trooper Hairston's observations of Defendant included watery, bloodshot eyes; the odor of alcoholic beverages emanating from his breath; and speech that was slow and slurred.

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Post-*Miranda* statements of defendant are admissible where officer properly administered *Miranda* warnings to defendant and defendant knowingly, intelligently, and voluntarily waived her rights—State is not required to establish that defendant expressly waived her rights; waiver can be implied from defendant's having answered questions after being advised of rights—Blood test results are suppressed, although defendant consented to roadside blood draw, because implied consent law does not require blood draw under circumstances, and officer did not advise defendant that blood draw was not required by implied consent law

STATE OF FLORIDA, Plaintiff, v. NANCY B. O'NEIL, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, Misdemeanor Division L. Case No. 50-2022-CT-006382-AXXX-SB. November 21, 2022. April Bristow, Judge. Counsel: Otis Lee Sanders, Office of the State Attorney for the 15th Judicial Circuit, for Plaintiff. Helene B. Raisman, Raisman & Raisman, P.A., for Defendant.

ORDER DENYING MOTION TO SUPPRESS STATEMENTS AND GRANTING MOTION TO EXCLUDE BLOOD TEST RESULTS

THIS CAUSE came before the Court on November 14, 2022 upon Defendant, Nancy O'Neil's, Motion to Suppress Statements and Motion to Exclude Blood Test Results. This is a Driving Under the Influence (DUI) case stemming from a single vehicle crash. Following the crash, Defendant provided post-*Miranda* statements to the investigating officer wherein she admitted to drinking earlier in the day and also submitted to a blood draw, the results of which established Defendant's BAC was above the legal limit. Defendant now moves to suppress her post-*Miranda* statements to the investigating officer as well as the results of a blood draw, arguing that neither were voluntarily made. For the following reasons, the Court denies the Motion to Suppress Statements but grants the Motion to Exclude the Blood Test Results.

Facts

At the hearing on Defendant's Motions, the State introduced testimony from the investigating officer, Officer Casas of the Boca Raton Police Department. The State also introduced a body-worn camera recording of Officer Casas' interactions with Defendant. This evidence established that on February 3, 2022, Officer Casas responded to a call regarding a vehicle in a ditch near an on-ramp to I-95. Upon reporting to the scene, Officer Casas encountered Defendant sitting in the driver's seat of the vehicle with blood on her legs, face, and hands. Officer Casas determined that Defendant had a laceration on her knee and called fire rescue. He then began a crash investigation. During his investigation, Officer Casas testified that he smelled the odor of an unknown alcoholic beverage emanating from Defendant's person and that he observed Defendant to have glossy, bloodshot eyes. He also observed that Defendant's speech was slurred and that she was disoriented.

Based on his observations as well as the circumstances of the crash, Officer Casas decided to conduct a DUI investigation. He then informed Defendant that his crash investigation was over but that he had more questions for Defendant pertaining to a criminal DUI investigation. Defendant indicated that she understood, but added that

she was not impaired. Officer Casas stated "this doesn't necessarily mean you're in trouble" and then explained that the Constitution affords citizens certain protections and he needed to advise Defendant of those rights. Officer Casas then read Defendant her *Miranda* rights and asked Defendant if she understood those rights. Defendant stated "I do." Officer Casas proceeded to ask Defendant questions about how the crash happened and her activities prior to the crash, including her consumption of alcohol. Defendant was very cooperative and answered the questions without hesitation, maintaining that she was driving home from a friend's home in Delray, but was not sure how the crash happened. Defendant admitted to drinking some alcohol earlier in the day, but maintained that it was "not a lot."

Officer Casas informed Defendant that he was not going to ask her to perform field-side sobriety exercises due to Defendant's laceration on her knee. Defendant responded that she felt fine to perform the exercises, but Officer Casas reiterated that he did not feel it was fair based on her injury. Officer Casas then asked Defendant if she would instead be willing to give a sample of blood to ensure that she was not under the influence of alcohol or another chemical substance. Defendant, without hesitation, responded "absolutely." Fire rescue then collected a blood sample from Defendant.

Analysis

Defendant argues that both her post-*Miranda* statements as well as the results of her blood draw should be suppressed as neither were provided voluntarily. When considering whether a waiver of rights or consent is freely and voluntary given, the court must consider the totality of the circumstances, including factors such as the time and place of the encounter, the number of officers present, the officer's words or actions, age and maturity of the defendant, defendant's prior offenses, defendant's execution of a written consent form, whether the defendant was informed of his or her right to refuse consent, the length of time of interrogation, and any other relevant factor. *Montes-Valeton v. State*, 216 So. 3d 475, 480 (Fla. 2017) [42 Fla. L. Weekly S210a].

a) Post-*Miranda* Statements

With respect to the post-*Miranda* statements, Defendant argued that the statements cannot be considered voluntary because Defendant did not expressly indicate she wished to waive her *Miranda* rights. However, it is not necessary for the State to establish an express waiver of *Miranda* rights in order to survive a motion to suppress. *Tanner v. State*, 313 So. 3d 815, 821 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D135a]. Rather such a waiver can be implied by the Defendant's subsequent answering of questions.

After considering the totality of the circumstances, the Court finds that the State met its burden of establishing that Officer Casas properly administered *Miranda* warnings to Defendant and that Defendant knowingly, intelligently, and voluntarily waived those rights. Defendant was clearly advised by Officer Casas that he was shifting into a criminal DUI investigation which triggered additional constitutional rights. Defendant acknowledged that she understood. Officer Casas did not make any coercive statements to Defendant nor was the situation in which Defendant was read her *Miranda* rights unduly coercive. Following the recitation of *Miranda*, Defendant, a mature adult of retirement age, proceeded to answer Officer Casas' questions without hesitation. Therefore, the Court denies Defendant's Motion as it pertains to her post-*Miranda* statements.

b) Blood Draw Results

With respect to the results of the blood draw, the Court is compelled to reach a different result based on binding case law, specifically, *State v. Chu*, 521 So. 2d 330 (Fla. 4th DCA 1988). In *Chu*, an officer responding to a single car accident initiated a DUI investigation based on the driver's demeanor. *Id.* at 331. After initiating a DUI investigation, the officer asked the driver to submit to a blood test at the scene. *Id.* In doing so, the officer read the driver implied consent and also obtained written consent from the driver. *Id.* The driver moved to suppress the results of the blood draw, arguing that the voluntary blood test was inadmissible as the requirements of implied consent statute were not met. *Id.* In response, the State argued that the implied consent statute does not preclude the admission of blood alcohol tests where the driver has given actual consent to the blood draw. *Id.* Considering the issue on appeal, the Fourth District Court of Appeal agreed that law enforcement officers are not legislatively authorized "to request a blood test when the conditions [outlined in the implied consent" statute do not exist. *Id.* at 332. However, it recognized that "circumstances may occur where it is more convenient for a person to submit to a blood test rather than a breath or urine test." *Id.* Under those circumstances, the court held that there would be "no reason to exclude a voluntary blood test provided the person has been fully informed that the implied consent law requires submission only to a breath or urine test and that the blood test is offered as an alternative." *Id.* Given that the driver was informed of the voluntary consent, the Court held that the blood tests were admissible. *Id.*

The *Chu* holding has since caused some confusion in blood-draw DUI cases. In this Court's view, the *Chu* opinion conflated two distinct, concepts: express voluntary consent and implied consent. *See Robertson v. State*, 604 So. 2d 783, 790 (Fla. 1992) (recognizing that if a defendant expressly consents to a blood test, "then the blood test falls wholly outside the scope of the implied consent law."). Generally speaking, voluntary consent exists outside any legislative framework and is a common law exception to the Fourth Amendment's requirement for a warrant or probable cause. Criminal suspects often voluntarily consent to searches of their person and or property, and the fact that there may not be a statute authorizing a consensual search or seizure does not make the evidence derived from that search or seizure inadmissible. Instead, when a defendant moves to suppress the results of such a search, the issue for the Court is not whether the search was legislatively authorized, but whether the consent was indeed freely, intelligently, and knowingly given based on a totality of the circumstances. *See Ruiz v. State*, 50 So. 3d 1229, 1231-32 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D99c] (discussing the evolution of voluntary consent as an exception to the Fourth Amendment's warrants or probable cause requirements).

Implied consent, on the other hand, is a creature of statute applicable in cases where law enforcement has probable cause to suspect a DUI. Per the implied consent law, drivers in Florida agree to submit to breath or urine tests for the detection of alcohol or chemical substances when there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or a controlled substance. § 316.193(1)(a), Fla. Stat. (2021). If breath or urine is impractical or impossible due to the fact that the suspect is being treated at a "hospital, clinic, or other medical facility," the person also impliedly consents to a blood test. § 316.193(1)(c), Fla. Stat. (2021). By virtue of this the implied consent law, blood samples given by a suspect after being properly advised of the implied consent laws are admissible.

However, just because blood samples properly given pursuant to implied consent are deemed admissible does not mean that implied consent is the only avenue for admission. It is this distinction that the *Chu* decision failed to appreciate when it suggested that officers investigating a DUI cannot request voluntary blood unless a blood test is authorized under the implied consent statute. To confuse matters more, in the next stroke of the pen, the *Chu* court acknowledged that voluntary blood may be admissible (and therefore, necessarily requested) even when implied consent is not applicable so long as the driver has been informed implied consent law requires submission only to a breath or urine test and that the blood test is offered as an

alternative. Reading these two statements together, the *Chu* opinion stands for the proposition that the results of a warrantless blood draw taken during the course of a DUI investigation are not admissible unless either a blood draw would be permissible under the implied consent statute OR the blood was given voluntarily after the officer fully informed the Defendant that blood was not required under the implied consent statute.

Several courts have since expressed conflict with *Chu* or otherwise distinguished its holding. In *State v. Murray,* 51 So. 3d 593 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b], the Fifth District Court of Appeal considered the admissibility of the results of a voluntary blood draw taken at the scene of an accident involving a fatality. *Id.* at 594. At the time the blood draw was requested, the officer did not notice any signs of impairment and did not inform the defendants regarding implied consent. *Id.* However, the officer advised the defendants that "blood would be tested for the presence of alcohol and drugs and that the potential for criminal charges arising from the crash existed." *Id.* The trial court granted the defendants' joint motion to suppress, ruling that despite the defendants' voluntary consent to the blood draws, *Chu* required suppression because the defendants were not informed that the implied consent law only required submission to a breath or urine test and that blood was offered as an alternative. *Id.* The *Murray* Court disagreed, holding that *Chu* was factually distinguishable because there was no DUI investigation at the time blood was requested. *Id.* at 595 However, in distinguishing *Chu*, the Fifth District Court of Appeal also noted that *Chu*'s "holding likely sweeps too broadly." *Id.* It concluded that "[t]he implied consent law is not the exclusive manner by which blood tests may be admitted into evidence. As the United States Supreme Court held in *Schmerber v. California*, 384 U.S. 757, 771 (1966) if a blood test 'was performed in a reasonable manner' the results should be admissible under traditional common law rules. If *Chu* is read to require a contrary result, we acknowledge our direct and express conflict with it." *Id.* at 596.

Through a series of decisions, the Fourth District Court of Appeal has also limited the holding of *Chu*. First, in *State v. Dubiel,* 958 So. 2d 486, 488 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1338a], the court considered the consequences on a blood draw taken at a hospital pursuant to section 316.1932(1)(c), Florida Statutes, for law enforcement's failure to instruct on the consequences of refusal. The Fourth District Court of Appeal reversed the trial court's suppression of the blood draw results based on *Chu*, holding that "the two cases are factually different, as Dubiel was in the hospital when the blood was requested." *Id.*

Then, in *State v. Meyers*, 261 So. 3d 573 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2647b], law enforcement requested a voluntary blood sample from a Defendant arrested for reckless driving and suspected of DUI. The request was made at the hospital where Defendant was being treated, and because the Defendant voluntarily consented, the officer "did not inform [the Defendant] that the implied consent law requires submission only to a breath or urine test and that a blood test is offered only as an alternative." Without discussing *Chu*, the court held that blood draw was admissible. The *Meyers* court reasoned that because the defendant expressly consented to the blood test, the test fell wholly outside the scope of implied consent and, therefore, "the trial court erred in suppressing the blood test results for failure to comply with the provisions of the implied consent law." *Id.*

Finally, in *Department of Highway Safety and Motor Vehicles v. Davis*, 264 So. 3d 965, 967 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D450a], the Fourth District Court of Appeal expressly recognized that by virtue of *Dubiel* and *Meyers*, *Chu* is not applicable to cases where a suspect voluntarily consents to a blood draw "while in a hospital."

While, the Fourth District Court of Appeal's decisions in *Meyers*, *Dubiel*, and *Davis* recognized that voluntary consent and implied consent are separate concepts, none of these decisions went so far as to expressly vacate *Chu*. Instead, *Meyers*, *Dubiel*, and *Davis* establish that *Chu* does not apply to voluntary blood draws in a **hospital**[1] setting. Although it does not make a great deal of sense to conclude that requests for voluntary blood should be treated different solely based on location,[2] absent a Florida Supreme Court decision expressly overruling *Chu* or a Fourth District Court of Appeal decision expressly vacating *Chu*, *Chu* remains binding on this Court. Accordingly, as it currently stands in this jurisdiction, *Chu* establishes that it is impermissible for an officer conducting a DUI investigation to request voluntary blood roadside unless implied consent applies OR the officer advised the defendant that blood is not required under the implied consent law and is a voluntary alternative to breath or urine. Neither scenario was established in this case. Therefore, the Court is compelled to suppress the results of the blood draw.

