No. _____

In The
Supreme Court of the United States

MRI ASSOCIATES OF TAMPA, INC.,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Florida Supreme Court violate the Petitioner's constitutionally guaranteed due process rights by reversing the trial court's summary judgment based on an unpreserved and waived issue, and a determination that is unsupported by any evidence or the parties' stipulation of facts?

PARTIES TO THE PROCEEDING

The caption of the case on the cover page identifies all parties.

CORPORATE DISCLOSURE STATEMENT

The Petitioner's parent company is Ava Industries, Inc. No publicly traded company owns 10% or more of the Petitioner's stock.

RELATED CASES

State Farm Mutual Automobile Insurance Company v. MRI Associates of Tampa, Inc., No. 14-CA-008634, Division D, Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. Judgment entered September 6, 2016.

State Farm Mutual Automobile Insurance Company v. MRI Associates of Tampa, Inc., No. 2D16-4036. Judgment entered May 18, 2018.

MRI Associates of Tampa, Inc. v. State Farm Mutual Automobile Insurance Company, No. SC18-1390. Judgment entered December 9, 2021.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, MRI Associates of Tampa, Inc., respectfully petitions for a writ of certiorari to review the decision of the Florida Supreme Court.

OPINIONS BELOW

The Florida Supreme Court's decision is reported as *MRI Associates of Tampa, Inc. v. State Farm Mutual Insurance Company*, ___ So.3d ___, 2021 WL 5832298 (Fla. Dec. 9, 2021), and is reproduced in the Petitioner's Appendix ("A") at A1-18.

The Florida Second District Court of Appeal's decision is reported as *State Farm Mutual Insurance Company v. MRI Associates of Tampa, Inc.*, 252 So.3d 773 (Fla. 2d DCA 2018), and is reproduced at A20-32.

The decision of the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, is unreported and is reproduced at A33-35.

JURISDICTION

The Florida Supreme Court denied rehearing on January 19, 2022. (A41). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in part, "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

Section One of the Fourteenth Amendment to the United States Constitution provides, in part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

Section 627.736(5)(a)5, Florida Statutes (2012 to present) provides, in part, "An insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph."

STATEMENT OF THE CASE

A. Introduction regarding the Florida "PIP" law

Since 1971, Florida drivers have been required by Section 627.736 of the Florida Statutes to be covered by no-fault personal injury protection ("PIP") insurance, which requires insurers to pay for "reasonable" medical expenses incurred by their insureds who sustain injuries in motor vehicle accidents. The reasonable amount of those medical

expenses has historically been a hotly contested issue, which state trial judges and juries had to decide in protracted and costly litigation based on a loosely defined fact-dependent reasonable amount standard. That fact-dependent standard appears in the 1971 through 1997 versions of Section 627.736(5), the 1998 through 2007 versions of Section 627.736(5)(a), the 2008 through 2011 versions of Section 627.736(5)(a)1, and the 2012 through present versions of Section 627.736(5)(a).

To reduce the amount of litigation over the reasonable amount of medical expenses covered by PIP insurance, the Florida Legislature amended Section 627.736 in 2008, to add a permissive alternative methodology that PIP insurers may rely upon to limit reimbursement of medical expenses based on a "schedule of maximum charges." *See* Ch. 2007-324, §20, Laws of Fla. (2007). *See also Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 90 So.3d 321, 323 (Fla. 3d DCA 2012) (the 2008 fee schedule amendments to the PIP statute "sought to address the enormous costs and inefficiencies of the law prior to amendment").

The schedule of maximum charges methodology was originally found in the 2008 through 2011 versions of Section 627.736(5)(a)2-5. For some types of medical expenses, the schedule of maximum charges refers to certain "Medicare" fee schedules and pricing standards. *See*, *e.g.*, § 627.736(5)(a)1.f(I), Fla. Stat. (2012) (allowing PIP insurers to pay "80 percent of . . . 200 percent of the allowable amount under . . . [t]he participating physicians fee schedule of Medicare Part

B"). Hence, case law sometimes refers to the schedule of maximum charges method as the "fee schedule method" or the "Medicare fee schedule method."

Although the schedule of maximum charges method was adopted to reduce litigation, additional litigation soon arose concerning the manner in which PIP insurers could lawfully rely on that method. That litigation migrated up to Florida's intermediate-level appellate courts. During May 2011 through March 2012, those intermediate appellate courts uniformly held that the original fact-dependent method and the new schedule of maximum charges method were two different and alternative methods of calculating reasonable medical expenses, and that PIP insurers could not rely on the schedule of maximum charges method without clearly and unambiguously electing it in the insurance policy. *See Kingsway Amigo Insurance Company v. Ocean Health, Inc.*, 63 So.3d 63 (Fla. 4th DCA 2011) (issued on May 18, 2011); *Geico Indem. Co. v. Virtual Imaging Servs., Inc.*, 79 So.3d 55 (Fla. 3d DCA 2012) ("*Virtual I*") (issed on February 15, 2012); *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc*., 90 So.3d 321 (Fla. 3d DCA 2012) ("*Virtual II*") (issued on July 3, 2012); *DCI MRI, Inc. v. Geico Indem. Co.*, 79 So.3d 840 (Fla. 4th DCA 2012) (issued on March 12, 2012).

