Supreme Court of Florida

No. SC 18-1390

MRI ASSOCIATES OF TAMPA, INC., etc.,
Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

December 9, 2021

PER CURIAM.

In this case we consider whether the provisions of a personal injury protection (PIP) insurance policy permit the insurer to limit reimbursement payments in accordance with a statutory schedule of maximum charges. We accepted jurisdiction to review *State Farm Mutual Automobile Insurance Co. v. MRI Associates of Tampa, Inc.*, 252 So. 3d 773 (Fla. 2d DCA 2018), which certified a question of great public importance related to its holding that State Farm's policy provisions permitted the insurer to use the schedule of maximum charges even though the policy also refers to the use of other statutory factors for determining reasonable charges. *See* art. V, § 3(b)(4), Fla. Const. We agree with the Second District Court of Appeal that the PIP policy issued by State Farm was effective to authorize the use of the schedule of maximum charges under the

relevant provisions of section 627.736(5), Florida Statutes (2013).

This is the third time in the last decade that we have considered a case in which a medical services provider, as the assignee of an insured's PIP policy benefits, challenged an insurer's use of the PIP statutory schedule of maximum charges. In *Geico General Insurance Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013), we interpreted amendments to the PIP statute that became effective in 2008 authorizing the use of the schedule of maximum charges. We held that under that version of the PIP statute "a PIP insurer cannot take advantage of the Medicare fee schedules to limit reimbursements without notifying its insured by electing those fee schedules in its policy." *Id.* at 160. Subsequently, in *Allstate Insurance Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975 (Fla. 2017)—applying the same statutory provisions—we upheld the sufficiency of a policy notice providing that PIP payments "shall be subject to any and all limitations, authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited to, all fee schedules." In the case now on review, we consider the sufficiency of a policy notice governed by the terms of a statutory notice provision that became effective in 2012.

In explaining our decision, we begin with a review of the pertinent statutory provisions followed by an examination of the relevant terms of the PIP policy. We then briefly consider the proceedings below and the

decision of the district court, including the specific question certified. After a summary of arguments presented by petitioner MRI Associates challenging that decision, along with opposing argument presented by respondent State Farm, we explain why the policy provisions clearly and unambiguously authorize the use of the statutory schedule of maximum charges in accord with the requirements of the statute.

I.

Subject to certain conditions and limitations, section 627.736(1)(a) provides generally that PIP medical benefits must cover "[e]ighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services." Section 627.736(5) contains detailed provisions regarding "[c]harges for treatment of injured persons." Subsection (5)(a) begins with the statement that medical providers "rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered." Following this broad statement, subsection (5)(a) contains two major elements. The first element is centered on an enumeration of various factors that may be considered in determining the reasonableness of charges. The second element sets forth the schedule of maximum charges that may be used to limit reimbursement and provisions related to the application of that schedule.

The first major element of subsection (5)(a) begins with a statement that reasonable charges "may not exceed the amount the [provider] customarily charges for like services or supplies." Subsection (5) (a) then sets forth the following provision regarding factors that may be used in determining reasonable charges:

> In determining whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

This provision is followed by section 627.736(5)(a)1., which begins the second major element of the subsection and is central to the dispute in this case. Under this provision, "*[t]he insurer may limit reimbursement to 80 percent of [the listed] schedule of maximum charges*" set forth in subsection (5)(a)1.a.-f. (Emphasis added.) Provisions governing the application of the schedule of maximum charges are detailed in subsection (5)(a)2.-5. Of particular significance, subsection (5)(a)5. requires that an insurer provide notice of its election to use the schedule of maximum charges:

> 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*.

(Emphasis added.)

II.