In reaching this conclusion, the Court wishes to note that had *Chu* not been applicable, it would have denied the Motion based on a finding of voluntariness. The Court recognizes Defendant's reliance on *State v. Ramsey*, 22 Fla. L. Weekly Supp. 1095b (Palm Beach County Court 2014). There, a Palm Beach County judge attempted to reconcile the holding of *Chu* by ruling that a law enforcement officer's failure to inform a DUI suspect that blood is not mandatory under implied consent before requesting voluntary blood at the scene of a DUI investigation renders the consent *per se* involuntary. While the fact that a Defendant is not informed that blood is a voluntary alternative to breath or urine *could* certainly weigh into a voluntariness calculus, voluntariness is based on the totality of the circumstances. Given the totality of the circumstances, the Court would have found that Defendant's consent to the blood draw was voluntarily given in this case. However, as this Court is not at liberty to ignore binding precedent and, it is hereby

ORDERED that Defendant's Motion to Suppress Statements is **DENIED**. Defendant's Motion to Exclude Blood Test Results is **GRANTED**.

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[1]Although practically speaking, implied consent to blood as authorized by section 316.193(1)(c), Florida Statutes, is usually found in a hospital setting, the Court notes that the statute does not limited implied consent to blood to a hospital setting. Instead, the statute uses the term "medical facility," which, per the plain language of the statute, includes an ambulance. Thus, if a suspect was being treated in an ambulance at the scene of the accident at the time the officer asked for voluntary blood, arguably the limitations set forth in *Chu* would not apply. However, the evidence presented in this case did not establish that Defendant was being treated in an ambulance at the time she was asked to/agreed to give voluntary blood.

[2]To the extent that it could be argued the distinction between *Chu* and the *Meyers*, *Dubiel* and *Davis* cases is based on whether a blood draw is legislatively authorized as opposed to location alone, the Court wishes to point out that the fact a suspect is being treated in a "medical facility" in and of itself does not mean that blood is authorized under the implied consent law. Rather, it must also be established that blood or urine was impractical or impossible. § 316.193(1)(c), Fla. Stat. (2021). The impractical/impossible prong was not established or found in either *Meyers*, *Dubiel*, or *Davis*, and, therefore, it does not follow that the blood draws in those cases were actually legislatively authorized per implied consent. *See Meyers*, 261 So. 3d at 574; *Davis*, 264 So. 3d at 967; *Dubiel*, 958 So. 2d at 487.

* * *

Insurance—Personal injury protection—Demand letter satisfies condition precedent—Letter is not required to consider all prior payments or allege defects in reimbursement methodology or amounts—Even if additional information were required, medical provider would still be entitled to summary judgment on defective demand letter defense where insurer did not sustain any prejudice as result of alleged deficiencies

ASSOCIATESMD MEDICAL GROUP, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22056361. Division 51. November 17, 2022. Kathleen McHugh, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg,

P.A., Hollywood, for Plaintiff. Rafael Reyes, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT'S FIRST AFFIRMATIVE DEFENSE

THIS CAUSE, having come before the Court on Plaintiff's Motion for Partial Summary Judgment as to Defendant's First Affirmative Defense, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED, as follows:

Plaintiff's Motion for Partial Summary Judgment as to Defendant's First Affirmative Defense is hereby Granted. The Court finds that Plaintiff's Demand Letter, which is attached to the Statement of Claim, meets all of the requirements of Florida Statute 627.736(10), qualifies as a valid Demand Letter and that the Plaintiff has met the Demand Letter condition precedent.

The Defendant's first affirmative defense claimed that the Demand Letter was defective because it failed to specify each exact amount of benefit claimed to be due either by failing to consider "all prior payments" and/or "failing to specifically allege defects in Defendant's reimbursement methodology/amounts therein as requested by Defendant prior to the filing of the subject lawsuit." Notwithstanding that Florida Statute 627.736(10) does not require a Demand Letter to consider "all prior payments" or "allege defects in Defendant's reimbursement methodology/amounts therein as requested by Defendant prior to the filing of the subject lawsuit" the defense counsel, during the hearing, acknowledged that the subject Demand Letter did account for all prior payments, and he never addressed the second alleged defect.

Even had the Court not found as it did above the Court would still find for the Plaintiff because the Defendant did not sustain any prejudice in relationship to the Plaintiff's Demand Letter. The Court determined this after reviewing the Defendant's response to the Demand Letter and determining that the Defendant fully understood the Demand Letter and the services that were at-issue therein.

The Court also notes that the Defendant did not file a response to the instant motion, much less any evidence, setting forth the Defendant's factual and legal position in accordance with the 20-day requirement set forth in Rule 1.510. Florida Rule of Civil Procedure 1.510 states 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." The Florida Supreme Court's commentary on Rule 1.510 (SC20-1490) also states that the new rule and its timing requirements were designed to "reduce gamesmanship and surprise and allow for more deliberative consideration of summary judgment motions."

* * *

Arbitration—Confirmation of award—Judgment must be entered in accordance with arbitrator's decision where parties did not request trial de novo within deadline for such request—Fact that plaintiff continued to prepare for trial during 20-day period allowed for requesting trial de novo is insufficient to conclude that plaintiff had rejected arbitrator's decision where plaintiff did not request to move forward to trial

ASAP ULTIMATE RESTORATION CORP., Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21029544. Division 53. November 29, 2022. Robert W. Lee, Judge.

FINAL JUDGMENT ON ARBITRATOR'S DECISION IN FAVOR OF DEFENDANT

THIS CAUSE came before the Court for consideration of the notice of filing Arbitration Award filed by the Arbitrator Robert S. Zack, and the Court's having reviewed the docket, the entire Court file, and the relevant legal authorities; and having been sufficiently advised in the premises, the Court finds as follows:

This case was submitted to mandatory arbitration. The arbitrator served his decision on October 12, 2022. Under Rule 1.820(h), Fla. R. Civ. P., a motion for trial de novo must be "made" within 20 days of the "service" of the arbitrator's decision. Under Florida law, "a party has the right to move for a trial within twenty days after service of the arbitrator's decision. If no motion for trial is timely served, then the trial court *must* enforce the decision of the arbitrator and has *no discretion* to do otherwise" (emphasis added). *Bacon Family Partners, L.P. v. Apollo Condominium Ass'n,* 852 So.2d 882, 888 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1795a]. *See also Johnson v. Levine,* 736 So.2d 1235, 1238 n.3 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1456a]; *Klein v. J.L. Howard, Inc.*, 600 So.2d 511, 512 (Fla. 4th DCA 1992). The Arbitration Decision reflects that the arbitrator appropriately considered the parties' arguments, as well as their submitted evidence. Rule 1.820(c). The Court lacks discretion to deny entry of a judgment in accordance with the arbitrator's decision when the parties fail to timely request a trial de novo or otherwise fail to dispose of the case of record within the de novo deadline.

The parties' request for trial de novo was required to be ***filed*** no later than November 1, 2022. Neither party filed a timely request. As a result, the Court is required to enter judgment in accordance with the Arbitrator's decision. *See Gossett & Gossett, P.A. v. Fleming,* 10 Fla. L. Weekly Supp. 839b (Broward Cty. Ct. 2003). The Plaintiff now argues that it has, in essence, implicitly requested a trial de novo by continuing to litigate this case after the arbitrator served his decision, relying on *Nicholson-Kenny Capital Management, Inc. v. Steinberg,* 932 So.2d 321 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D423a]. The Court rejects that argument and finds *Nicholson-Kenny* to be wholly distinguishable. In the instant case, because of case management procedures under the Circuit's administrative orders, the Court referred the parties to arbitration, while *at the same time* also setting a case management conference and a pretrial conference with similar deadlines. There has been no suggestion that all the deadlines in this case were stayed pending the 20-day period so that the parties could leisurely contemplate whether to move for a trial de novo. Indeed, the Court would expect that the parties would continue to move forward preparing for trial while deciding to accept or reject the arbitrator's decision. Moreover, the Defendant promptly moved for judgment on the arbitrator's decision, and further did nothing that would amount to "gotcha" tactics. Nothing that the Plaintiff did after the arbitrator served his decision indicated that the Plaintiff was *rejecting the arbitrator's decision* and *requesting to move forward to trial.* Both components are required. Merely continuing to prepare for trial during the 20-day decision window is insufficient to conclude that the Plaintiff has rejected the arbitrator's decision. Accepting the Plaintiff's argument would make it highly unlikely that a party would ever have to actually file a request for a trial de novo.

Accordingly, the Court has this day unsealed the Arbitrator's decision. The Arbitrator finds that the Defendant is the prevailing party. As a result, it is hereby

ADJUDGED THAT:

The Plaintiff shall take nothing in this action and the Defendant shall go hence without day. The Court reserves jurisdiction on any issue of attorney's fees and costs.

The pretrial conference set for December 9, 2022 is CANCELED.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement—Medicare budget neutrality adjustment is not applicable when determining reimbursement amounts under Florida PIP law

CHIROPRACTIC USA OF PLANTATION, INC., a/a/o Robert Anthony, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21052809. Division 70. December 19, 2022. Kim Theresa Mollica, Judge. Counsel: Howard Myones, Myones Legal, PLLC, Fort Lauderdale; and Travis Greene, Anidjar & Levine Florida PIP Attorneys, PLLC, Plantation, for Plaintiff. Jacqueline Whittingham, House Counsel of United Automobile Insurance Company, Miami, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW AS TO PROPER REIMBURSEMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR §57.105 SANCTIONS AND FINAL JUDGMENT IN FAVOR OF THE PLAINTIFF

THIS CAUSE came before the Court on December 15, 2022, for hearing on Defendant's Motion for Summary Judgment and Request for §57.105 Sanctions and Plaintiff's Motion for Summary Judgment and Memorandum of Law as to Proper Reimbursement, and the Court, having reviewed both motions and the entire record; having heard argument of counsel; having considered the applicable legal authorities and having otherwise been sufficiently advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendant's motion is DENIED and Plaintiff's motion is GRANTED for the reasons set forth below:

FINDINGS OF FACT

1. On October 31, 2022, the parties entered into a Joint Pretrial Stipulation ("JPS"). In the JPS, the parties stipulated that Robert Anthony was insured by United under a policy of insurance that provided $10,000.00 in PIP benefits. The parties stipulated that the Plaintiff had standing to pursue this claim on behalf of Robert Anthony. The parties stipulated that Robert Anthony was involved in a motor vehicle accident on October 21, 2017. They further stipulated that the policy was in full force and effect at all times relevant to this claim and provided PIP coverage to Robert Anthony. Finally, the parties stipulated that the Defendant timely received the Plaintiff's bills for dates of service from October 26, 2017 through November 27, 2017.

2. The only disputed issue that was presented to the Court as found in the JPS is whether the Defendant applied an improper Budget Neutrality Adjustment to the Plaintiff's charges.

3. Defendant's motion for summary judgment filed on March 16, 2022 states that Defendant's previous payments were properly paid in accordance with the terms of its policy and the Florida PIP Statute.

4. Plaintiff's motion for summary judgment filed on September 21, 2022 alleged that Defendant improperly applied Medicare's Budget Neutrality Adjustment (BNA) to CPT codes 72050, 72070, and 72100 resulting in an improper underpayment pursuant to Defendant's policy and the Florida PIP statute.

5. There is no dispute that the Defendant's policy provides notice of its intent to limit reimbursement pursuant to the schedule of maximum charges found in Fla. Stat. §627.736(5)(a)(1-5) and that the appropriate amount on which payment for these X-Rays should be based is Medicare's 2007 limiting charge. The only dispute is about how the 2007 limiting charge should be calculated.

6. With respect to the 2007 BNA at issue here, pursuant to section §1848(c)(2)(B)(i) of the Social Security Act, work RVUs are to be reviewed no less than every five years. The first review was initiated in 1997, followed by a second review in 2002, and a third review that went into effect in 2007, finalized in the final as rule stated in Federal Register published December 1, 2006. As part of this 5-Year study, the work RVUs were reviewed and ultimately revised, reflecting "changes in medical practice, coding changes, and new data on relative value components that affect the relative amount of physician work required to perform each service, as required by the statute . . . Work RVU revisions will be fully implemented for services furnished to Medicare beneficiaries on or after January 1, 2007." 71 Fed. Reg. 69629. HMS further explained that

> Section §1848(c)(2)(B)(ii)(II) of the Act provides that increases or decreases in RVUs for a year may not cause the amount of expenditures for the year to differ by more than $20 million from what expenditures would have been in the absence of these changes. If this threshold is exceeded, we must make adjustments to preserve BN. The 5-Year Review of work RVUs would result in a change in expenditures that would exceed $20 million if we made no offsetting adjustments to either the CF or RVUs.

7. To reign in payments made by Medicare to providers treating Medicare beneficiaries, and thereby bring Medicare expenditures back within the federal budget, CMS instituted a plan to offset the increased expenditures by applying a budget neutrality adjustment to the calculation of payments to providers treating Medicare patients. The distinction between the allowable amounts under the Medicare Physician Fee Schedule and the budget neutral payment amounts to Medicare beneficiaries was made clear in the Federal Register final rule published on December 1, 2006:

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

8. The General Formula is the formula referenced in *Sunrise Chiropractic and Rehabilitation Center, Inc. (a/a/o Bichenet Louis) v. Security National Insurance Company*, 321 So.3d 786, 788 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a] that produces the allowable amount under the participating physicians fees schedule of Medicare Part B as referenced in the Florida PIP statute. But to meet its budget neutrality requirements, for purposes of determining what Medicare actually pays—as reflected in the CMS payment files—HHS explained:

> However, as discussed in section IV.D of this final rule with comment period, due to the need to meet the budget neutrality (BN) provisions of 1848(c)(2)(B)(ii), we are applying a BN adjustor to the work RVUs in order to calculate payment for a service. Therefore, payment for services will now be calculated as follows: Payment = [(RVU work × BN adjustor × GPCI work) + (R VU PE × GPCI PE) + (R VU malpractice × GPCI malpractice)] × CF.) (The "Modified Formula").