On May 1, 2012, the *Virtual II* decision was appealed to the Florida Supreme Court. A few days later, on May 4, 2012, the Governor of Florida approved some amendments to Section 627.736. *See* Ch. 2012-197, §10, Laws of Fla. (2012). (A55). As part of those

amendments, some of the subparagraphs within Section 627.736(5) were renumbered. As a result, the original fact-dependent standard is now found at Section 627.736(5)(a), and the schedule of maximum charges is now found at Section 627.736(5)(a)1.a through f. The 2012 amendment also created a new Section 627.736(5)(a)5, which expressly sets forth how a PIP insurer may rely on the schedule of maximum charges for limiting reimbursement of medical expenses. That provision states:

> 5. Effective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. A policy form approved by the office satisfies this requirement. 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.

§ 627.736(5)(a)5, Fla. Stat. (2012).

Under the plain text of the first sentence of the new Section 627.736(5)(a)5, the Florida Legislature imposed three requirements which were not previously stated in the statute. According to those three requirements, PIP insurer may rely on the new schedule of maximum charges method "only" if: (1) the insurance policy must include "a notice," (2) such "a notice" must be included "at the time of issuance or

renewal," and (3) such "a notice" must provide "that the insurer may limit payment pursuant to the schedule of charges[.]" This new statutory provision took effect on July 1, 2012, while litigation was still pending over the manner in which PIP insurers could lawfully elect to rely on the schedule of maximum charges under the prior version of the statute.

On July 3, 2012 (i.e., two days after the effective date of the new Section 627.736(5)(a)5), the Florida Supreme Court issued its decision in *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc*., 141 So.3d 147 (Fla. 2013) ("*Virtual III*"). Based on the 2008 through 2011 versions of Section 627.736, the Court held that "there *are* two different methodologies for calculating reimbursements to satisfy the PIP statute's reasonable medical expenses coverage mandate," and that PIP insurers have "a choice in dealing with their insureds as to whether to limit reimbursements based on the [schedule of maximum charges] or whether to continue to determine the reasonableness of provider changes for necessary medical services rendered to a PIP insured based on the factors enumerated in section 627.736(5)(a)1." *Id.*, 141 So.3d at 156-157 (italics in original, underline added). To make that "choice," the insurer "was required to give notice to its insured by electing the permissive . . . fee schedules in its policy before taking advantage of the . . . fee schedule methodology to limit reimbursements." *Id.*, at 150. The Court further explained that "when the plain language of the PIP statute affords insurers two different mechanisms for calculating reimbursements, the

insurer must clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Id.*, at 158.

In recognition of the new and different requirements set forth in the 2012 amendments, the Florida Supreme Court also stated, "[b]ecause . . . the Legislature has now specifically incorporated a notice requirement into the PIP statute, effective July 1, 2012, *see* § 627.736(5)(a)5., Fla. Stat. (2012), our holding applies only to policies that were in effect from the effective date of the 2008 amendments to the PIP statute that first provided for the . . . fee schedule methodology, which was January 1, 2008, through the effective date of the 2012 amendment, which was July 1, 2012." *Virtual III*, 141 So.3d at 150.

Notably, the *Virtual III* decision held that under the 2008 through 2011 versions of the statute, PIP insurers were required to "give notice . . . by electing the permissive . . . fee schedules in its policy[.]" *Id.*, at 150. In contrast, the new Section 627.736(5)(a)5 expressly required PIP insurers to include "a notice" in the insurance policy, required PIP insurers to provide such "a notice" in a particular manner and at a particular time, and dictated the contents of such "a notice." Because these two notice standards are different (i.e., "give notice" versus "include a notice"), the Court announced that its decision in *Virtual III* would not apply to insurance policies issued after the effective date of the new notice requirement imposed by Section 627.736(5)(a)5.

B. State Farm amends its insurance policy

Meanwhile, on February 6, 2012, the Respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), submitted a proposed amended insurance policy (form 9810A) to the Florida Office of Insurance Regulation (A52, 57). Rather than making "a choice" between the fact-dependent method "or" the schedule of maximum charges method, that amended insurance policy combined those two methods together to form a single "hybrid" method by which one or more elements of either or both methods could be used to determine the reasonable amount of medical expenses that State Farm would pay in PIP benefits (A5-6, 22-24, 34).