State Farm's PIP policy recognizes the statutory obligation to pay reasonable charges: "We will pay in accordance with the No-Fault Act properly billed and documented reasonable charges for bodily injury to an insured caused by an accident resulting from the ownership, maintenance, or use of a motor vehicle. . . ." The policy includes a definition of reasonable charges that refers specifically to the schedule of maximum charges:

> Reasonable Charge, which includes reasonable expense, means an amount determined by us to be reasonable in accordance with the No-Fault Act, considering *one or more of the following*:
>
> 1. usual and customary charges;
> 2. payments accepted by the provider;
> 3. reimbursement levels in the community;
> 4. various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages;
> 5. *the schedule of maximum charges in the No-Fault Act*[;]

> 6. other information relevant to the reasonableness of the charge for the service, treatment, or supply; or
>
> 7. Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, if the coding policy or payment methodology does not constitute a utilization limit.

(Emphasis added.) The policy contains an additional provision referring to the schedule of maximum charges:

> We will limit payment of Medical Expenses described in the Insuring Agreement of this policy's No-Fault Coverage to 80% of a properly billed and documented reasonable charge, but *in no event will we pay more than 80% of the following No-Fault Act "schedule of maximum charges"* including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers: [reciting statutory schedule].

(Emphasis added.)

III.

In a dispute over the amount of payments due for MRIs arising from nineteen individual PIP claims, a final judgment adverse to State Farm was entered by the trial court on "the issue of whether State Farm's policy 'lawfully invokes the schedule of maximum

charges . . . set forth in section 627.736(5)(a)(1).'" *MRI Assocs.*, 252 So. 3d at 774 n.1. On appeal, the Second District addressed petitioner's argument "that State Farm must elect either the reasonable charge method of calculation under section 627.736(5)(a) or the schedule of maximum charges method of calculation under section 627.736(5)(a)(1) and that because its policy includes both, State Farm relies on an 'unlawful hybrid method' of reimbursement calculation." *Id.* at 775-76. The court also considered petitioner's claim that State Farm's attempt to use this "unlawful" method requires that it "use the reasonable charge method as outlined in the definitions section of its policy and section 627.736(5)(a)." *Id.* at 776.

Based on the policy and statutory provisions that we have already set forth above, the Second District recognized that "[t]he State Farm policy tracks the method of reimbursement calculation outlined in section 627.736(5)(a) and the limitation set forth in section 627.736(5)(a)(1)." *Id.* at 775 (footnote omitted). After discussing our decisions in *Virtual Imaging* and *Orthopedic Specialists*, the district court pointed out that neither decision "applies to policies created after the 2012 amendment to the PIP statute, which the State Farm policy at issue in this case was." *Id.* at 777. But in refuting the challenge to the legality of State Farm's policy provisions, the district court relied on our statement in *Orthopedic Specialists* "that the insurer's 'PIP policy cannot contain a statement that the insurer will not pay eighty percent of reasonable charges because no insurer can disclaim the PIP

statute's reasonable medical expenses coverage mandate.'" *Id.* (quoting *Orthopedic Specialists*, 212 So. 3d at 977). And in its discussion of our decision in *Virtual Imaging*, the district court focused on the manner in which the statute we interpreted there was organized: "By placing the reasonable charge method and the fee schedules limitation in two separate but coequal subsections of 627.736(5)(a)"—that is, subsections (5)(a)1. and (5)(a)2.—"the legislature created two distinct reimbursement calculation methodologies." *Id.* at 776.

Relying on that understanding, the district court pointed out that "[i]n 2012 the legislature substantially amended section 627.736(5), setting forth the schedule of maximum charges limitation as a subsection of the reasonable charge calculation methodology"—by moving the provision enumerating various factors for determining reasonableness (characterized by the district court as the reasonable charge method) from subsection (5)(a)1. to subsection (5)(a) and moving the schedule of maximum charges from subsection (5)(a)2. to subsection (5)(a)1. *Id.* at 777-78. From this reorganization of the statute, the district court concluded "that there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer." *Id.* at 778.