9. The Modified Formula includes a budget neutrality adjustment of 0.8994 that is applied to the work RVU. To ensure that the Modified Formula was used only for Medicare fee-for-service claims by Medicare providers treating Medicare beneficiaries, as opposed to other payors for different purposes, HHS explained:

> We share the commenters' concerns about transparency and recognize the Medicare PFS is used by other payors and for other purposes than just Medicare payments. To maintain a high level of transparency in the fee schedule, the Addendum B published in this rule will show the RVUs without the BN adjustment applied. This will serve as a reference for any interested party and should help to minimize any confusion about the unadjusted codes.

10. Plaintiff contends that the codes at issue should be reimbursed at 80% of 200% of the 2007 limiting charge based on the General

Formula discussed in *Sunrise Chiropractic,* 321 So.3d 786, 788 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a]. Each party detailed the simple arithmetic behind their arguments in their respective motions and responses, the only difference being whether the Modified Formula using the 0.8994 BNA should be applied to the work portion of the calculation for the services at issue in this case.

11. Defendant contends that they made proper payment by paying 80% of 200% of the 2007 limiting charge using the Modified Formula including the BNA reduction.

12. The total difference in the allowable amount for the three X-rays at issue is $5.80, 80% of which is $4.64.

SUMMARY JUDGMENT STANDARD

Fla. R. Civ. P., Rule 1.510(a), as Amended April 30, 2021, states "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. The court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The Florida Supreme Court recently adopted new rules regarding summary judgments adopting the federal standard as found in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). These new rules "mandate 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." *Celotex* at 322,323 (1986).

The movant "bears the initial responsibility of informing the [court] of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact." *Morrison v. Quality Transps. Servs.*, 474 F. Supp. 2d 1303, 1307 (S.D. Fla. 2007). To discharge this burden, the movant "must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* After the movant has met its burden, the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*. 475 U.S. 574, 586 (1986). The nonmoving party cannot merely rely on the allegations or denials of the pleadings, but instead "must come forward with specific facts showing that there is a genuine issue for trial. *Id.* at 1308. The nonmoving party must come forward with affirmative evidence to support its claim. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Morrison* at 1308 quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

"Statutory interpretation is clearly a matter of law". *See, e.g. Green v. Cottrell*, 204 So. 3d 22 (Fla. 2016) [41 Fla. L. Weekly S506a]. Furthermore, "[t]he interpretation of a contract or a covenant is a matter of law. . ." *Royal Oak Landing Homeowners Ass'n v. Pelletier*, 620 So. 2d 786 (Fla. 4th DCA 1993).

FINDINGS OF LAW

As a threshold matter, the Court finds that the Plaintiff has met its burden under the Rule 1.510(a) and is entitled to judgment as a matter of law. Furthermore, the Court finds no genuine issue for trial and has not been presented anything by the Defendant that would allow a jury to find for the Defendant.

This Court previously ruled on the BNA issue in *Empire Imaging, Inc. v. Security National Insurance Company*, COINX22008735 (Fla. 17th Cir. Cty. Ct., September 23, 2022) and stands on its previous ruling regarding this issue. This Court previously held that the BNA is not applicable in the determination of reimbursement amounts in the Florida PIP context and finds that Defendant's payment based on the Modified Formula using the BNA which Medicare applies when paying for services provided to Medicare beneficiaries was improper.

Ultimately, budget neutrality adjustments—like the one at issue in *Sunrise Chiropractic* and the one at issue here—were designed to recoup costs borne by the federal government when it exceeds its budget. Defendant, as a private payor who is statutorily bound to pay the full fee schedule amounts, does not get the benefit of a Medicare-only reduction imposed to bring the federal government's budget back in line.

The Plaintiff's argument is supported by the Fourth DCA's previous holding in *Sunrise Chiropractic*. In that case, the insurer based its payment on the CMS payment files using a 2% budget neutrality adjustment rather than calculating the reimbursement value using the simple arithmetic General formula set out by Medicare. The Court in *Sunrise Chiropractic* rejected the insurer's argument that it was permitted to use the 2% budget neutrality adjustment because those values were calculated into the CMS payment files. Ultimately, the Court held that the insurer was required by the plain language of § 627.736(5)(a)1. to calculate the correct amount without the adjustment and to pay that amount. The Court found that the insurer could not use that 2% budget neutrality adjustment because it was applied to the payment files rather than the actual RVU's themselves to preserve the integrity of the RVU's as they were relied upon by many private payers, such as the Defendant in that case. 321 So.3d at 788-789.

With respect to the BNA that is applicable to this case, the Court finds the Plaintiff's argument compelling. The Plaintiff argued in this case that the BNA in effect from 2010-2014 with respect to chiropractic services is identical or at worst substantially similar to the BNA that was in effect for the 2007 fee schedule. The Court is most influenced by the language highlighted by the Fourth DCA in *Sunrise Chiropractic* and noted above. The government's descriptions of both sets of BNAs are set forth below:

2010-2014 BNA	2007 BNA
"Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. **Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs."** (emphasis in original). *Sunrise Chiropractic*, 321 So.3d at 789 (quoting 74 Fed. Reg. 61927)(E.S.).	CMS is proposing to create a separate budget neutrality adjuster that can be applied just to the work RVUs for Medicare purposes, without changing the number of work RVUs assigned to a particular service. **This would preserve the integrity of the existing work RVU structure, which is often adopted by other payers.** (emphasis added) "CMS Announces Proposed Changes to Physician Fee Schedule Methodology"—June 21, 2006 "We. . .recognize the Medicare PFS is used by other payors and for other purposes than just Medicare payments. To maintain a high level of transparency in the fee schedule, the Addendum B published in this rule will **show the RVUs without the BN adjustment applied. This will serve as a reference for any interested party and should help to minimize any confusion about the unadjusted codes."** (emphasis added). 71 Fed. Reg. 69736 (December 1, 2006)(E.S.)

The Fourth DCA thought it was important enough that Medicare was not adjusting the RVUs themselves to preserve the integrity of the fee schedule that they bolded the language. In reference to the 2007 BNA currently at issue before this Court, Medicare again stated they were not changing the actual RVUs themselves to preserve the integrity of the existing structure. Based upon this Court's interpretation of the PIP statute and the case law presented, there is no genuine issue that the Plaintiff is correct, the 2007 BNA at issue here is identically or at least substantially similar to the 2010-2014 BNA and is not applicable in calculating PIP reimbursements under the Florida PIP Statute.

Finally, the Defendant argued that forcing insurance carriers to do their own math on every single claim received without the BNA adjustment would be too difficult for them and they should be allowed to just use the Medicare look up tool so they can make swift and automatic payments. The Court is not moved by this argument for the following reasons. First, the BNA only applies when the reimbursement level for the service year drops below the 2007 reimbursable amount and the insurer is required to pay the higher 2007 amount pursuant to Fla. Stat. § 627.736(5)(a)2. As such, the insurer would have only needed to perform the calculation once over the course of the past decade to determine the baseline payment at the 2007 rate. Second, the Fourth District in *Sunrise Chiropractic* held that the arithmetic is simple and that the insurer was required to do it; the "math is too hard" argument therefore fails as a matter of law. Finally, the Plaintiff provided examples of recent United Automobile explanation of review that expressly stated that its reimbursements were based on the 2007 limiting charge without the BNA, thus demonstrating that United Automobile is perfectly capable of calculating, adjusting, and issuing payment using the 2007 limiting charge without the BNA.[1] Therefore, the argument that the simple arithmetic is too difficult for an insurance company must fail.

CONCLUSION AND FINAL JUDGMENT

Based on the foregoing, the proper method of calculating reimbursement of PIP benefits under the Florida PIP statute and Defendant's policy, when using the 2007 limiting charge, is without the BNA. It is therefore,

ORDERED AND ADJUDGED that final judgment be and the same is hereby entered in favor of the Plaintiff, CHIROPRACTIC USA OF PLANTATION, INC. A/A/O ROBERT ANTHONY, and against the Defendant, UNITED AUTOMOBILE INSURANCE COMPANY, in the amount of $4.64 in PIP Benefits improperly calculated by the Defendant and $1.46 in prejudgment interest for a total amount of $6.10, which shall bear interest at the current statutory rate for which sum let execution issue forthwith. This Court reserved jurisdiction to determine the amount of Plaintiff's reasonable attorney's fees and costs upon filing of a timely motion.

[1]See Plaintiff's Notice of Filing United Automobile Insurance Company Explanations of Benefits dated December 14, 2022.

* * *

Insurance—Personal injury protection—Attorney's fees—Amount—Reasonable hours expended and reasonable hourly rates are established for multiple attorneys and paralegals for work performed on 23 PIP cases at trial court and appellate levels—Award of contingency risk multiplier is not appropriate where multiplier has not been sought

PLANTATION OPEN MRI, LLC, a/a/o Sammy Brown, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 18-9429 COCE 53. December 21, 2022. Robert W. Lee, Judge.

CONSOLIDATED FINAL JUDGMENT ON DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS (TRIAL AND APPELLATE)

THIS CAUSE came before the Court on November 29, 2022 for hearing of the Defendant's Motions for Attorneys' Fees and Costs, and the Court's having reviewed the Motions and Court files; received evidence; heard argument; and been sufficiently advised in the premises, the Court finds as follows:

Background. This case is one of 23 cases in this division that involved the same parties and issues, all filed by the Plaintiff at the same time. With the exception of the work involving the appeal (which has all been charged to only one of the cases), the Defendant concedes that the work done in each case was almost identical, with defense counsel generally creating a filed document or completing a task once, and then duplicating it for each case. On April 26, 2021, this Court entered its Order finding that the Defendant was entitled to an award of attorney's fees and costs on both the trial court and appellate levels from the date the Defendant's Proposal for Settlement was filed (December 19, 2018). On June 1, 2022, the Defendant filed its time records indicating the amounts it was seeking, listed by date, description, and time. On June 28, 2022, the Court entered its Order Preliminary to Hearing on Defendant's Motion for Attorney's Fees and Costs, directing that the Plaintiff respond by filing its detailed Objections to Plaintiff's breakdown. The Plaintiff filed its response on July 28, 2022. By Order dated September 2, 2022, the Court set an evidentiary fee hearing for October 14, 2022. The parties filed a Joint Motion to Continue, and the Court thereafter reset the fee hearing to November 29, 2022.

The parties were able to work out agreed orders on the issue of costs. As a result, this Order will address only the amount of attorney's fees awarded.

For trial level work, the Defendant divided the total time for each task among all the cases involved for that task, resulting in admittedly quirky yet quite specific time records. For example, for some tasks the Defendant is seeking 0.02 hours per task per case, or 1.2 minutes per task per case. The Court finds that, under the facts of these particular cases, this is a reasonable way to divide the time. At the hearing both sides appeared with their expert witnesses, Luis Perez, Esq. for the defense and Henry Crouser, Esq. for the Plaintiff.

For the trial level cases, the Defendant is seeking an hourly rate of $500.00 per hour for Gladys Perez Villanueva, Esq.; $400.00 per hour for Leslie M. Goodman, Esq.; $350.00 per hour Tracy B. Berkman, Esq.; $300.00 per hour for Amanda E. Kayfus, Esq.; and $245.00 per hour for paralegal work. Both Ms. Villanueva and Ms. Goodman have billed time in all of the cases, while Ms. Berkman and Ms. Kayfus have each billed only in a few files. Plaintiff's expert had no objection to the hourly rates of Ms. Villanueva and Ms. Goodman, but did object to the hourly rates for Ms. Berkman and Ms. Kayfus, as well as the paralegal rate sought of $245.00. Plaintiff's expert believed that the paralegals should be awarded a rate from $100.00 to $125.00 per hour.

For the appellate level, the Defendant is seeking an hourly rate of $350.00 for Garrett E. Tozier; $500.00 for Suzanne Y. Labrit; and $500.00 for Daniel E. Nordby. The Plaintiff agreed with the hourly rates for Mr. Tozier and Ms. Labrit, but believed that Ms. Nordby should be awarded an hourly rate of $400.00.

In reaching its decisions, the Court has considered the testimony at the hearing, as well as the detailed written submissions of both parties, the argument of the attorneys, and the controlling case law. In addition, the Court is quite familiar with and conducted its own thorough review of matters of record in this case. This Court has presided over hundreds of insurance cases, and is quite familiar with the issues involving the pleadings, discovery, strategy, motion practice and resolution related to insurance cases litigated in South Florida.

CASE 18009429 COCE 53
(a/a/o Sammy Brown)

In this case, the Defendant is seeking 211.83 hours, with Garrett A. Tozier, Esq. billing 97.6 hours; Suzanne Y. Labrit, Esq. billing 73.85 hours; Gladys Perez Villanueva, Esq. billing 4.55 hours; Leslie M. Goodman, Esq. billing 14.1 hours; Daniel E. Nordby, Esq. billing 0.4 hours; and paralegals billing 21.33 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 99.93 hours of time claimed by Defendant. Plaintiff objected to 111.9 hours of time billed. Therefore, while the Defendants seek at total of $84,425.85 in fees attributed to this case, the Plaintiff believes it should instead be $39,578.75.

The Court has reduced Ms. Villanueva's time by 1.15 hours, Ms. Goodman's time by 1.8 hours and the paralegal time by 0.3 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) As conceded by the Defendant's expert, the Court has further reduced paralegal time by 3.5 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done; and reduced Ms. Goodman's time by 3.5 hours for time involving work that was essentially duplicative in nature. The Court has further scrutinized the overlapping appellate work done by several attorneys on behalf of the Defendant and finds that additional reductions are required: 5.85 hours for Ms. Labrit and 1.4 hours for Ms. Villanueva. Additionally, the Court finds that an additional 1.6 hours for Ms. Goodman should be reduced for time not sufficiently detailed.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 192.73 hours, as follows: 97.6 hours for Mr. Tozier; 68 hours for Ms. Labrit; 2 hours for Ms. Villanueva, 7.2 hours for Ms. Goodman; 0.4 hours for Mr. Nordby, and 17.53 hours for paralegal time.