About three months later, on May 4, 2012, the same date that the amendments to Section 627.736 were signed into law by the Governor, the Florida Office of Insurance Regulation issued "Informational Memorandum OIR-12-02M" to "assist insurers with the filings necessary to implement the notice requirement in Section 627.736(5)(a)5[.]" (A53-54). In pertinent part, the memorandum instructed insurers as follows:

> The Office will commit to review filings submitted for this purpose on an expedited basis provided that the insurer has only submitted one endorsement in the filing and that one endorsement only contains language to implement the notice requirement. All form filings are subject to the standard form review process of Section 627.410, Florida Statutes.

(A54, 59).

With respect to timing, State Farm's proposed new insurance policy form was submitted before the legislation proposing to adopt Section 627.736(5)(a)5 was created, and before Informational Memorandum OIR-12-02M was issued. (A52-54). Moreover, State Farm's submission was not merely "one endorsement" that "only contain[ed] language to implement the notice requirement" of Section 627.736(5)(a)5, but was instead an expansive new insurance policy form. (A52-53, 58-59, 72, 88-89). And, to be certain, there is no evidence to demonstrate or suggest that State Farm requested the Florida Office of Insurance Regulation to approve its insurance policy form for purposes of complying with the requirements set forth in Section 627.736(5)(a)5 that would become effective on July 1, 2012, as opposed to the "standard form review process of Section 627.410, Florida Statutes" identified in the above-quoted instructions (A54, 58-59, 71-72, 88-89). Indeed, State Farm submitted the proposed insurance policy form months before the new legislation was drafted, before the agency memorandum was issued, and before *Virtual III* was issued. Therefore, absent clairvoyance, State Farm was not in a position to predict the forthcoming requirements of Section 627.736(5)(a)5 or the outcome of *Virtual III*.

On October 5, 2012 (i.e., about three months after the Florida Supreme Court's decision in *Virtual III* was issued), the Florida Office of Insurance Regulation rubber-stamped the State Farm's insurance policy form 9810A with the word "approved." (A57-58, 88). The agency did not specify whether the policy form was

approved for purposes of Section 627.736(5)(a)5 or for purposes of the "standard form review process of Section 627.410." (A54, 57-59, 69, 71-72).

C. Trial-level proceedings

The Petitioner is a provider of magnetic resonance imaging ("MRI") services (A21). During 2013, the Petitioner provided MRIs to 19 patients who had PIP coverage provided by State Farm. (A21-22, 44). The Petitioner billed State Farm for those MRIs, and State Farm paid less than the charged amounts. (A22).

When the Petitioner disputed State Farm's payment amounts, State Farm filed a declaratory relief action against the Petitioner in Florida state court. (A22, 44). The Petitioner then counterclaimed for declaratory relief against State Farm. (A22, 44).

The parties agreed to file competing motions for summary judgment which would be governed by procedures set forth in the trial court's "Stipulated and Agreed Case Management Order." (A34, 57). In that order, the trial court required the parties to file a stipulated set of "all facts and evidence on which the parties [would] rely in support of their respective motions for summary judgment," and ruled that "no party [could] rely on additional facts or evidence not contained in or attached to the fact stipulation." (A57).

In their stipulated set of facts and evidence, the parties agreed that the Petitioner "does not concede that State Farm's Policy Form 9810A complies with

Informational Memorandum OIR-12-02M or Section 627.736(5)(a)5, Florida Statutes (2012-2015)" and "does not concede" that the Florida Office of Insurance Regulation's approval of that form "has the legal effect of constituting approval within the meaning of Section 627.736(5)(a)5, Florida Statutes (2012-2015), or that [the agency] approved Policy Form 9810A for purposes of Section 627.736(5)(a)5, or that State Farm otherwise complied with Section 627.736(5)(a)5." (A57-58). Although the parties stipulated that those particular factual matters are disputed, there was no evidence—and State Farm presented no legal arguments—demonstrating compliance with any of the three requirements imposed by the first sentence of Section 627.736(5)(a)5. (A46, 59-74, 88, 89).

The trial court ultimately granted final summary judgment in favor of the Petitioner and against State Farm. (A21, 33-40). The trial court's order expressly "adopt[ed] the stipulations of fact as the factual basis for its ruling." (A38). Based on the stipulated facts, the trial court ruled that State Farm "failed to clearly and unambiguously elect" the schedule of maximum charges methodology in its insurance policy, and "instead adopted an unauthorized hybrid method" comprised of elements described in Section 627.736(5)(a)1-5, Florida Statutes (2012-2015) and elements of the original fact-dependent methodology described in Section 627.736(5)(a). (A34).

D. State Farm appeals to the Florida Second District Court of Appeal

State Farm appealed the trial court's final summary judgment to the Florida Second District Court of Appeal, which is an intermediate-level state appellate court. On May 18, 2018, the Second District issued its appellate decision (A20-32), which is reported as *State Farm Mutual Insurance Company v. MRI Associates of Tampa, Inc.*, 252 So.3d 773 (Fla. 2d DCA 2018).