Reasoning that "an insurer may not disclaim the fact-dependent calculation"—that is, use of the factors for determining reasonableness enumerated in subsection (5)(a)—but "it may elect to limit its payment in accordance with the schedule of maximum charges under subsection (5)(a)(1)(a)-(f)," the district court

rejected the "argument that State Farm's policy contains an 'unlawful hybrid method' of reimbursement calculation and is therefore impermissibly vague." *Id.* The district court thus concluded that "State Farm's inclusion of the statutory factors in its definition of reasonable charges tracks the PIP statute and is not inconsistent with the policy language limiting reimbursement to the schedule of maximum charges." *Id.*

The district court completed its analysis by focusing on the reference in the policy to the schedule of maximum charges:

> State Farm's policy clearly and unambiguously states that "in no event will *we* pay more than 80% of the . . . *No-Fault Act* 'schedule of maximum charges.'" The policy also includes language virtually identical to that of section 627.736(5)(a)(1)(a)-(f), listing verbatim all of the applicable fee schedules that it will use to limit reimbursement.

Id. And the district court compared this policy language to the policy provision we approved in *Orthopedic Specialists*: "State Farm's policy language is even more clear and unambiguous than that at issue in *Orthopedic Specialists*, which 'state[d] that "[a]ny amounts payable" for medical expense reimbursements "shall be subject to any and all limitations, authorized by section 627.736, . . . including . . . all fee schedules."'" *Id.* (alterations in original) (quoting *Orthopedic Specialists*, 212 So. 3d at 977).

Finally, the district court certified the following question 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)?

Id. at 778-79.

IV.

Unremarkably, the arguments the parties present to us center on the analysis adopted by the district court. MRI Associates contends—as it did in the district court—that section 627.736(5)(a) contains two mutually exclusive methods of calculating the amount of reasonable reimbursement—namely, (1) the method set forth in subsection (5)(a)'s enumeration of factors for determining reasonableness, and (2) the maximum schedule of charges set forth in subsection (5)(a)1. MRI Associates further contends that State Farm's election to use the limitations of the schedule of maximum charges in subsection (5)(a)1. was improper because the policy also referred to the use of factors enumerated in subsection (5)(a)—described in the certified question as "a fact-dependent calculation of reasonable charges." According to MRI Associates, the policy's adoption of an improper "hybrid-payment methodology"

was nugatory and the use by State Farm of the schedule of maximum charges is therefore precluded. Relying on our decision in *Orthopedic Specialists*, State Farm counters by arguing that there is no basis for condemning its policy for adopting an illegal hybrid payment methodology. State Farm emphasizes that the schedule of maximum charges is designed to operate as a limitation on reimbursement—imposing a cap on the amount of payments otherwise payable—rather than a provision that must operate in isolation from the other provisions of the statute related to the determination of reasonableness.[1]

V.

"Because the question presented requires this Court to interpret provisions of the Florida Motor Vehicle No-Fault Law—specifically, the PIP statute—as well as to interpret the insurance policy, our standard of review is de novo." *Virtual Imaging*, 141 So. 3d at 152.

When "interpreting an insurance contract," this Court is "bound by the plain meaning of the contract's text." *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569 (Fla. 2011). We are similarly bound by the plain meaning of the text of the provisions of the PIP statute. We thus are guided by "what Justice Thomas has described as the 'one, cardinal canon [of

[1] The parties present other arguments that are either without merit or need not be addressed to resolve the issue presented by this case. We will not further comment on those arguments.

construction] before all others'—that is, we 'presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 958 (Fla. 2020) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). On the question presented here—which ultimately turns on the interpretation of the PIP statute—we conclude that the meaning of the governing text is clear beyond any doubt.

We have never held that the "reasonable charge method" and the "schedule of maximum charges" are mutually exclusive methods for determining the reasonableness of reimbursements. Neither *Virtual Imaging* nor *Orthopedic Specialists* contains any such holding. Rather than being dictated by these precedents, the controversy in this case is readily answered by the statutory text, which contains provisions that were not applicable in those cases and that wholly undermine the notion that section 627.736(5) establishes mutually exclusive reimbursement methodologies.