CASE 18009491 COCE 53
(a/a/o Patrick Obianwuzu)

In this case, the Defendant is seeking 11.67 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.4 hours; and paralegals billing 2.29 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.11 hours of time claimed by Defendant. Plaintiff objected to 8.56 hours of time billed. Therefore, while the Defendants seek a total of $4,411.05 in fees attributed to this case, the Plaintiff believes it should instead be $983.50.

The Court has reduced Ms. Goodman's time by 2.6 hours and the paralegal time by 0.7 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 7.039 hours, as follows: 0.909 hours for Ms. Villanueva, 5.4 hours for Ms. Goodman, and 0.73 hours for paralegal time.

CASE 18009492 COCE 53
(a/a/o Amanda Dinac)

In this case, the Defendant is seeking 12.02 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.2 hours; and paralegals billing 2.84 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.86 hours of time claimed by Defendant. Plaintiff objected to 8.16 hours of time billed. Therefore, while the Defendants seek a total of $4,446.20 in fees attributed to this case, the Plaintiff believes it should instead be $1,104.75.

The Court has reduced Ms. Goodman's time by 3.6 hours and the paralegal time by 0.5 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 6.689 hours, as follows: 0.909 hours for Ms. Villanueva, 4.3 hours for Ms. Goodman, and 1.48 hours for paralegal time.

CASE 18009496 COCE 53
(a/a/o Maria Chacin)

In this case, the Defendant is seeking 10.07 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 6.8 hours; and paralegals billing 2.29 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 2.91 hours of time claimed by Defendant. Plaintiff objected to 7.16 hours of time billed. Therefore, while the Defendants seek a total of $3,771.05 in fees attributed to this case, the Plaintiff believes it should instead be $1,041.00.

The Court has reduced Ms. Goodman's time by 2.9 hours and the paralegal time by 0.7 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 5.239 hours, as follows: 0.909 hours for Ms. Villanueva, 3.6 hours for Ms. Goodman, and 0.73 hours for paralegal time.

CASE 18009494 COCE 53
(a/a/o Latesia Adams)

In this case, the Defendant is seeking 18.65 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 11.8 hours; and paralegals billing 5.87 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 6.46 hours of time claimed by Defendant. Plaintiff objected to 12.19 hours of time billed. Therefore, while the Defendants seek a total of $6,647.55 in fees attributed to this case, the Plaintiff believes it should instead be $1,846.00.

The Court has reduced Ms. Goodman's time by 3.1 hours and the paralegal time by 0.4 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 14.219 hours, as follows: 0.909 hours for Ms. Villanueva, 8.7 hours for Ms. Goodman, and 4.61 hours for paralegal time.

CASE 18009438 COCE 53
(a/a/o Pierina Rodriguez)

In this case, the Defendant is seeking 11.69 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.25 hours; and paralegals billing 2.46 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.86 hours of time claimed by Defendant. Plaintiff objected to 7.83 hours of time billed. Therefore, while the Defendants seek a total of $4,392.70 in fees attributed to this case, the Plaintiff believes it should instead be $1,228.50.

The Court has reduced Ms. Goodman's time by 3.1 hours and the paralegal time by 0.62 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 6.739 hours, as follows: 0.909 hours for Ms. Villanueva, 4.85 hours for Ms. Goodman, and 0.98 hours for paralegal time.

CASE 18009432 COCE 53
(a/a/o Julio Melendez)

In this case, the Defendant is seeking 11.97 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.2 hours; and paralegals billing 2.79 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.01 hours of time claimed by Defendant. Plaintiff objected to 8.96 hours of time billed. Therefore, while the Defendants seek a total of $4,453.55 in fees attributed to this case, the Plaintiff believes it should instead be $943.50.

The Court has reduced Ms. Goodman's time by 3.2 hours and the paralegal time by 0.7 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 6.839 hours, as follows: 0.909 hours for Ms. Villanueva, 4.7 hours for Ms. Goodman, and 1.23 hours for paralegal time.

CASE 18009466 COCE 53
(a/a/o Joseph Montocoeur)

In this case, the Defendant is seeking 9.77 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 6.7 hours; and paralegals billing 2.09 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.11 hours of time claimed by Defendant. Plaintiff objected to 6.66 hours of time billed. Therefore, while the Defendants seek a total of $3,682.05 in fees attributed to this case, the Plaintiff believes it should instead be $1,282.50.

The Court has reduced Ms. Goodman's time by 2.7 hours and the paralegal time by 0.5 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 5.339 hours, as follows: 0.909 hours for Ms. Villanueva, 3.7 hours for Ms. Goodman, and 0.73 hours for paralegal time.

CASE 18009430 COCE 53
(a/a/o Harry Pierre)

In this case, the Defendant is seeking 9.61 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 6.14 hours; and paralegals billing 2.49 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 2.71 hours of time claimed by Defendant. Plaintiff objected to 6.90 hours of time billed. Therefore, while the Defendants seek a total of $3,560.95 in fees attributed to this case, the Plaintiff believes it should instead be $856.00.

The Court has reduced Ms. Goodman's time by 2.72 hours and the paralegal time by 0.8 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 4.859 hours, as follows: 0.909 hours for Ms. Villanueva, 3.12 hours for Ms. Goodman, and 0.83 hours for paralegal time.

CASE 18009295 COCE 53
(a/a/o Agnes Saint Jean)

In this case, the Defendant is seeking 15.17 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.6 hours; Tracy B. Berkman, Esq. billing 3.2 hours; and paralegals billing 2.39 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.51 hours of time claimed by Defendant. Plaintiff objected to 11.66 hours of time billed. Therefore, while the Defendants seek a total of $4,495.95 in fees attributed to this case, the Plaintiff believes it should instead be $1,044.00.

The Court has reduced Ms. Goodman's time by 2.9 hours, Ms. Berkman's time completely (- 3.2 hours) and the paralegal time by 0.7 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 7.139 hours, as follows: 0.909 hours for Ms. Villanueva, 5.4 hours for Ms.

Goodman, and 0.83 hours for paralegal time.

CASE 18009425 COCE 53
(a/a/o Luis Olivera Helguera)

In this case, the Defendant is seeking 12.67 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 9.7 hours; and paralegals billing 2.99 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.01 hours of time claimed by Defendant. Plaintiff objected to 9.66 hours of time billed. Therefore, while the Defendants seek a total of $4,457.55 in fees attributed to this case, the Plaintiff believes it should instead be $916.00.

The Court has reduced Ms. Goodman's time by 3.4 hours and the paralegal time by 0.4 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 8.639 hours, as follows: 0.909 hours for Ms. Villanueva, 6.0 hours for Ms. Goodman, and 1.73 hours for paralegal time.

CASE 18009487 COCE 53
(a/a/o Alexander Abel)

In this case, the Defendant is seeking 12.26 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 9.15 hours; and paralegals billing 2.13 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.43 hours of time claimed by Defendant. Plaintiff objected to 8.83 hours of time billed. Therefore, while the Defendants seek a total of $4,671.85 in fees attributed to this case, the Plaintiff believes it should instead be $1,175.50.

The Court has reduced Ms. Goodman's time by 3.5 hours and the paralegal time by 0.62 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 6.909 hours, as follows: 0.909 hours for Ms. Villanueva, 5.35 hours for Ms. Goodman, and 0.65 hours for paralegal time.

CASE 18009478 COCE 53
(a/a/o Mildred Leggett)

In this case, the Defendant is seeking 10.02 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 6.65 hours; Amanda E. Kayfus, Esq. billing 0.4 hours; and paralegals billing 1.99 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.26 hours of time claimed by Defendant. Plaintiff objected to 6.76 hours of time billed. Therefore, while the Defendants seek a total of $3,777.55 in fees attributed to this case, the Plaintiff believes it should instead be $1,066.00.

The Court has reduced Ms. Goodman's time by 2.2 hours and the paralegal time by 0.4 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 6.189 hours, as follows: 0.909 hours for Ms. Villanueva, 4.15 hours for Ms. Goodman, 0.4 hours for Ms. Kayfus, and 0.73 hours for paralegal time.

CASE 18009483 COCE 53
(a/a/o Laurie Dinac)

In this case, the Defendant is seeking 11.22 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 7.4 hours; Amanda E. Kayfus, Esq. billing 1.0 hour; and paralegals billing 1.84 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.01 hours of time claimed by Defendant. Plaintiff objected to 8.21 hours of time billed. Therefore, while the Defendants seek a total of $4,250.80 in fees attributed to this case, the Plaintiff believes it should instead be $928.50.

The Court has reduced Ms. Goodman's time by 3.3 hours and the paralegal time by 0.3 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 6.389 hours, as follows: 0.909 hours for Ms. Villanueva, 3.8 hours for Ms. Goodman, 1.0 hours for Ms. Kayfus, and 0.68 hours for paralegal time.

CASE 18009493 COCE 53
(a/a/o Liz Torres)

In this case, the Defendant is seeking 10.12 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 6.85 hours; and paralegals billing 2.29 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.16 hours of time claimed by Defendant. Plaintiff objected to 6.96 hours of time billed. Therefore, while the Defendants seek a total of $3,791.05 in fees attributed to this case, the Plaintiff believes it should instead be $1,091.00.

The Court has reduced Ms. Goodman's time by 3.0 hours and the paralegal time by 0.5 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 5.389 hours, as follows: 0.909 hours for Ms. Villanueva, 3.55 hours for Ms.

Goodman, and 0.93 hours for paralegal time.

CASE 18009296 COCE 53
(a/a/o Miesha McLendon)

In this case, the Defendant is seeking 10.62 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 7.1 hours; and paralegals billing 2.54 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.11 hours of time claimed by Defendant. Plaintiff objected to 7.51 hours of time billed. Therefore, while the Defendants seek a total of $3,952.30 in fees attributed to this case, the Plaintiff believes it should instead be $983.50.

The Court has reduced Ms. Goodman's time by 2.6 hours and the paralegal time by 0.8 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 5.989 hours, as follows: 0.909 hours for Ms. Villanueva, 4.2 hours for Ms. Goodman, and 0.88 hours for paralegal time.

CASE 18009305 COCE 53
(a/a/o Mitzie Troncoso)

In this case, the Defendant is seeking 11.77 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.8 hours; and paralegals billing 1.99 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.01 hours of time claimed by Defendant. Plaintiff objected to 8.76 hours of time billed. Therefore, while the Defendants seek a total of $4,497.55 in fees attributed to this case, the Plaintiff believes it should instead be $916.00.

The Court has reduced Ms. Goodman's time by 3.1 hours and the paralegal time by 0.4 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 7.039 hours, as follows: 0.909 hours for Ms. Villanueva, 5.4 hours for Ms. Goodman, and 0.73 hours for paralegal time.

CASE 18009304 COCE 53
(a/a/o John Harris)

In this case, the Defendant is seeking 12.41 hours, with Gladys Perez Villanueva, Esq. billing 1.38 hours; Leslie M. Goodman, Esq. billing 9.2 hours; and paralegals billing 1.83 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 5.13 hours of time claimed by Defendant. Plaintiff objected to 7.28 hours of time billed. Therefore, while the Defendants seek a total of $4,818.35 in fees attributed to this case, the Plaintiff believes it should instead be $1,813.00.

The Court has reduced Ms. Goodman's time by 2.1 hours and the paralegal time by 0.4 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 8.279 hours, as follows: 0.909 hours for Ms. Villanueva, 6.8 hours for Ms. Goodman, and 0.57 hours for paralegal time.

CASE 18009301 COCE 53
(a/a/o Blake Piha)

In this case, the Defendant is seeking 20.67 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 15.5 hours; and paralegals billing 4.19 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 6.01 hours of time claimed by Defendant. Plaintiff objected to 14.66 hours of time billed. Therefore, while the Defendants seek a total of $7,696.95 in fees attributed to this case, the Plaintiff believes it should instead be $1,978.50.

The Court has reduced Ms. Goodman's time by 2.6 hours and the paralegal time by 0.4 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 16.439 hours, as follows: 0.909 hours for Ms. Villanueva, 12.6 hours for Ms. Goodman, and 2.93 hours for paralegal time.

CASE 18009298 COCE 53
(a/a/o Carmen Guzman)

In this case, the Defendant is seeking 13.59 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.4 hours; Tracy B. Berkman billing 1.0 hour; and paralegals billing 3.21 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.23 hours of time claimed by Defendant. Plaintiff objected to 10.36 hours of time billed. Therefore, while the Defendants seek a total of $4,986.45 in fees attributed to this case, the Plaintiff believes it should instead be $1,056.50.

The Court has reduced Ms. Goodman's time by 3.4 hours and the paralegal time by 1.4 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 7.559 hours, as follows: 0.909 hours for Ms. Villanueva, 4.7 hours for Ms. Goodman, 1.0 hour for Ms. Berkman, and 0.95 hours for paralegal time.

CASE 18009303 COCE 53
(a/a/o Juliet DeFreitas)

In this case, the Defendant is seeking 9.69 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 6.6 hours; and paralegals billing 2.11 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.01 hours of time claimed by Defendant. Plaintiff objected to 6.68 hours of time billed. Therefore, while the Defendants seek a total of $3,646.95 in fees attributed to this case, the Plaintiff believes it should instead be $943.50.

The Court has reduced Ms. Goodman's time by 2.6 hours and the paralegal time by 0.42 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 5.439 hours, as follows: 0.909 hours for Ms. Villanueva, 3.7 hours for Ms. Goodman, and 0.83 hours for paralegal time.

CASE 18009302 COCE 53
(a/a/o Cleveland Rahming)

In this case, the Defendant is seeking 11.54 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 8.35 hours; and paralegals billing 2.21 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.38 hours of time claimed by Defendant. Plaintiff objected to 8.16 hours of time billed. Therefore, while the Defendants seek a total of $4,372.05 in fees attributed to this case, the Plaintiff believes it should instead be $1,088.00.