The Second District's decision acknowledged that State Farm's insurance policy "tracks" both the fact-dependent method in the 2012 version of Section 627.736(5)(a) and schedule of maximum charges limitations set forth in the 2012 version of Section 627.736(5)(a)1. *State Farm*, 252 So.3d at 775. (A24). Nonetheless, the Second District reversed the trial court's judgment based on an unpreserved legal argument that had never been raised in the trial court or in the appeal. (A44-45, 49, 74, 80).

Instead of deciding the issues actually presented by State Farm on appeal, the Second District *sua sponte* decided that because the Florida Legislature amended Section 627.736(5) in 2012 by renumbering some of its subparagraphs, "there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer." (A8, 30, 44, 80). *State Farm*, 252 So.3d at 777-778.

In reversing, the Second District certified the following question to the Florida Supreme Court as a

matter of great public importance, "Does the 2013 PIP statute as amended permit an insurer to conduct a fact-dependent calculation of reasonable charges under section 627.736(5)(a) while allowing the insurer to limit its payment in accordance with the schedule of maximum charges under section 627.736(5)(a)(1)?" (A31-32). *State Farm*, 252 So.3d at 778-779. Notably, the certified question does not address whether State Farm provided "a notice" that complied with any of the requirements imposed by Section 627.736(5)(a)5. (A31-32).

The Petitioner filed a motion for rehearing or clarification. (A78-89). Among other things, that motion contended that neither party had ever raised the Legislature's renumbering of the statute's subparagraphs as an issue either in the trial court or in the appeal. (A79-80). As such, the Petitioner argued, "State Farm did not preserve this argument for review and so it cannot be the basis for a reversal in State Farm's favor." (A80). The Petitioner's motion also clearly established that the renumbering of the subparagraphs was a mere editorial change which did not alter the meaning of the prior version of the statute. (A80-87). The Petitioner's motion also explained that State Farm never presented any evidence that it complied with Section 627.736(5)(a)5. (A87-89).

By order dated July 18, 2018, the Second District denied the Petitioner's motion for rehearing or clarification. (A18).

E. Petitioner seeks review in the Florida Supreme Court

The Petitioner sought review in the Florida Supreme Court, which invoked its jurisdiction under Article V, Section (3)(b)(4) of the Florida Constitution to decide matters of great public importance. (A1).

On December 9, 2021, the Florida Supreme Court issued its appellate decision (A1-17), which is reported as *MRI Associates of Tampa, Inc. v. State Farm Mutual Insurance Company*, ___ So.3d ___, 2021 WL 5832298 (Fla. Dec. 9, 2021).

The decision acknowledged that the parties' arguments to the Florida Supreme Court "center[ed] on the analysis adopted by the district court." (A10). And, consistent with the Petitioner's arguments, the Court expressly rejected the Second District's reasons for reversing the trial court, stating, "we are not persuaded that the reorganization of the statute relied on by the Second District is a sound basis for determining the issue presented in this case. . . ." (A14).

Despite rejecting the Second District's *sua sponte* reasons for reversing the trial court's judgment, the Florida Supreme Court nonetheless proceeded to express its own *sua sponte* determination "that the text of the notice provision [of Section 627.736(5)(a)5] that became effective in 2012 supports the result reached by the district court." (A14, 15).

Interestingly, the Florida Supreme Court's decision purports to pay homage to this Court's decision in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992), where Justice Clarence Thomas observed that "the 'one, cardinal canon [of construction] before all others' . . . is, we 'presume that a legislature says in a statute what it means and means in a statute what it says there.'" (A12). After identifying that "cardinal cannon," however, the Florida Supreme Court proceeded to violate it.

In its decision, the Florida Supreme Court quoted, with italics for emphasis, the plain text of Section 627.736(5)(a)5, but then proceeded to gloss over that plain text:

> . . . Although we are not persuaded that the reorganization of the statute relied on by the Second District is a sound basis for determining the issue presented in this case, we do believe that the text of the notice provision that became effective in 2012 supports the result reached by the district court. That portion of the statute provides:
>
> > Effective July 1, 2012, an insurer *may limit payment* as authorized by this paragraph only if the *insurance policy includes a notice* at the time of issuance or renewal *that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph*.
>
> § 627.736(5)(a)5., Fla. Stat. (emphasis added).

> 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. . . .

(A14; italics in original; underline added). Elsewhere in the decision, the Court also concluded that Section 627.736(5)(a)5 merely "requires that an insurer provide notice of its election to use the schedule of maximum charges[.]" (A4; underline added). Thus, the Florida Supreme Court ignored or effectively rewrote the plain text of the statute, which clearly requires that the insurance policy must include "a notice," into a requirement that the policy must merely "contain notice" or "provide notice," without the preceding indefinite article "a" found in the plain text of Section 627.736(5)(a)5.