The issue presented in *Virtual Imaging* was whether the insurer was required to include a specific election in its policy to use the limitations of the statutory maximum fee schedules. *Virtual Imaging*, 141 So. 3d at 150. The Court decided that such an election in the policy was required. *Id.* We reasoned 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 (citing *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.*, 63 So. 3d 63, 67-68 (Fla. 4th DCA 2011)). Because the necessary specific election was not contained in the policy at issue, the Court had no basis for deciding how a policy containing such an election would be applied. Specifically, the Court had no reason to consider and decide whether an election of the limitations of the schedule of maximum charges would preclude an insurer from relying on the other statutory factors for determining reasonableness. Our characterization in *Virtual Imaging* of the PIP statute as "afford[ing] insurers two different mechanisms for calculating reimbursements" by no means establishes that those mechanisms are mutually exclusive.

Orthopedic Specialists addressed the sufficiency of the policy notice provided by the insurer of its election to use statutory fee schedule limitations. *Orthopedic Specialists*, 212 So. 3d at 974. As in *Virtual Imaging*, we recognized 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 977 (quoting *Virtual Imaging*, 141 So. 3d at 158). The focus of our analysis was whether the policy notice was ambiguous—a question not at issue in the case now on review—and therefore should be interpreted against the insurer. Having decided that the broad notice contained in the policy was sufficient and that the insurer was therefore entitled to rely on the fee schedule

limitations, we were not called on to decide how the policy would otherwise be applied.

Of course, here we are addressing a version of the statute that we have not previously interpreted. 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. 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. On the contrary, the language signals that the insurer is given an option that may be used in

addition to other options that are authorized. This notice language echoes the underlying authorization to limit reimbursements under the schedule of maximum charges: "The insurer *may limit* reimbursement to 80 percent of the [listed] schedule of maximum charges." § 627.736(5)(a)1., Fla. Stat. (emphasis added). Given the full context of these provisions, a reasonable reading of the statutory text requires that reimbursement *limitations* based on the schedule of maximum charges be understood—as State Farm contends—simply as an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates. By its very nature, a limitation based on a schedule of maximum charges establishes a ceiling but not a floor.

We rephrase the certified question as follows:

> Does section 627.736(5)(a), Florida Statutes (2013), preclude an insurer that elects to limit PIP reimbursements based on the schedule of maximum charges from also using the separate statutory factors for determining the reasonableness of charges?

We answer this question in the negative.

VI.

We therefore reject the argument that State Farm has used a prohibited hybrid-payment methodology, and we approve the result reached by the Second District. No basis has been presented for invalidating

State Farm's election of the limitations of the schedule of maximum charges.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

GROSSHANS, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal Direct Conflict of Decisions/ Certified Great Public Importance

Second District—Case No. 2D16-4036

(Hillsborough County)

David M. Caldevilla of de la Parte & Gilbert, P.A., Tampa, Florida; Kristin A. Norse and Stuart C. Markman of Kynes, Markman & Felman, P.A., Tampa, Florida; Craig E. Rothburd of Craig E. Rothburd, P.A., Tampa, Florida; Scott R. Jeeves of Jeeves Law Group, P.A., St. Petersburg, Florida; and John V. Orrick, Jr. of Law Offices of John V. Orrick, P.L., Tampa, Florida,

for Petitioner

Marcy Levine Aldrich and Nancy A. Copperthwaite of Akerman LLP, Miami, Florida; Chris W. Altenbernd of Banker Lopez Gassler P.A., Tampa, Florida; and D. Matthew Allen of Carlton Fields Jorden Burt P.A., Tampa, Florida,

for Respondent

Mac S. Phillips of Phillips Tadros, P.A., Fort Lauderdale, Florida; Kenneth J. Dorchak of Buchalter, Hoffman & Dorchak, North Miami, Florida; Stuart L. Koenigsberg of Stuart L. Koenigsberg, P.A. Miami, Florida; and Melisa L. Coyle of The Coyle Law Firm, P.A., Miami Beach, Florida,

for Amicus Curiae Floridians for Fair Insurance, Inc.