The Court has reduced Ms. Goodman's time by 3.7 hours and the paralegal time by 0.6 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 6.009 hours, as follows: 0.909 hours for Ms. Villanueva, 4.35 hours for Ms. Goodman, and 0.75 hours for paralegal time.

CASE 18009493 COCE 53
(a/a/o Thomas Bond)

In this case, the Defendant is seeking 10.22 hours, with Gladys Perez Villanueva, Esq. billing 0.98 hours; Leslie M. Goodman, Esq. billing 6.95 hours; and paralegals billing 2.29 hours. In its Notice of Filing, the Plaintiff's expert advised the Court that the Plaintiff did not object to 3.26 hours of time claimed by Defendant. Plaintiff objected to 6.96 hours of time billed. Therefore, while the Defendants seek a total of $3,791.05 in fees attributed to this case, the Plaintiff believes it should instead be $1,091.00.

The Court has reduced Ms. Goodman's time by 2.8 hours and the paralegal time by 0.7 hours for work done prior to service of the Proposal for Settlement. (At the hearing, the Defendant's expert agreed to these reductions.) The Court has further reduced Ms. Villanueva's time by 0.071 for excessive time billed for attending a consolidated hearing on these files; reduced Ms. Goodman's time by 0.3 for time involving work pertaining to files outside this Court's division; and 0.86 hours for paralegal work that was either secretarial in nature, or not specifically detailed as to what precisely was being done.

The Court has determined that the number of hours reasonably expended by Defendant's counsel in this case is a total of 5.489 hours, as follows: 0.909 hours for Ms. Villanueva, 3.85 hours for Ms. Goodman, and 0.73 hours for paralegal time.

Conclusions of Law.

The Court has also determined based upon the criteria set forth in Disciplinary Rule 4-1.5(b) of the Florida Bar Rules of Professional Responsibility that a reasonable hourly rate for the hours expended by Plaintiff's counsel is $500.00 for Gladys Perez Villanueva, Esq. (based on Plaintiff's stipulation), $500.00 for Suzanne Y. Labrit, Esq. (based on Plaintiff's stipulation), $350.00 for Garrett E. Tozier, Esq. (based on Plaintiff's stipulation), $400.00 for Leslie M. Goodman, Esq. (based on Plaintiff's stipulation), $300.00 for Tracy B. Berkman, Esq., $300.00 for Amanda E. Kayfus, Esq., and $500.00 for Daniel E. Nordby, Esq. The Court has considered all testimony presented on this issue, including Plaintiff and its expert.

In making its ruling, the Court specifically considered the following factors in determining the reasonable hourly fee and the reasonable number of hours spent litigating this case:

A. The time and labor required, the novelty and difficulty of the question involved and the skill requisite to perform the legal service properly.

B. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

C. The fee customarily charged in the locality for similar legal services.

D. The amount involved and the results obtained.

E. The time limitations imposed by the client or by the circumstances.

F. The nature and length of the professional relationship with the client.

G. The experience, reputation, and ability of the lawyer or lawyers performing the services.

H. Whether the fee is fixed or contingent.

The issue for the Court is whether the "difficulty of the question involved and the skill requisite to perform the legal services properly" militates in favor of the higher hourly rate sought for the PIP work in these cases.

The Court's experience shows that a relatively small group of attorneys in South Florida handle these type of cases. Those that do typically dedicate the great majority of their practices to automobile insurance claims. They are well versed on the nuances of the law, as well as its legislative history and frequently-conflicting case law. They handle a case load involving varying versions of the Florida statutes and face the prospect of trials before juries who frequently have a hard time grasping the technical minutiae of the law. Additionally, this Court has had a hard time finding a pool of qualified mediators and arbitrators who are able to competently handle referral of these types of cases. In the Court's experience, these type of cases pose difficult questions and require a higher level of skill to handle than most commercial litigation. Further, the Court notes that plaintiffs in PIP cases routinely seek the same high rates (or even higher) as requested by defense counsel in this cases.

In this case, all but three attorneys seek hourly rates stipulated to by Plaintiff. As for the other attorneys involved in these cases, the Court finds that Tracy B. Berkman and Amanda E. Kayfus present a level of

competence and experience that warrants an hourly rate of $300.00, the rate suggested by Plaintiff's expert; and Daniel E. Nordby warrants an hourly rate of $500.00, the same as stipulated for Ms. Labrit. As for the paralegals, the Court finds that the rate sought by Defendant ($245.00 per hour) is commensurate with that sought by less experienced attorneys in South Florida, but is generally higher than that customarily sought by parties in insurance cases for paralegal work. That being said, the Court finds that the Plaintiff's expert opinion that the rate should be between $100.00 - $125.00 represents the lower end of the paralegal pay scale. In light of the type of work done of these cases, the Court finds $195.00 to be a reasonable hourly rate for the paralegal work.

Additionally, based on controlling case law dealing with the issue of awarding of attorney's fees, the Court notes several guidelines to assist in determining whether a fee is reasonable:

• The fee award in this case is based on service of a Proposal for Settlement. The Court cannot award fees for work the Defendant did prior to that point. The fee records indicate, however, that the Defendant is seeking work done prior to December 18, 2018. As a result, the Court has deducted that time from each case. The Defendant's expert has conceded this point.

• For much of the disputed time, the Plaintiff claims that the Defendant engaged in "boilerplate" work that should have taken considerably less total time for the task. The Court must consider the time that would ordinarily have been spent by lawyers in the community to resolve this particular type of dispute, which is not necessarily the number of hours actually expended by counsel in the case at issue. *Trumbull Ins. Co. v. Wolentarski*, 2 So.3d 1050, 1056-57 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D274a]; *Baratta v. Valley Oak Homeowners Ass'n at the Vineyards, Inc.*, 928 So.2d 495, 499 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c]. In the instant case, however, the evidence revealed that Plaintiff's counsel were not "over-thorough" in research and preparation, but rather moved forward in the case in a manner reasonable for an automobile insurance case being prepared for a trial. The Court further finds that the Defendant divided up the total time reasonably expected to be done for each task and properly allocated that time throughout the cases. While the work may be considered "boilerplate" to a certain extent, each document had to be prepared and reviewed to insure that the particular facts of each case were reflected in that filing. While the dispositive legal issue was ultimately the same in each case, the stakes were high because of the precedent to be set, as the Plaintiff itself has argued during the pendency of these cases. Moreover, each case involved a different patient, different automobile accident, and different date of treatment. Additionally, the time records reveal that the Defendant was quite measured in how it reported the time for each task and each case.

• As a general rule, duplicative time charged by multiple attorneys working on the case is usually not compensable. *Baratta*, 928 So.2d at 499. The Court finds that some of Defendant counsel's time is duplicative. *See Centex-Rooney Construction Co. v. Martin County*, 725 So.2d 1255, 1259-60 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D336a]. The Court has carefully reviewed the time records and made the appropriate reductions as earlier noted in each particular case.

• The Court should also consider the amount of fees sought in relation to the amount in dispute. *See Progressive Express Ins. Co. v. Schultz*, 948 So.2d 1027, 1032-33 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D548b]. In determining whether the fee sought in this case is reasonable, the Court has therefore considered that this is a County Court case seeking less than $500 in damages per case.

• The Court should consider the nature of the defense, particularly whether the non-moving party went "to the mat" in the case. *See Progressive*, 948 So.2d at 1032. If the non-moving party took positions and actions to be litigious, it cannot now be heard to complain that it "invited the moving party to dance." *See Roco Tobacco Co. v. Div. of Alcoholic Beverages*, 934 So.2d 479, 482 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1826b]. Although this case involved a seemingly small amount of damages in relation to the fee sought, the Court notes that the Plaintiff's counsel has a reputation for vigorously prosecuting its cases, as it did so in these cases through appeal.

• The Court should further consider whether it has received adequate documentation to support the number of hours claimed. As stated by the Florida Supreme Court, "inadequate documentation may result in a reduction in the number of hours claimed." *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985). This is true because "Florida courts have emphasized the importance of keeping accurate and current time records of work done and time spent on a case, particularly when someone other than the client may pay the fee." *Id.* The Court finds that for the most part the documentation supporting the fee request in the instant was generally adequate and well supportive of the fee request. However, the time records for the paralegal work in many entries was simply insufficient for the Court to determine what work was actually done and why it had to be done. For instance, in many entries the paralegal notes that she simply "reviewed" documents and then billed for that time. To what end? In other paralegal entries, the work was simply secretarial in nature and should be part of the firm's overhead rather than a separately billed item. As a result, the Court has made an appropriate reduction from the time sought in each case.

The ultimate goal of all the guidelines set forth above is to determine whether a fee is "reasonable." The Court has summarized the findings as to each case below, as detailed previously in this judgment.

In sum, the Court finds that the time awarded in this case was reasonable based on the significant legal issues in the case, as well as the projected operative precedential effect of the resulting appellate decision; the general reputation of the Plaintiff in vigorously prosecuting its cases; the manner in which this particular case was defended; the amount of time the attorney needed to bring this case to a conclusion; the ultimate disposition of these cases; and the specific factors discussed in *Rowe*, *Bell*, and Rule of Professional Responsibility 4.1-5.

The Court considered evidence of whether it should award a contingency risk multiplier and considered:

A. Whether the relevant market requires a contingency fee multiplier to obtain competent counsel;

B. Whether the Plaintiff's attorney was able to mitigate the risk of non-payment in any way; and

C. Whether any of the factors set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) are applicable, especially, the amount involved, the results obtained and the type of fee arrangements between the Plaintiff and the Plaintiff's attorney.

The Court finds that the award of a multiplier is not appropriate in this case as it has not been sought. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990).

Finally, the Court considers the expert witness fee sought by the Defendant's expert, Luis Perez, Esq. Mr. Perez is seeking $500.00 for 22 hours of work done for all 23 cases, for a total of $11,000.00. The Plaintiff objects to both his hourly rate and the total amount of time he expended. The Court agrees with the Plaintiff that the hourly rate sought by Mr. Perez is excessive and should be commensurate with that awarded to Ms. Goodman, $400.00 per hour. However, the Court concludes that a total of 22 hours is reasonable. While it certainly should have taken the expert a considerable amount of time to go through each case, the Court notes that other than for the appeal, once the work of reviewing one of the cases has been completed, the time for the remaining cases should have been considerably shorter due to the substantial similarity of work done on each case. Nevertheless,

even if the expert spent only half an hour per each additional case after the initial case was reviewed, the Court does not find it unreasonable to have spent a total of 22 hours to prepare for and attend the hearing.

SUMMARY OF AWARD

COCE 18-9429	Sammy Brown	TOTAL: $75,618.35
	97.60 hours @ $350.00 =	$34,160.00 (Tozier)
	68.0 hours @ $500.00 =	$34,000.00 (Labrit)
	2.0 hours @ $500.00 =	$ 1.000.00 (Villanueva)
	7.2 hours @ $400.00 =	$ 2,880.00 (Goodman)
	0.40 hours @ $400.00 =	$ 160.00 (Nordby)
	17.53 hours @ $195.00 =	$ 3,418.35 (Paralegal)
COCE 18-9491	Patrick Obianwuzu	TOTAL: $2,756.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	5.4 hours @ $400.00 =	$ 2,160.00 (Goodman)
	0.73 hours @ $195.00 =	$ 142.35 (Paralegal)
COCE 18-9491	Amanda Dinac	TOTAL: $2,463.00
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	4.3 hours @ $400.00 =	$ 1,720.00 (Goodman)
	1.48 hours @ $195.00 =	$ 288.60 (Paralegal)
COCE 18-9496	Maria Chacin	TOTAL: $2,040.75
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	3.6 hours @ $400.00 =	$ 1,440.00 (Goodman)
	0.75 hours @ $195.00 =	$ 146.25 (Paralegal)
COCE 18-9494	Latesia Adams	TOTAL: $4,713.45
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	8.4 hours @ $400.00 =	$ 3,360.00 (Goodman)
	4.61 hours @ $195.00 =	$ 898.95 (Paralegal)
COCE 18-9438	Pierina Rodriguez	TOTAL: $2,585.60
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	4.85 hours @ $400.00 =	$ 1,940.00 (Goodman)
	0.98 hours @ $195.00 =	$ 191.10 (Paralegal)
COCE 18-9432	Julio Melendez	TOTAL: $2,574.35
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	4.70 hours @ $400.00 =	$ 1,880.00 (Goodman)
	1.23 hours @ $195.00 =	$ 239.85 (Paralegal)
COCE 18-9432	Joseph Montocoeur	TOTAL: $2,076.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	3.70 hours @ $400.00 =	$ 1,480.00 (Goodman)
	0.73 hours @ $195.00 =	$ 142.35 (Paralegal)
COCE 18-9430	Harry Pierre	TOTAL: $1,864.35
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	3.12 hours @ $400.00 =	$ 1,248.00 (Goodman)
	0.83 hours @ $195.00 =	$ 161.85 (Paralegal)
COCE 18-9295	Agnes Saint Jean	TOTAL: $2,776.35
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	5.4 hours @ $400.00 =	$ 2,160.00 (Goodman)
	0.83 hours @ $195.00 =	$ 161.85 (Paralegal)
COCE 18-9425	Luis Olivera Helguera	TOTAL: $3,311.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	6.0 hours @ $400.00 =	$ 2,520.00 (Goodman)
	1.73 hours @ $195.00 =	$ 337.35 (Paralegal)
COCE 18-9487	Alexander Abel	TOTAL: $2,721.25
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	5.35 hours @ $400.00 =	$ 2,140.00 (Goodman)
	0.65 hours @ $195.00 =	$ 126.75 (Paralegal)
COCE 18-9478	Mildred Leggett	TOTAL: $2,376.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	4.15 hours @ $400.00 =	$ 1,660.00 (Goodman)
	0.40 hours @ $300.00=	$ 120.00 (Kayfus)
	0.73 hours @ $195.00 =	$ 142.35 (Paralegal)
COCE 18-9483	Laurie Dinac	TOTAL: $2,407.10
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	3.80 hours @ $400.00 =	$ 1,520.00 (Goodman)
	1.00 hours @ $300.00=	$ 300.00 (Kayfus)
	0.68 hours @ $195.00 =	$ 132.60 (Paralegal)
COCE 18-9493	Liz Torres	TOTAL: $2,055.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	3.55 hours @ $400.00 =	$1,420.00 (Goodman)
	0.93 hours @ $195.00 =	$ 181.35 (Paralegal)
COCE 18-9296	Miesha McLendon	TOTAL: $2,326.10
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	4.25 hours @ $400.00 =	$1,700.00 (Goodman)
	0.88 hours @ $195.00 =	$ 171.60 (Paralegal)
COCE 18-9305	Mitzie Troncoso	TOTAL: $2,756.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	5.40 hours @ $400.00 =	$ 2,160.00 (Goodman)
	0.73 hours @ $195.00 =	$ 142.35 (Paralegal)
COCE 18-9304	John Harris	TOTAL: $3,285.65
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	6.80 hours @ $400.00 =	$2,720.00 (Goodman)
	0.57 hours @ $195.00 =	$ 111.15 (Paralegal)
COCE 18-9301	Blake Piha	TOTAL: $6,065.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	12.6 hours @ $400.00 =	$5,040.00 (Goodman)
	2.93 hours @ $195.00 =	$ 571.35 (Paralegal)
COCE 18-9298	Carmen Guzman	TOTAL: $2,819.75
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	4.70 hours @ $400.00 =	$1,880.00 (Goodman)
	1.00 hours @ $300.00 =	$ 300.00 (Berkman)
	0.95 hours @ $195.00 =	$ 185.25 (Paralegal)
COCE 18-9303	Julie DeFreitas	TOTAL: $2,096.35
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	3.70 hours @ $400.00 =	$1,480.00 (Goodman)
	0.83 hours @ $195.00 =	$ 161.85 (Paralegal)
COCE 18-9302	Cleveland Rahming	TOTAL: $2,340.65
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	4.35 hours @ $400.00 =	$1,740.00 (Goodman)
	0.75 hours @ $195.00 =	$ 146.25 (Paralegal)
COCE 18-9300	Thomas Bond	TOTAL: $2,136.85
	0.909 hours @ $500.00 =	$ 454.50 (Villanueva)
	3.85 hours @ $400.00 =	$1,540.00 (Goodman)
	0.73 hours @ $195.00 =	$ 142.35 (Paralegal)