Based on the conclusion that the "text" of Section 627.736(5)(a)5 "supports the result reached by the district court," the Florida Supreme Court approved that result and found "that the PIP policy issued by State Farm was effective to authorize the use of the schedule of maximum charges" and that "[n]o basis has been presented for invalidating State Farm's election of the limitations of the schedule of maximum charges." (A1, 14-15).

The Florida Supreme Court's decision does not mention that the case was decided by summary judgment on a set of stipulated facts, and does not mention any evidence or stipulated facts that the Court relied upon to find that State Farm's policy included "a notice" that satisfied any of the specific requirements of Section 627.736(5)(a)5 (A1-17).

The Petitioner subsequently filed a motion for rehearing or clarification (A43-77). Among other things, that motion contended that, like the Second District's prior decision, the Florida Supreme Court's decision erroneously reversed the trial court's judgment based on arguments that State Farm never preserved for appeal and never argued as a basis for reversing the trial court's judgment. (A46-51).

The Petitioner's motion also explained that the parties' competing motions for summary judgment were based on and governed by a set of stipulated facts, which did not address or establish that State Farm's insurance policy complied with any of the requirements imposed by Section 627.736(5)(a)5. (A57-60). The motion also explained that there was no evidence that could support a determination that State Farm complied with Section 627.736(5)(a)5. (A46, 57-74).

The motion also explained that the Court had disregarded the plain text of Section 627.736(5)(a)5 in violation of the "supremacy-of-text" and "whole-text" cannons of statutory construction, which the Florida courts routinely profess to embrace. (A46-47,

60-74). Quoting and citing to this Court's decision in *Niz-Chavez v. Garland*, ___ U.S. ___, 141 S.Ct. 1474, 1481 (2021), the motion explained that the plain text of Section 627.736(5)(a)5 required State Farm's insurance policy to include "a notice" as a "countable" object, as opposing to merely requiring that policy to "contain" or "provide notice" as a "noncountable abstraction." (A63-65).

The motion also explained that State Farm did not present such evidence for any of the Petitioner's 19 insured patients. (A68). There was no evidence establishing that State Farm provided such "a notice" to any of the 19 insured patients "at the time of insurance or renewal" of their respective insurance policies. (A46, 58, 62, 71), and no evidence establishing the contents of such "a notice." (A46, 62). In other words, there was no evidence (much less the type of undisputed material facts needed to prevail on a motion for summary judgment) to demonstrate that State Farm complied with any of the three requirements imposed by the plain text of the first sentence of Section 627.736(5)(a)5, which the Florida Supreme Court concluded were satisfied. (A62, 71). Instead of presenting any evidence of "a notice" to any of the 19 insured patients, State Farm voluntarily opted to enter into, and be bound by, a written stipulation of the relevant enumerated set of facts that would strictly govern the outcome of this lawsuit. (A44, 57-59, 68-69). But that stipulation is silent about the requirements imposed by Section 627.736(5)(a)5, other than to expressly confirm that the Petitioner disputed

that State Farm had complied with those requirements. (A57-58).

By order dated January 19, 2022, the Florida Supreme Court denied the Petitioner's motion for rehearing or clarification. (A41). This timely petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

THE FLORIDA SUPREME COURT VIOLATED THE PETITIONER'S CONSTITUTIONALLY GUARANTEED DUE PROCESS RIGHTS BY REVERSING THE TRIAL COURT'S SUMMARY JUDGMENT BASED ON AN UNPRESERVED AND WAIVED ISSUE, AND A DETERMINATION THAT IS UNSUPPORTED BY ANY EVIDENCE OR THE PARTIES' STIPULATION OF FACTS

A. Introduction

There is no evidence to support the Florida Supreme Court's determination on the unpreserved issue of whether State Farm complied with the plain text of the first sentence of Section 627.736(5)(a)5. In reversing the trial court's summary judgment without any supporting evidence to support that determination, the Florida Supreme Court violated the Petitioner's constitutionally guaranteed due process rights.

B. Due process requires fact findings to be supported by evidence

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution form the cornerstone upon which the American justice system is built and upon which all litigants rely when seeking to vindicate their rights in all federal and state criminal, civil, and administrative proceedings. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). This is a guarantee that the forefathers of this nation placed their lives in peril to establish and countless soldiers have died in battle to preserve.

The constitutionally guaranteed right to due process contemplates that no person will be deprived of life, liberty or property without reasonable notice and a meaningful opportunity to confront the adverse party's arguments and evidence. Stated another way, "[t]he fundamental requisite of due process of law is the opportunity to be heard" and "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). These principles require that the courts must give a litigant timely and adequate notice detailing the reasons for an opposing party's claim or defense, and an effective opportunity to confront and rebut that opposing party's arguments and evidence. *Id.*, 397 U.S. at 267-268.