Edward H. Zebersky of Zebersky Payne Shaw Lewenz, LLP, Fort Lauderdale, Florida; and Lawrence Kopelman of Lawrence M. Kopelman, P.A., Plantation, Florida,

for Amicus Curiae Florida Medical Association

Maria Elena Abate of Colodny Fass, Sunrise, Florida, and L. Michael Billmeier, Jr. of Colodny Fass, Tallahassee, Florida,

for Amici Curiae American Property Casualty Insurance Association and Personal Insurance Federation of Florida

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FL 33802-0327**

July 18, 2018

CASE NO.: 2D16-4036
L.T. No.: 14-CA-008634

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	v.	M R I ASSOCIATES OF TAMPA, INC. D/ B/ A PARK PLACE M R I
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

The appellant's motion for extension of time to file a response is granted to the extent that the response filed on June 29, 2018, is accepted as timely filed.

The appellee's motion for rehearing is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Chris W. Altenbernd, Esq.	Nancy A. Copperthwaite, Esq.
David M. Caldevilla, Esq.	Scott R. Jeeves, Esq.
Kristin A. Norse, Esq.	Kenneth P. Hazouri, Esq.
Craig E. Rothburd, Esq.	Sandra L. Heller, Esq.
Maria Elena Abate, Esq.	Pat Frank, Clerk

Stuart C. Markman, Esq.
David Matthew Allen, Esq.
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John V. Orrick, Esq.

ec

/s/ Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel [SEAL]
Clerk

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED

IN THE DISTRICT
COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant,

v.

MRI ASSOCIATES OF TAMPA, INC., d/b/a PARK PLACE MRI,

Appellee.

Case No. 2D16-4036

Opinion filed May 18, 2018.

Appeal from the Circuit Court for Hillsborough County; Claudia Isom, Judge.

D. Matthew Allen and Chris W. Altenbernd of Carlton Fields Jorden Burt, P.A., Tampa, and Marcy Levine Aldrich and Nancy A. Copperthwaite of Ackerman LLP, Miami, for Appellant.

David M. Caldevilla of de la Parte & Gilbert, P.A.; Kristin A. Norse and Stuart C. Markman of Kynes, Markman, Felman, P.A.; Craig E. Rothburd of Craig E. Rothburd, P.A., John V. Orrick, Jr., of the Law Offices of John V. Orrick, P.L., Tampa, and Scott R. Jeeves of Jeeves Law Group, P.A., St. Petersburg, for Appellee.

SLEET, Judge.

State Farm Mutual Automobile Insurance Company appeals the final declaratory judgment denying its motion for summary judgment and entering final judgment in favor of MRI Associates of Tampa, Inc., d/b/a Park Place MRI (Park Place). The circuit court ruled that State Farm's Personal Injury Protection (PIP) policy failed to clearly and unambiguously elect to limit reimbursement payments to the schedule of maximum charges described in section 627.736(5)(a)(1)–(5), Florida Statutes (2013). Because the express language of State Farm's PIP policy does clearly and unambiguously elect to limit reimbursement payments for medical expenses to the schedule of maximum charges, we reverse.