Accordingly, it is

ORDERED AND ADJUDGED that DEFENDANT shall recover the sum of $63,362.00 (the reasonable attorney fee for the law firm that represented the Plaintiff) from the Defendant, PLANTATION OPEN MRI LLC, for *trial level work* in these cases, plus interest thereon at 4.31% per annum from April 26, 2021 to the date of this Judgment (*Clay v. Prudential*, 617 So.2d 443 (Fla. 4th DCA, 1993)), in the amount of $4,518.52, for a total of $67,880.52, that shall bear interest at the rate of 4.75% per annum until paid, for which sums let execution issue. It is also

ORDERED AND ADJUDGED that DEFENDANT shall additionally recover the sum of $72,808.85 (the reasonable attorney fee for the law firm that represented the Plaintiff) from the Defendant, PLANTATION OPEN MRI LLC, for *appellate level work* in these cases, plus interest thereon at 4.31% per annum from April 26, 2021 to the date of this Judgment (*Clay v. Prudential*, 617 So.2d 443 (Fla. 4th DCA, 1993)), in the amount of $5,553.78, for a total of $78,362.63, that shall bear interest at the rate of 4.75% per annum until paid, for which sums let execution issue. It is also

ORDERED AND ADJUDGED that Plaintiff's attorney fee expert, Luis Perez, Esq., shall recover the sum of $8,800.00, which shall bear interest at the rate of 4.75% per annum until paid, for which sum let execution issue.

* * *

Insurance—Personal injury protection—Limitation of actions—Court ruling on motion to dismiss may consider documents incorporated into complaint by reference—Statute of limitations for PIP action began to run when medical bill became overdue 31 days after submission of bill to insurer—Complaint filed more than five years after bill became overdue is barred—No merit to argument that cause of action did not accrue until insurer responded to demand letter that was sent after expiration of limitations period

EMPIRE IMAGING, INC., a/a/o Chrisland Joseph, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22026290. Division 82. December 9, 2022. Kal Evans, Judge. Counsel: Patrick Calixte and Thomas J. Wenzel, Steinger, Greene & Feiner, for Plaintiff. Gladys Perez Villanueva and Julia Sturgill, Law Offices of Leslie M. Goodman & Associates, Doral, for Defendant.

FINAL ORDER OF DISMISSAL

This matter came before the Court upon the Defendant, Infinity Indemnity Insurance Company ("Infinity's"), Motion to Dismiss, or Alternatively Motion for Entry of Final Judgment. Plaintiff, Empire Imaging, Inc. a/a/o Chrisland Joseph ("Plaintiff"), was represented by Patrick Calixte, Esq. and Thomas J. Wenzel, Esq. of Steinger, Greene & Feiner, and Defendant, Infinity Indemnity Insurance Company, was represented by Gladys Perez Villanueva, Esq.; and Julia Sturgill, Esq. of Law Offices of Leslie M. Goodman & Associates. The Court, having heard argument of counsel on the 16th day of November, 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

On January 27, 2015, the claimant was involved in an automobile accident. Plaintiff provided medical services to the claimant on February 5, 2015. Plaintiff timely submitted its bill to Infinity, which was received on March 12, 2015. Infinity paid for the February 5, 2015 date of service on March 24, 2015. On October 1, 2021, Plaintiff served a demand letter for additional PIP benefits; Infinity responded to Plaintiff's demand letter on November 18, 2021. Plaintiff filed the instant action for recovery of Personal Injury Protection benefits under Florida's No-Fault Statute, 627.736, Florida Statutes, on April 28, 2022.

Infinity filed a Motion to Dismiss or Alternatively Motion for Entry of Final Judgment based upon the statute of limitations, along with a Memorandum of Law. This Court set the Motion to Dismiss for hearing, which is the subject of this order.

Conclusions of Law

A. Procedural Considerations for Motion to Dismiss

In considering a motion to dismiss a complaint, this Court is confined to the allegations contained within the four corners of the complaint and supporting exhibits, and all documents impliedly incorporated via reference; all allegations in the complaint must be accepted as true. *See One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So. 3d 749, (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]; *Veal v. Voyager Drop & Cas. Ins. Co.*, 51 So. 3d 1246 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a] *Hitt v. North Broward Hospital Dist.*, 387 So. 2d 482 (Fla. 4th DCA 1980). If the existence of an affirmative defense is apparent on the face of the complaint, such a defense can be considered on a motion to dismiss. *Fla. R. Civ. P.* 1.110(d). Although as a general rule, the statute of limitations should be raised as an affirmative defense in an answer, when the facts constituting the defense appear affirmatively on the face of the complaint, the statute of limitations may also be raised via a motion to dismiss. *See Williams v. Potamkin Motor Cars, Inc.*, 835 So. 2d 310 (Fla. 3d DCA 2002) [28 Fla. L. Weekly D16a]; *General Motors Acceptance Corp. v. Thornberry*, 629 So. 2d 292 (Fla. 3d DCA 1993); *Toledo Park Homes v. Grant*, 447 So. 2d 343, 344 (Fla. 4th DCA 1984). Where, as here, the complaint refers to documents that under the law form the basis for the Plaintiff to be able to bring suit, and impliedly incorporates those documents by reference, a trial court is entitled to review those documents in ruling on a motion to dismiss. *Id*.

Infinity filed a "Notice of Intent to Rely on Documents Incorporated in Plaintiff's Complaint," citing specific paragraphs where Plaintiff had referenced the demand letter and demand response in its complaint. At the hearing, Plaintiff objected to this Court's consideration of the demand letter and demand response. The only "facts" derived from the demand letter and demand response are relevant dates for the statute of limitations analysis, which are not in dispute. More importantly, Plaintiff's complaint incorporates the demand and demand response by reference, and, therefore, under the authority of the Fourth District Court of Appeal's decision in *One Call Property Services v. Security First Insurance Company*, this Court may consider the documents in ruling upon the motion to dismiss. 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a] ("In ruling on a motion to dismiss, a trial court is limited to the four corners of the complaint and its incorporated attachments. But where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss.); Comp. 8, 18, 19.

B. Statute of Limitations for PIP Claims

The prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001) [26 Fla. L. Weekly S465a]. This includes the defendant's right to be free from claims from one who has willfully slept on its legal rights. *Id*. "As a rule, statutes of limitation impose a strict time limit for filing legal actions." *Id*. at 1074.

The parties agree that the statute of limitations for a PIP breach of contract action, such as the one *sub judice*, is governed by section 95.11(2)(b), and provides for a five year statute of limitations. Plaintiff maintains that the statute of limitations in this case began to run on November 18, 2021, when Infinity responded to its demand letter, relying upon *Donovan v. State Farm and Casualty Company*, 574 So. 2d 285 (Fla. 2d DCA 1991). Infinity maintains that the statute of limitations ran, at best, on May 20, 2020, making the instant suit barred, as Plaintiff's complaint was filed on April 28, 2022, almost two years after the expiration of the statute of limitations. This Court agrees with the Infinity's analysis, as it is in accord with the statutory framework in Florida's No-Fault Law and Florida Supreme Court precedent.

The path from claim to suit in PIP is well delineated in the PIP statute and in robust caselaw spanning decades. For our purposes, the analysis begins when the Plaintiff seeks payment for providing medical services to a claimant. The Plaintiff is required under the No-

Fault Statute to furnish the insurer with a statement of charges and the insurer is not required to pay charges for treatment or services rendered more than 35 days before the postmark date. See §627.736(5)(c), Florida Statutes (2015). This provision was enacted by the Florida Legislature in 1998. Prior to its enactment, the only limitation on submissions of claims was the five year statute of limitations. *See Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005) [30 Fla. L. Weekly S197b]. Consequently, "medical providers could potentially allow charges to mount, and submit charges for services rendered over a long period of time and distant from the time of the original accident." *Id.* Therefore, as a matter of law, Plaintiff is required to comply with the statutory requirements, including time limitation, for presenting a claim or be barred from recovery. However, the cause of action has not accrued at this point, because the insurer may or may not pay and is not in breach of the contract.

The question then becomes, when does the cause of action accrue for purposes of the statute of limitations in a PIP suit. The Florida Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Lee*, 678 So. 2d 818 (Fla. 1996) [21 Fla. L. Weekly S335a], clearly established the applicable statute of limitations in an action based on an insurer's failure to pay PIP benefits. The limitations period begins to run on the date of the insurer's alleged breach of the contract—that is, the date when PIP benefits under the policy become overdue. *Id.* Section 627.736(4)(b), Florida Statutes, provides that "[p]ersonal injury protection insurance benefits. . .are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same."

This Court notes that Plaintiff's reliance upon *Donovan*, which addressed a statute of limitations that ran from the date of the accident, not the breach of contract, is misplaced. The *Donovan* decision addressed the issue of statute of limitations without regard to the PIP statute; the PIP statute in effect in 1983 was markedly different than the PIP statute applicable to the instant suit, notably missing sections 627.736(5)(c) (time limitation to furnish claim to insurer—enacted in 1998) and section 627.736(10) (demand letter—enacted in 2001); and this Court is bound to follow our supreme court's decision in *Lee* on the specific issue of when a PIP cause of action accrues. In the same vein, this Court notes that the per curiam affirmance in *Progressive Select Ins. Co. v. South Fla. Imaging & Diagnostic Center, Inc. a/a/o Branislav Hronsky*, 331 So. 3d 714 (Fla. 4th DCA 2022), is not binding and has no precedential value. *See Department of Legal Affairs v. District Court of Appeal, 5th District*, 434 So. 2d 310 (Fla. 1983)("The rationale and basis for the decision without opinion is always subject to speculation. . . 'In fine, there is no limit to the grounds that may prompt a per curiam opinion.' Such uncertainty in itself negates a basis for reliance on a unwritten decision for guidance or precedence. . .[Per curiam affirmance] have no precedential value.").

Once the claims becomes "overdue," the PIP Statute guides the progression of the claim.

Subsection (10), states:

(10) DEMAND LETTER.—

(a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) The notice must state that it is a "demand letter under s. 627.736" and state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, 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. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.

(c) Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. Such postal costs shall be reimbursed by the insurer if requested by the claimant in the notice, when the insurer pays the claim. Such notice must be sent to the person and address specified by the insurer for the purposes of receiving notices under this subsection. Each licensed insurer, whether domestic, foreign, or alien, shall file with the office the name and address of the designated person to whom notices must be sent which the office shall make available on its Internet website. The name and address on file with the office pursuant to s. 624.422 is deemed the authorized representative to accept notice pursuant to this subsection if no other designation has been made.

(d) If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer. If the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, no action may be brought against the insurer if, within 30 days after its receipt of the notice, the insurer mails to the person filing the notice a written statement of the insurer's agreement to pay for such treatment in accordance with the notice and to pay a penalty of 10 percent, subject to a maximum penalty of $250, when it pays for such future treatment in accordance with the requirements of this section. To the extent the insurer determines not to pay any amount demanded, the penalty is not payable in any subsequent action.

For purposes of this subsection, payment or the insurer's agreement shall be treated as being made on the date a draft or other valid instrument that is equivalent to payment, or the insurer's written statement of agreement, is placed in the United States mail in a properly addressed, postpaid envelope, or if not so posted, on the date of delivery. The insurer is not obligated to pay any attorney fees if the insurer pays the claim or mails its agreement to pay for future treatment within the time prescribed by this subsection.