The right to be heard in a meaningful manner, necessarily carries with it the right to present evidence

in support of one's claim or defense, and the right to confront and rebut the evidence presented by one's opponent. *See*, *e.g.*, *Interstate Commerce Comm'n v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913) ("manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute"); *Baron v. Baron*, 941 So.2d 1233, 1236 (Fla. 2d DCA 2006) (due process to be heard includes the right to "introduce evidence at a meaningful time and in a meaningful manner").

Due process does not permit or tolerate an adjudication for which there is no supporting evidence in the record. *See Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985) (decision does not comport with the minimum requirements of procedural due process, unless the tribunal's findings are supported by some evidence in the record); *Bearden v. Georgia*, 461 U.S. 660, 662-673 (1983) (court cannot revoke defendant's probation for failure to pay imposed fine and restitution, absent evidence that defendant was responsible for the failure or that alternative forms of punishment were inadequate); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (state court violated defendant's due process rights by revoking his probation based on a finding that was devoid of evidentiary support); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (to comply with due process, meaningful opportunity to defend, if not the right to a trial itself, presumes that a total want of evidence to support a charge will conclude the case in favor of defendant);

Vachon v. New Hampshire, 414 U.S. 478, 479-480 (1974) (defendant's conviction reversed due to lack of supporting evidence); *California v. Green*, 399 U.S. 149, 187, n. 20 (1970) (Justice Harlan, concurring) (due process does not permit a conviction based on no evidence); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (convictions devoid of evidentiary support violate due process); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 94-95 (1965) (it was a violation of due process to convict and punish defendant without evidence of his guilt); *Adderley v. State of Florida*, 385 U.S. 39, 44 (1966) (state court's convictions based on a total lack of relevant evidence would be a denial of due process); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) (it is a violation of due process to convict and punish a man without evidence of his guilt), *abrogated on other grounds by Jackson v. Virginia*, 443 U.S. 307 (1979); *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 247 (1957) (state bar applicant's due process rights were violated when his application was denied based on insufficient evidence); *Spruytte v. Walters*, 753 F.2d 498, 509 (6th Cir. 1985) (state prison officials violated due process by taking action that was not supported by evidence sufficient to satisfy state law requirements); *Gwinn v. Awmiller*, 354 F.3d 1211, 1219 (10th Cir. 2004) (due process requires "some evidence to support the hearing panel's decision"); *Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004, 1011-1013 (D.C.Cir. 2005) (Kentucky Public Service Commission violated petitioners' due process rights when it adopted a rate

premium *sua sponte* and without evidence in the record).

The right to due process also bars arbitrary decisions, regardless of the fairness of the procedures used to reach them. *See Foucha v. Louisiana*, 504 U.S. 71, 72 (1992). "A finding without evidence is arbitrary and baseless." *Louisville & N.R. Co*., 227 U.S. at 91. An order is arbitrary and violates due process if it depends on a finding reached without supporting evidence, or a finding based on evidence that does not support it. *R.R. Comm'n of California v. Pac. Gas & Elec. Co.*, 302 U.S. 388, 399 (1938). Otherwise, a court "could disregard all rules of evidence, and capriciously make findings by administrative fiat." *Id.* "Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." *Id.*

Accordingly, this Court and federal circuit courts uniformly hold that, in a civil lawsuit, a jury verdict must be vacated if it is unsupported by any evidence. *See*, *e.g.*, *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 578 (1951) (where there was no evidence to support the plaintiff's negligence claim, the court trial court properly granted defendant's motion for judgment notwithstanding the verdict); *Piedmont & Arlington Life Ins. Co. v. Ewing*, 92 U.S. 377, 382 (1875) (judgment for plaintiff reversed with directions to set aside jury verdict where there was no evidence of the existence of a valid contract to sustain the verdict); *Turner v. Upton County, Tex.*, 967 F.2d 181, 186 (5th

Cir. 1992) (reversing judgment in favor of plaintiff where evidence was insufficient to sustain jury's verdict); *Sutherland v. Elpower Corp*., 923 F.2d 1285, 1290 (8th Cir. 1991) (reversing punitive damages award due to insufficient evidence to sustain jury's verdict); *Howard v. Walgreen Co.*, 605 F.3d 1239, 1242 (11th Cir. 2010) (motion for judgment as a matter of law should be granted "when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action"); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1278 (11th Cir. 2005) (trial court should grant judgment as a matter of law when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action).

For these same reasons, a court cannot grant a plaintiff's motion for summary judgment on its own cause of action if an element thereof is unsupported by any evidence. *See*, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *Matter of Maple Mortg., Inc.*, 81 F.3d 592, 595 (5th Cir. 1993). *See also UA Local 343 of the United Ass'n of Journeymen & Apprentices v. Nor–Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994) (when party moving for summary judgment has burden of proof for an element of a claim, that party has burden of establishing a prima facie case in support of its motion).