The facts are undisputed in this case. This action arises from nineteen individual PIP claims involving State Farm insureds who were injured in automobile accidents in 2013, received MRIs from Park Place, and

subsequently executed assignments of benefits to Park Place. Park Place submitted the bills to State Farm under the insureds' PIP policies, and State Farm paid portions of each of the nineteen bills in accordance with its interpretation of its policy. Park Place disputed the amounts paid by State Farm, and State Farm filed an action seeking a declaration of its rights and obligations under its policy and the PIP statute, section 627.736. Park Place countersued, seeking a declaration of its rights and obligations under the State Farm policy and the PIP statute and an injunction to prevent State Farm from limiting its payments for charges to the schedule of maximum charges.[1]

To calculate the amount payable to Park Place for the MRI charges at issue, State Farm relied on the following language from its policy:

> *We* will pay in accordance with the *No-Fault Act* properly billed and documented *reasonable charges* for *bodily injury* to an *insured* caused by an accident resulting from the ownership, maintenance, or use of a *motor vehicle* as follows:

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[1] In their appellate briefs and at oral argument, the parties also disputed whether the actual payments made by State Farm were in compliance with the schedule of maximum charges limitation. However, by stipulation of the parties, the trial court's summary judgment order was limited to the issue of whether State Farm's policy "lawfully invokes the schedule of maximum charges . . . set forth in section 627.736(5)(a)(1)"; therefore, whether the amount actually paid by State Farm complies with the schedule of maximum charges was not before the trial court and is thus outside the scope of our appellate review.

. . . .

We will limit payment of **Medical Expenses** described in the **Insuring Agreement** of this policy's No-Fault Coverage to 80% of a properly billed and documented *reasonable charge*, but in no event will we pay more than 80% of the following *No-Fault Act* "schedule of maximum charges" including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers.

The policy defines a reasonable charge as follows:

Reasonable Charge, which includes reasonable expense, means an amount determined by *us* to be reasonable in accordance with the *No-Fault Act*, considering one or more of the following:

1. usual and customary charges;
2. payments accepted by the provider;
3. reimbursement levels in the community;
4. various federal and state medical fee schedules applicable to *motor vehicle* and other insurance coverages;
5. the schedule of maximum charges in the *No-Fault Act*[;]
6. other information relevant to the reasonableness of the charge for the service, treatment, or supply; or

> 7. Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, if the coding policy or payment methodology does not constitute a utilization limit.

The State Farm policy tracks the method of reimbursement calculation outlined in section 627.736(5)(a)[2] and the limitation set forth in section 627.736(5)(a)(1).[3] State Farm contends that it is authorized under the 2013 PIP statute to limit its maximum payment to eighty percent of the schedule of maximum charges under section 627.736(5)(a)(1). Park Place disagrees, arguing that State Farm must elect either the

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[2] Section 627.736(5)(a) provides:

> **(5) Charges for treatment of injured persons. –**
>
> (a) A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered. . . . In determining whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

[3] Section 627.736(5)(a)(1) provides that "[t]he insurer may limit reimbursement to 80 percent of the . . . schedule of maximum charges."

reasonable charge method of calculation under section 627.736(5)(a) or the schedule of maximum charges method of calculation under section 627.736(5)(a)(1) and that because its policy includes both, State Farm relies on an "unlawful hybrid method" of reimbursement calculation. Park Place contends that because State Farm cannot elect both calculation methods, it must use the reasonable charge method as outlined in the definitions section of its policy and section 627.736(5)(a). We disagree.

This court reviews a final summary judgment de novo. Motzenbecker v. State Farm Mut. Auto. Ins. Co., 123 So. 3d 600, 602 (Fla. 2d DCA 2013) (reviewing a ruling on cross-motions for summary judgment where both parties sought declaratory relief); see also Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 975 (Ha. 2017) ("Because the question presented requires this Court to interpret provisions of the Florida Motor Vehicle No-Fault Law—specifically, the PIP statute—as well as to interpret the insurance policy, our standard of review is de novo." (quoting Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc., 141 So. 3d 147, 152 (Fla. 2013))). "'[L]egislative intent is the polestar that guides a court's inquiry under the No-Fault Law,' including the PIP statute. 'Such intent is derived primarily from the language of the statute.'" Virtual Imaging, 141 So. 3d at 154 (citation omitted) (quoting Allstate Ins. Co. v. Holy Cross Hosp., Inc., 961 So. 2d 328, 334 (Fla. 2007)).