(e) **The applicable statute of limitation for an action under this section shall be tolled for 30 business days by the mailing of the notice required by this subsection.**

In 2001, the Legislature amended the PIP statute to require the insured to provide a pre-suit notice of intent to initiate litigation. Section 627.736(10) requires a demand letter as a condition precedent to the filing of a PIP suit to recover benefits. *See Rivera v. State Farm Mut. Auto. Ins. Co.*, 317 So. 3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]. "[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 it does not pay the claim." *Id.* at 204. The intent of this section is 'to reduce the burden on the courts by encouraging the quick resolution of PIP claims. . .' *Id. (citing Venus Health Center v. State Farm*, 21 Fla. L. Weekly Supp. 496a (Fla. 11th

Cir. Ct. Mar. 13, 2014)).

It is clear from the plain language of the demand letter section of Florida's No-Fault statute and caselaw interpreting same that: a) Plaintiff must provide a pre-suit demand; b) an insurer cannot be sued if it pays upon demand and will avoid potential exposure to attorney's fees; c) an insurer has a right not to pay any amount demanded; d) the insured must provide precise notice of the disputed amount in the demand letter as a condition precedent to the filing of a lawsuit; and e) that a demand letter tolls the statute of limitation. The payment or non-payment upon demand does not constitute a second breach of the insurance contract, it simply places the bill in dispute and gives the Plaintiff the statutory right to initiate the lawsuit under Florida's PIP Statute for the *disputed amounts* and gives the insurer the right to defend. *See Century-Nat'l Ins. Co. v. Regions All Care Health Ctr., Inc.*, 2022 WL 1159588 (Fla. 2d DCA April 20, 2022) [47 Fla. L. Weekly D896a] (citing *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82 (Fla. 2002) [26 Fla. L. Weekly S747a]).

Importantly, the Legislature included the sole tolling provision for a PIP suit—the thirty business day tolling by the demand letter—following subsection (d), an elaborate statutory scheme intended to curtail PIP litigation and afford the insurer an opportunity to avoid a lawsuit and exposure to attorney's fees. If the statute of limitation is tolled by the mailing of a demand letter, it necessarily follows that the applicable statute of limitations had already begun to run; otherwise, the Legislature would not have included the tolling provision of 627.736(10)(e). This analysis, as detailed by Infinity, comports with the PIP statutory scheme and *Lee*.

Given these principles of law, the first question for the Court's consideration is the date that the bills became "overdue." Under section 627.736(4)(b), benefits are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and amount of same. Here, the bill at issue was received by Infinity on March 12, 2015. The bill, therefore, became overdue 31 days after, on April 12, 2015. When a Plaintiff submits a demand letter, the statute of limitation is tolled for 30 business days. Even if the demand letter herein would have been sent prior to the expiration of the statute of limitations[1] and the tolling provision of subsection (10)(e) applied, the thirty days would be May 22, 2015, plus the limitations period of five years, would place the expiration of the statute of limitations at May 20, 2020. Consequently, the complaint filed on April 28, 2022 is barred.

The PIP statute clearly establishes the timeline that confers the right to sue on Plaintiff. First, Plaintiff is required to furnish bills to the insurer within 35 days of service. Plaintiff then is placed on notice when an insurer fails to pay a claim or purportedly underpays and, consequently, when that bill becomes "overdue." Further, Plaintiff is then under a legal obligation to provide a pre-suit demand letter. The insurer has a right to not pay the bill. Plaintiff is also on notice of the expiration of the thirty days after it provided the pre-suit demand, which would toll the statute of limitations. Upon the expiration of the thirty business days, Plaintiff has complied with the condition precedent and may file suit against the insurer to recover benefits purportedly due. The insurer, of course, would be subject to the statutory penalties as set forth in 627.736(10). The clear statutory framework for the progression of PIP claims from accrual of the cause of action for purposes of the statute of limitations by virtue of "overdue" claims, the tolling of same to provide the insurer to cure at demand, and subsequent right to sue if the insurer fails to pay upon demand, leaves no room for plaintiffs to argue that they are not on notice of the insurer's position in relation to a claim or that the cause of action did not accrue until the insurer responded to the demand. Plaintiff's argument, taken to its logical extension, would abrogate section 95.11(2)(b) and section 627.736(10), Florida Statutes. Plaintiff, as all other plaintiffs who fail to act within the limitations period, did nothing to assert its claim during the five year period.

IT IS HEREBY ORDERED AND ADJUDGED that Infinity's Motion to Dismiss or Alternatively Motion for Entry of Final Judgment is hereby GRANTED.

The instant cause is hereby DISMISSED, as it is barred by the Statute of Limitations. This Court reserves jurisdiction to determine the amount of attorney's fees and costs.

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[1]The demand letter was dated October 1, 2021, after the expiration of the statute of limitations.

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MISCELLANEOUS REPORTS

Municipal corporations—Zoning—Reasonable accommodation request—Application for reasonable accommodation from strict application of term "family" in city land development code, which allows for no more than three unrelated persons per dwelling, to allow recovery residential housing for four to six unrelated persons in each dwelling unit on applicant's property is denied—City has agreed to amend code to allow four unrelated persons in each dwelling unit, and request for higher number of unrelated persons per unit is not reasonable or necessary for financial or therapeutic viability of project—There is no competent evidence that having four to six recovering addicts per unit would be more effective in guarding against relapse than having four persons per unit—Other cases regarding reasonable accommodation requests decided by special magistrates do not have collateral estoppel effect on current request where those cases involved different facts, different parties, and different issues

IN RE: PETITION FOR REASONABLE ACCOMMODATION REQUEST 11611-11614 NW 35 STREET, CITY OF CORAL SPRINGS, FLORIDA. Applicant, Powerhouse Recovery Project. Case No. RA 22-0001. November 7, 2022. Harry Hipler, Special Magistrate of the City of Coral Springs. Counsel: James K. Green, for Petitioner. Christina M. Gomez, for Respondent.

FINAL ORDER

THIS CAUSE came before the Special Magistrate of the City of Coral Springs on October 27, 2022 in a public hearing at the City of Coral Springs. Petitioner, PowerHouse Recovery Project, was represented by James K. Green, Esq. Respondent, City of Coral Springs, was represented by Christina Gomez, Esq. The Petition concerns a Reasonable Accommodation Request submitted by the Applicant. The City presented witnesses that included Julie Krolak, Director of Development Services, and attorney Daniel Lauber, AICP. Respondent presented witness that included Rachel Barone, CEO of PowerHouse Recovery. Both sides also presented documents to the Special Magistrate that will be referenced herein below and that are made part of the record. After holding a public hearing, the Special Magistrate does hereby issue its findings of fact, conclusions of law, and order as follows:

I. FINDINGS OF FACTS

A. The Applicant is requesting, pursuant to Section 105 of the City's Land Development Code ("the LDC"), a reasonable accommodation from the strict application of the term "Family" as set forth in Section 250105 of the City's LDC in order to provide recovery residential housing to more than three unrelated persons in each dwelling unit for the property located at 11611-11614 NW 35 Street, Coral Springs, Florida ("Property").

B. A properly noticed hearing on Applicant's request was held on October 27, 2022.

C. At the hearing, the City provided the testimony of Julie Krolak, the Director of Development Services for the City of Coral Springs, and Daniel Lauber, an attorney and planner (AICP). Mr. Lauber is an attorney and has a JD and planner with a MURP, who is an expert in planning, land use, and fair housing laws.

D. The City introduced the following documents into evidence:

a. Developmental Services Memorandum drafted by Julie Krolak (4 pages) over Applicant's objection

b. Resume of Daniel Lauber (17 pages) over Applicant's objection

c. Evaluation of Reasonable Accommodation Request by Daniel Lauber (9 pages) over Applicant's objection

d. City's PowerPoint Presentation (13 slides)

E. At the hearing, the Applicant provided the testimony of Rachel Barone, the CEO of Powerhouse Recovery. She has first-hand knowledge about recovery as she has been in recovery since 2014. She is not an expert witness, but a lay person who testified to facts and circumstances on behalf of Applicant. There has also been documentary evidence produced by the City and Applicant, ie, Petition for Reasonable Accommodation and attachments and photographs, Letter dated May 23, 2022 from James K. Green, Esquire, and any other documents that are part and parcel to this proceeding which have been reviewed by the Special Magistrate.

F. The Applicant introduced the following documents into evidence, over City's objection, as to all Final Orders decided by a Special Magistrate in cases not heard on this date:

a. RA 18-0001 Reasonable Accommodation Final Order from Legacy Healing Center (3 pages)

b. RA 19-0001 Reasonable Accommodation Final Order from Legacy Healing Center (3 pages)

c. RA 20-0001 and RA 20-0002 Reasonable Accommodation Final Order from Legacy Healing (11 pages). This Final Order was made reference to during the hearing, but it was never introduced into evidence, however, the Special Magistrate has considered and reviewed it.

G. The Property is zoned as Low-Medium Density Multiple Family (RM-15) with a structure on 0.28 acres of land.

H. The Property has four (4) dwelling units with three bedrooms per dwelling unit and has a total living area space of 4,000 square feet.

I. The Applicant requests a reasonable accommodation from the LDC to allow four to six unrelated individuals to reside within each dwelling unit with two unrelated individuals per bedroom, except for one room used as an office at the Property for a total of twenty-two unrelated individuals, more or less.

J. The purpose of the reasonable accommodation request is to create a recovery community called PowerHouse Recovery Project for recovering alcoholics and substance abuse/use disorder, who are attempting to recover from alcohol and substance abuse/use disorder.

K. The Applicant began renting the Property in March of 2022 and ever since that time, the Property has been used as a recovery community with between 14 and 22 total residents depending on the demand that Applicant receives from individuals. Applicant was cited by the City's Code Enforcement Division and was directed to timely file a Request for reasonable accommodation with the City, which occurred thereby dismissing the Code Enforcement proceeding.

L. The Applicant provides residential housing at the Property to individuals participating in substance abuse and alcohol recovery treatment programs.

M. The Applicant's residents at the Property are required to obtain employment, unless they are unable to work. Each resident is estimated to stay in this Property for 60 to 90 days more or less depending on how well they cope with the recovery process and how well they progress and their willingness to stay according to a May 23, 2022 letter updating information by James K. Green, Esq., outlining Applicant's positions, and the testimony of Applicant's CEO. Each resident signs a short term lease with Applicant for their stay in the Property, and each individual has a two week grace or handicap period if payment is not made to Applicant in order to pay; and upon nonpayment the individual will be evicted. Further, each individual is required to attend alcoholics' anonymous (AA) and/or narcotics anonymous meetings at least three times per week where they will find social support and experience experiential learning. Each is also required to participate in recovery treatment group therapy at a facility not located at the Property at least nine hours per week in groups who are like situated and where they will meet and discuss issues and concerns with persons similarly situated. By living in their own

bedroom with a roommate, daily and regular employment, group therapy, and AA/Narcotics Anonymous, the goal is that these procedures will aid in their recovery. It should also not be overlooked that individuals in the recovery process live nearby individuals outside the scope of their recovery network in a neighborhood that is not in recovery and nearby others in the neighborhood that are sober and in all walks of life that they can communicate with during their free time if they so choose.

N. The Applicant employs staff to supervise the Property; however, the Applicant's staff does not reside at the Property.

O. The Applicant's staff utilizes one bedroom in one dwelling unit as an office.

P. The Property has adequate parking facilities to accommodate the residents and staff that contain eight parking spaces. The facility provides van pick-ups and drop-offs for individuals living on the Property, and those vans come and go on behalf of the Property and their residents in an attempt to transport them to and from outside the Property for group therapy and AA/narcotics anonymous; the vans run during the day end late in the evening.

Q. The uncontested testimony of Julie Krolak provided that as of May 2022, the Applicant had a total of fifteen residents residing at the Property, with nine of the twelve bedrooms being utilized. Ms. Krolak also stated in her Report that Applicant does not need to place 22 residents in these four dwelling units to achieve therapeutic viability, and Applicant also testified that it was not seeking the reasonable accommodation to achieve financial viability. See also James K. Green letter dated May 23, 2022, paragraph 9. Based upon the failure to present such evidence at the hearing, and that Applicant answered "N.A. at this time" in their application and updated letter as made by representations of Applicant's counsel, a reasonable accommodation is not needed for economic viability of the Applicant.

R. Although stated in Applicant's application and updated information request that a reasonable accommodation is needed for therapeutic viability, there was no competent testimony or evidence provided at the hearing relating to therapeutic viability of any number of individuals that needed to reside in each dwelling unit on the Property to obtain a reasonable accommodation for therapeutic viability. Instead, based on Applicant's position it appears that Applicant believes that the more individuals who reside on said Property should aid individuals in defending against loneliness.

S. Based on the testimony of Daniel Lauber, allowing four unrelated individuals to reside in each dwelling unit at the Property will constitute a fundamental alteration of the land use and zoning regulations of the City of Coral Springs.

T. However, the City has agreed to allow a reasonable accommodation for four unrelated individuals to reside together per dwelling unit at the Property as a reasonable accommodation due to an anticipated change in the LDC.

U. Based on the testimony of Daniel Lauber, the requested accommodation of twenty-two unrelated individuals, or a maximum of six unrelated individuals per dwelling unit, is not reasonable and necessary to afford the handicapped/disabled individuals an equal opportunity to use and enjoy the dwellings at the property.

II. CONCLUSIONS OF LAW

A. Pursuant to Section 105 of the City of Coral Springs Land Development Code, a request for a reasonable accommodation shall be based on the following factors:

a. Whether the requesting party has established that he/she, or the individual on whose behalf the application was submitted, is protected under the FHA and/or ADA by demonstrating that they are handicapped or disabled, as defined in the FHA and/or ADA. Although the definition of disability is subject to judicial interpretation, for purposes of this section the disabled and/or handicapped individual must show:

i. A physical or mental impairment which substantially limits one of more major life activities; or

ii. A record of having such impairment; or

iii. That they are regarded as having such impairment.

b. Whether the requested accommodation is reasonable and necessary to afford the handicapped/disabled individual an equal opportunity to use and enjoy the dwelling.

c. Whether the requested accommodation would impose an undue financial or administrative burden on the City of Coral Springs.

d. Whether the requested accommodation would require a fundamental alteration in the nature of the land use and zoning regulations of the City of Coral Springs.