Thus, it is clear that a court's determination that is not sustained by any evidence in the record necessarily violates due process and must be vacated.

C. The Florida Supreme Court clearly violated due process

The Florida Supreme Court reversed the trial court's summary judgment based on the first sentence of Section 627.736(5)(a)5, even though there was no evidence that State Farm complied with any of the three requirements imposed by the plain text of that sentence. To make matters worse, the parties' competing motions for summary judgment were governed by a discrete set of stipulated facts and evidence, and a "Stipulated and Agreed Case Management Order" which clearly stated that "no party [could] rely on additional facts or evidence not contained in or attached to the fact stipulation." (A57). Contrary to the plain text of Section 627.736(5)(a)5, there is no evidence or stipulated facts establishing that State Farm's insurance policies for the 19 insured patients included "a notice," or that such "a notice" was included "at the time of issuance or renewal," or that such "a notice" stated "that the insurer may limit payment pursuant to the schedule of charges[.]" Without such supporting evidence, the Florida Supreme Court's conclusion that State Farm complied with Section 627.736(5)(a)5 boils down to arbitrary speculation and guesswork.

The egregious nature of the Florida Supreme Court's determination reached without the benefit of supporting evidence is further exacerbated by the incontrovertible fact that both the Second District and the Florida Supreme Court reversed the trial court's summary judgment based on arguments that State

Farm never raised in the trial court or on appeal. Ironically, the Florida Supreme Court rejected the Second District's *sua sponte* analysis of an unpreserved issue, but then proceeded to reverse the trial court based on its own *sua sponte* analysis of yet another unpreserved issue. With respect to the Florida Supreme Court's decision, State Farm never contended or established in the trial court that it complied with the three requirements imposed by the first sentence of Section 62.736(5)(a)5, and never asked the Second District or the Florida Supreme Court to reverse the trial court's summary judgment on that basis.

Florida appellate courts universally hold that arguments not presented to the trial court are not preserved for appeal, are deemed to have been waived, and cannot be considered on appeal as grounds to reverse the trial court. *See*, *e.g.*, *Young v. State*, 141 So.3d 161, 165 (Fla. 2013); *Insko v. State*, 969 So.2d 992, 1002 (Fla. 2007); *Florida Dept. of Financial Services v. Freeman*, 921 So.2d 598, 602 (Fla. 2006); *Nibert v. State*, 508 So.2d 1, 3 (Fla. 1987); *Dober v. Worrell*, 401 So.2d 1322, 1323-1324 (Fla. 1981); *Vorbeck v. Betancourt*, 107 So.3d 1142, 1148 (Fla. 3d DCA 2012); *Massey Services, Inc. v. Sanders*, 312 So.3d 209, 216 (Fla. 5th DCA 2021); *Williams v. Lowe's Home Centers, Inc.*, 973 So.2d 1180, 1186 (Fla. 5th DCA 2008).

Except in cases involving "fundamental error" (which is not present in this case), the Florida appellate courts strictly apply the preservation requirement, such that appellate review is limited to

the same specific grounds raised in the trial court. *See*, *e.g.*, *Chamberlain v. State*, 881 So.2d 1087, 1100 (Fla. 2004); *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982); *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985); *Castor v. State*, 365 So.2d 701, 703 (Fla. 1978); *W.R. Grace & Co.-Conn. v. Dougherty*, 636 So.2d 746, 749 (Fla. 2d DCA 1994). Even when the appellee conceded the trial court committed an error, the Second District has nonetheless refused to reverse on that basis where the appellant failed to preserve that error for appeal. *See*, *e.g.*, *Rivers v. State*, 980 So.2d 599, 601 (Fla. 2d DCA 2008).

In *Dober*, the Florida Supreme Court observed that "a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to . . . assert matters not previously raised renders a mockery of the 'finality' concept in our system of justice." *Id.*, 401 So.2d at 1324. The Petitioner agrees with this observation, and there was no basis to apply such a procedure in this case.

Even if an issue was squarely raised by the appellant in the trial court and thereby preserved for appellate review, a Florida appellate court still cannot consider that issue as a basis to reverse the trial court's judgment unless the appellant actually raised the issue in its briefs. If not, such issues are deemed to have been waived or abandoned by the appellant. *See*, *e.g.*, *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990); *City of Miami v. Steckloff*, 111 So.2d 446, 447-448 (Fla. 1959); *Hammond v. State*, 34 So.3d 58, 59 (Fla. 4th

DCA 2010); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So.2d 958, 960 (Fla. 4th DCA 1983).