B. Individuals in recovery from alcohol abuse and substance abuse use disorders at PowerHouse Recovery Project are protected under the FHA and/or ADA as handicapped or disabled. Recovering addicts are properly considered as "disabled" and/or "handicapped." Alcoholism like drug addiction is an "impairment" that falls within the definitions of a disability as set forth in the ADA and FHA. See *Oxford House, Inc. v. Twp. of Cherry Hill,* 799 F. Supp. 450, 460 (D.N.J. 1992) (holding that residents of the Oxford House met the statutory definition of "handicap" within the meaning of the FHA); *see also United States v. Borough of Audubon,* 797 F. Supp. 353, 359 (D.N.J. 1991) (finding recovering addicts were properly considered "handicapped"); *Jeffrey O. v. City of Boca Raton,* 511 F. Supp. 2d 1339 (S. D. Fla. 2007); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown,* 294 S.3d 35, 46 (2d Cir. 2002). To establish that a reasonable accommodation is necessary, a petitioner must establish that "but for the accommodation [the residents of the home] will be denied an equal opportunity to live at and enjoy the housing of their choice," and must show a "link between the proposed accommodation and the equal opportunity being sought." Further, it is ". . . only accommodations necessary to ameliorate the effect of the plaintiff's disability so that [he/she] may compete equally with the non-disabled in the housing market" that needs to be considered. See *Wisconsin Community Services, Inc. v. City of Milwaukee,* 465 F.3d 737, 749 (7th Cir. 2006). These general rules also need to be considered along with a qualification that the FHA does not preempt or abolish a municipality's power to regulate land use and pass zoning laws. *See Hemisphere Bldg. Co., Inc. v. Vill. of Richton Park,* 171 F.3d 437, 440 (7th Cir. 1999); *Bryant Woods Inn, Inc. v. Howard County, Md.,* 124 F.3d 597, 603 (4th Cir. 1997).

C. In considering the question of a reasonable accommodation, a fact-intensive analysis of the particular facts and circumstances at hand needs to be made by the trier of facts as each case is fact specific in each case. See *Schwarz v. City of Treasure Island,* 521 F. Supp. 2d 1307 (M.D. Fla. 2007), *affirmed and reversed* in part, 544 F. 3d 1201, 1221 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1154a]; *Oxford House-C v. City of St. Louis,* 77 F. 3d 249, 253 (8th Cir. 1996), among others. Each case is fact specific requiring a fact intensive analysis; there is no one size fits all standard which applies to reasonable accommodation requests.

D. The requested accommodation of a total of twenty-two residents is not necessary to afford handicapped/disabled individuals an equal opportunity to use and enjoy the dwelling. The Acts prohibit the city from making a living arrangement unit unavailable to handicapped people on the basis of their handicap. See 42 U.S.C. § 3604(f)(1), 42 U.S.C. § 3604(f)(3)(B), and as otherwise amended. As such, the city must make a reasonable accommodation in its generally applicable zoning code when necessary to give a handicapped person equal opportunity to use and enjoy a dwelling. See *Oxford House-C v. City of St. Louis,* 77 F. 3d 249 (8th Cir. 1996). The basic question here is whether the City by permitting four (4) persons per dwelling unit for recovering individuals rather than a higher number as

requested by Applicant, and does it comply with a reasonable accommodation request pursuant to the ADA and FHA and code provision of the City's definition of "family" and nonrelated individuals? The current code provision of the City provides that no more than three (3) nonrelated persons may reside in a dwelling unit. The City's expert testified that the number will be raised to four (4) nonrelated persons per dwelling unit that may reside in a dwelling unit when the City's land use code and zoning code is amended, and respectfully there is no reason why the City's requirement of four (4) persons per unit should not comply with the FHA, which the Special Magistrate concludes that it does.

It should be noted that the City's existing ordinance, as well as the amended one to be enacted, has no mention of recovering individuals or the handicapped in their criteria. The existing limit of three (3) people per dwelling unit for unrelated persons which will be amended to four (4) people applies to all regardless of status. Both of these code provisions, the one existing and the one that will be forthcoming, are facially neutral code provisions and do not violate the ADA and FHA. See *Schwarz v. City of Treasure Island,* 521 F. Supp. 2d 1307, 1320-3 (M.D. Fla. 2007), *affirmed and reversed in part,* 544 F. 3d 1201, 1221 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1154a]. The courts have made it clear that by placing a limit on the number of unrelated individuals who may live in a single dwelling unit does not per se violate the ADA and FHA where there is a procedure to allow a group of handicapped individuals to request a reasonable accommodation, which exists here in the City. See *Schwarz v. City of Treasure Island,* 521 F. Supp. 2d 1307, 1320-3 (M.D. Fla. 2007), *affirmed and reversed in part,* 544 F. 3d 1201, 1221 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1154a]. "A city must draw a line somewhere." *See Jeffrey O. v. City of Boca Raton,* 511 F. Supp.2d 1339, 1357-1358 (S.D. Fla. 2007). If the number chosen is in line with the average occupants per unit with the city, then it should pass FHA muster and should constitute a reasonable accommodation. *See Jeffrey O. v. City of Boca Raton,* 511 F. Supp.2d 1339, 1357-1358 (S.D. Fla. 2007); *Oxford House, Inc v. City of Virginia Beach,* 825 F. Supp. 1251, 1258-9 (E.D. Va. 1993). As such, there is no competent evidence to suggest that the City's amended code provisions to four (4) persons per dwelling unit as a reasonable accommodation will have a greater adverse impact on persons with disabilities than non-protected persons. See *Schwarz v. City of Treasure Island,* 521 F. Supp. 2d 1307, 1320-3 (M.D. Fla. 2007), *affirmed and reversed in part,* 544 F. 3d 1201, 1221 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1154a]; *Oxford House, Inc v. City of Virginia Beach,* 825 F. Supp. 1251, 1258-9 (E.D. Va. 1993).

E. It appears that the main argument presented by Petitioner is that there is therapeutic value in greater numbers of recovering individuals living together in a residential recovery community. As stated, currently three (3) nonrelated persons are allowed to reside in a dwelling unit, and that number will be amended to four (4) persons per dwelling unit as a reasonable accommodation in order to comply with the ADA and FHA. It is also contrary to reasonable accommodation considerations that a set number as requested by an Applicant must live together as a collective group based upon the number that is requested by the Applicant as cities have discretion to decide that number as long as everyone is treated equally. *See Jeffrey O. v. City of Boca Raton,* 511 F. Supp.2d 1339, 1357-1358 (S.D. Fla. 2007); *Oxford House, Inc v. City of Virginia Beach,* 825 F. Supp. 1251, 1258-9 (E.D. Va. 1993). This has also been considered as there was no competent evidence presented to show that four (4) unrelated individuals residing in one dwelling unit is less able and equipped to allow recovering persons to enjoy the housing of their choice and that a greater number as six (6) or seven (7) per dwelling unit will be more effective to handle fears and claims of loneliness and isolation in light of the fact that 16 persons may reside in the entire apartment complex of four (4) dwelling units, plus the many other methods and programs existing here to guard against loneliness and isolation, including mandatory attendance at AA/narcotics anonymous meetings at least three times per week, group therapy of 9 to 15 hours per week, mixing and connecting and bonding with individuals in the apartment complex and with roommates residing at Petitioner's place—all of these should be helpful to guard against loneliness and isolation by individuals in order to guard against a possible relapse. See *Jeffrey O. v. City of Boca Raton,* 511 F. Supp.2d 1339, 1357-1358 (S.D. Fla. 2007); *Oxford House-C v. City of St. Louis,* 77 F.3d 249 (8th Cir. 1996); *Oxford House, Inc. v. City of Virginia Beach,* 825 F. Supp. 1251 (E. D. Va. 1993).

F. The requested accommodation of four individuals per dwelling unit would not impose an undue financial administrative burden on the City of Coral Springs.

G. A reasonable accommodation is not required for therapeutic viability of the PowerHouse Recovery Project.

H. A reasonable accommodation is not required for the financial viability of the PowerHouse Recovery Project.

I. The requested accommodation would require a fundamental alteration in the nature of the land use and zoning regulations of the City of Coral Springs. However, the City has stipulated to allowing four (4) unrelated individuals in each dwelling unit at the Property.

III. APPLICANT'S CLAIM OF COLLATERAL ESTOPPEL

Petitioner argues that there were some cases decided by a Special Magistrate by the City of Coral Springs or elsewhere preclude the Special Magistrate from determining the question of reasonable accommodation, because those cases concluded that reasonable accommodation as requested by an Applicant in those cases and here was necessary to comply with the ADA and FHA. Petitioner submitted Final Orders in Legacy in Case Numbers RA 18-0001 and 19-0001 and RA 20-0001 and RA 20-0002, where a Special Magistrate determined that 13-14 residents could occupy a sober home inclusive of several staff members. For collateral estoppel to apply, the identical parties must be involved in the first and second lawsuit that involves identical claims that are made in each. See *Oxford House, Inc. v. Township of Cherry Hill,* 799 F. Supp. 450, 458 (D.N.YJ. 1992) ("Presumably defendant's argument is based on the doctrines of res judicata and/or collateral estoppel. It is hornbook law, however, that a party in a second lawsuit cannot be bound by a determination of a claim or issue in a previous lawsuit to which she was not a party. *See* 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4406 at 46, and § 4416 at 138 (1981). Since the individual plaintiffs in this action—the current residents of 911 South Kings Highway—were not parties to the state court action, which concerned only the Oxford Houses on Pine Valley Lane and Hilltop Court, they clearly cannot be bound by that decision.").

The well-established rule in Florida is that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies. See *Mobil Oil Corp. v. Shevin,* 354 So.2d 372 (Fla. 1977); *Universal Construction Co. v. City of Ft. Lauderdale,* 68 So.2d 366 (Fla. 1953). More particularly, for collateral estoppel to apply, there must be an identical issue presented in a prior proceeding, the issue must have been a critical and a necessary part of the prior determination, there must have been a full and fair opportunity to litigate that issue, the parties in the two proceedings must be identical, and the issues must have been actually litigated. See *Holt v. Brown's Repair Serv., Inc.,* 780 So. 2d 180, 182 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D307a]; *State Street Bank & Trust Co. v. Badra,* 765 So.2d 251, 253 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1880a].

In considering the question of a reasonable accommodation, a fact-intensive analysis of the particular facts and circumstances at hand needs to be made by the trier of facts as each case is fact specific. See *Schwarz v. City of Treasure Island,* 521 F. Supp. 2d 1307 (M.D. Fla. 2007), *affirmed and reversed* in part, 544 F. 3d 1201, 1221 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1154a]; *Oxford House-C v. City of St. Louis,* 77 F. 3d 249, 253 (8th Cir. 1996), among others which provides that each case is fact specific requiring a fact intensive analysis and that there is no one size fits all standard. From a review of the Legacy cases submitted as evidence and cited as authority by Applicant, the Legacy cases and the instant matter concerned other facts and circumstances that involved different parties (not identical parties), different issues, and different facts and circumstances from the instant case; therefore, the *Legacy* decisions and its proposed evidence and proposed testimony that was provided in those cases cannot be used as controlling evidence to support Applicant's position that collateral estoppel precludes the City from having an fact intensive analysis of the unique facts and circumstances of this case, and therefore the City's objection to admitting such evidence and decisions as controlling is hereby sustained.

ORDER

Based upon the competent and substantial evidence in this matter, the requested accommodation is not reasonable and necessary, and therefore, no reasonable accommodation should be granted as the Applicant has failed to meet their burden.

However, based on the agreement of the City, the Applicant shall be granted a reasonable accommodation from the LDC to provide for four (4) unrelated related individuals to reside in each dwelling unit at the Property for a total of sixteen (16) residents at the Property, subject to the following special conditions:

1. Applicant shall comply with any and all applicable building and/or engineering permitting processes required by the Code of Ordinances and/or Land Development Code of Coral Springs.

2. The reasonable accommodation granted applies only to individual(s) with a disability and/or handicap as defined by federal law.

3. Applicant shall submit application for certification to Florida Association of Recovery Residences (FARR) within 30 days of the rendition of this Order. If the Applicant fails to submit the application in time or if provisional FARR certification is denied, the reasonable accommodation shall be revoked and the Applicant shall place the residents in safe and secure housing elsewhere within 30 days after such revocation.

4. Applicant shall receive permanent FARR certification within six months of the rendition of this Order. If permanent certification by FARR is denied, the reasonable accommodation shall be revoked and the Applicant shall place the residents in safe and secure housing elsewhere within 30 days after such revocation.

5. Applicant shall retain FARR certification. If FARR certification is suspended, not renewed, or Applicant otherwise loses FARR certification, the reasonable accommodation shall be revoked and the Applicant shall place the residents in safe and secure housing elsewhere within 30 days after such revocation.

6. PowerHouse Recovery Project must establish a discharge policy and procedure to ensure every exiting resident is relocated to a safe and secure living environment elsewhere. Failure to establish such procedure within 60 days after rendition of this Order will result in the reasonable accommodation being revoked and the Applicant relocating residents to safe and secure housing elsewhere within 30 days of such revocation.

7. The reasonable accommodation does not alter the Applicant's or any other individual's or operator's obligations to comply with any other applicable federal, state, county, and/or city requirements, rules, regulations, and/or laws.

8. Should the total number of residents exceed the four per dwelling unit maximum as of the date this Order is rendered, the Applicant shall place the residents in safe and secure housing elsewhere within 30 days.

9. This reasonable accommodation shall not run with the land.

* * *