Both the Florida Supreme Court and the Second District have adamantly eschewed the notion of deciding issues that have not been presented by the appellant as a basis for reversing the trial court's judgment. For example, in *Thompson v. DeSantis*, 301 So.3d 180, 187-188 (Fla. 2020), the Florida Supreme Court commented that it is not an appellate court's role to impose a remedy that petitioner has not requested in its briefs. In *Manatee County School Bd. v. NationsRent, Inc.*, 989 So.2d 23, 25 (Fla. 2d DCA 2008), the Second District observed that it is "inappropriate" for an appellate court "to depart from [the] role of neutral tribunal and to become an advocate by developing arguments that the [appellant]—for whatever reason—has chosen not to make" and that appellate court should "work within the framework of the briefs[.]"

In *Bainter v. League of Women Voters of Fla.*, 150 So.3d 1115 (Fla. 2014), the Florida Supreme Court went one step further, and acknowledged that reversing a trial court based on an unpreserved issue violates due process:

> At the outset of our analysis, we reject . . . attempts to raise new issues . . . that were not raised or discussed in the briefs. . . . "Basic principles of due process"—to say nothing of professionalism and a long appellate tradition—"suggest that courts should not consider issues raised for the first time at oral

> argument" and "ought not consider arguments outside the scope of the briefing process."

Id., 150 So.3d at 1126, quoting *Powell v. State*, 120 So.3d 577, 591 (Fla. 1st DCA 2013). Indeed, the Florida appellate courts universally hold that when a court *sua sponte* decides issues that are not raised by the parties, it is a violation of due process. *See*, *e.g.*, *Rucker v. Just Brakes*, 75 So.3d 807, 808 (Fla. 1st DCA 2011); *Lobree v. ArdenX LLC*, 199 So.3d 1094, 1098 (Fla. 3d DCA 2016); *Nat'l City Bank v. Nagel*, 95 So.3d 458, 459 (Fla. 4th DCA 2012); *GMAC Mortg., LLC v. Choengkroy*, 98 So.3d 781, 782 (Fla. 4th DCA 2012); *Liton Lighting v. Platinum Television Group, Inc.*, 2 So.3d 366, 367 (Fla. 4th DCA 2008); *Williams v. Primerano*, 973 So.2d 645, 647 (Fla. 4th DCA 2008).

This case presents a situation that is far worse than a surprise appellate decision on an unpreserved issue for which there is no supporting evidence. In this case, State Farm actually agreed, and the trial court ordered, that the parties' competing motions for summary judgment would be strictly governed by a discrete set of stipulated facts and evidence. However, the stipulated facts and evidence do not come close to supporting the Florida Supreme Court's determination that State Farm complied with the three requirements imposed by the first sentence of Section 627.736(5)(a)5. That determination must, therefore, be reversed and vacated.

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CONCLUSION

In the United States of America, including the State of Florida, judges take oaths swearing to support our Constitution. The right of due process enshrined within that Constitution guarantees that a decision reached by any federal or state court without supporting evidence will not be tolerated and will be swiftly nullified. We respectfully request this Court to honor and enforce that guaranty. Otherwise, our sacred Constitution is rendered illusory and meaningless.

This case involves a fundamental and critical issue that deserves to receive plenary review by this Honorable Court. The Florida Supreme Court accepted jurisdiction over this case on the grounds that it involves a matter of "great public importance." However, its decision below now manifests an injustice of an even greater public importance. That decision cannot be reconciled with the fundamental cornerstone right of due process rights guaranteed to all Florida litigants by the Fourteenth Amendment of the United States Constitution and the well-settled case law construing that right. If that cornerstone is permitted to crack or chip away, our entire justice system falls like a house of cards.

No federal or state court in the United States is authorized to decide an issue in a manner that is unsupported by any evidence and beyond the scope of the parties' stipulation of facts. This is especially true when that issue was not presented by the appellant to

the trial court and then not raised on appeal as a basis for reversing the trial court's summary judgment.

Nonetheless, in this case, the Florida Supreme Court decided an issue that State Farm did not present to the trial court, and was, therefore, waived. After waiving the issue in the trial court, State Farm again waived the issue by not raising it in the Second District. The Florida Supreme Court's subsequent determination of that waived issue is both unsupported by any evidence in the record and beyond the discrete set of stipulated facts that the parties agreed and the trial court ordered would strictly govern the parties' competing motions for summary judgment. This series of significant errors amounts to an egregious due process violation that has been unequivocally demonstrated.

Accordingly, the Petitioner respectfully requests this Honorable Court to grant this petition for writ of certiorari and to conduct a plenary review of the Florida Supreme Court's decision. Alternatively, this Court may wish to consider entering a summary reversal pursuant to Supreme Court Rule 16.1 This Court has repeatedly granted summary reversal and vacated state court decisions that clearly violate controlling precedents. *See*, *e.g.*, *Ritz-Carlton Development Co. v. Narayan*, 136 S.Ct. 799 (2016); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17 (2012); *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012); *Hinton v. Alabama*, 571 U.S. 263 (2014); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011); *Presley v.*

Georgia, 558 U.S. 209 (2010); *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009).

Dated: March 7, 2022.

Respectfully submitted,

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