In 1971 the Florida Legislature enacted the Florida Motor Vehicle No-Fault Law[4] "to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault[] and to require motor vehicle insurance securing such benefits." Id. at 152 (quoting § 627.731, Fla. Stat. (2008)). The mandate that an insurer reimburse a percentage of the reasonable expenses for medically necessary services "is the heart of the PIP statute's coverage requirements." Id. at 155. Under the 2013 version of the PIP statute, an insurer is required to pay the reasonable charges for medically necessary services under section 627.736(5)(a); however, it may elect to limit its payment using the schedule of maximum charges under section 627.736(5)(a)(1). See Virtual Imaging, 141 So. 3d at 150 ("[T]he PIP statute, section 627.736, *requires* the insurer to pay for 'reasonable expenses . . . for medically necessary . . . services' but merely ***permits*** the insurer to use the Medicare fee schedules as a basis for limiting reimbursements." (citation omitted)). To make this election, the insurer must provide notice to the insured in the policy. § 627.736(5)(a)(5); see also Orthopedic Specialists, 212 So. 3d at 976-77.

In Virtual Imaging, the Florida Supreme Court considered "the effect of the 2008 amendments [to the PIP statute] on an insurer's ability to limit reimbursements" before the legislature enacted the notice requirement in 2012. 141 So. 3d at 154. The 2008 PIP statute contained language similar to the 2013 PIP

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[4] See §§ 627.730–.7405.

statute regarding the reasonable charge calculation method and the schedule of maximum charges limitation in subsections (5)(a)(1) and (5)(a)(2), respectively. By placing the reasonable charge method and the fee schedules limitation in two separate but coequal subsections of 627.736(5)(a), the legislature created two distinct reimbursement calculation methodologies. Id. at 156 ("[T]here ***are*** two different methodologies for calculating reimbursements to satisfy the PIP statute's reasonable medical expenses coverage mandate."). The supreme court held that the statute thus "offered insurers a choice . . . to limit reimbursements based on the Medicare fee schedules or . . . based on the [reasonable charge] factors enumerated in section 627.736(5)(a)(1)." Id. at 157. Relying on the permissive language of section 627.736(5)(a)(2), the supreme court explained that an "insurer must clearly and unambiguously elect the [schedule of maximum charges] payment methodology in order to rely on it." Id. at 158 (citing Kingsway Amigo Ins. Co. v. Ocean Health, Inc., 63 So. 3d 63, 67-68 (Fla. 4th DCA 2011)). Because the insurer's policy made no specific reference to the schedule of maximum charges, the supreme court ultimately concluded that it could not limit its reimbursement based on those fee schedules. Id. at 160.

In Orthopedic Specialists, the supreme court considered the 2009 version of the PIP statute, which included language identical to the 2008 statute defining the reasonable charge and schedule of maximum charges calculation methodologies in subsections (5)(a)(1) and (5)(a)(2), respectively. Relying on Virtual Imaging, the

supreme court reaffirmed that the reasonable charge calculation methodology and the schedule of maximum charges limitation were separate and distinct and that each individually "satisf[ied] the PIP statute's reasonable medical expenses coverage mandate." Orthopedic Specialists, 212 So. 3d at 976. But the supreme court went on to explain that the insurer's "PIP policy cannot contain a statement that the insurer will not pay eighty percent of reasonable charges because no insurer can disclaim the PIP statute's reasonable medical expenses coverage mandate" and that the policy cannot "state that the insurer will calculate benefits solely under the Medicare fee schedules contained within section 627.736(5)(a)(2) because the Medicare fee schedules are not the only applicable mechanism for calculating reimbursements under the permissive payment methodology." Id. at 977 (noting that the schedule of maximum charges outlined in section 627.736(5)(a)(2) contained both Medicare fee schedules and non-Medicare fee schedules). Accordingly, the supreme court expressly rejected the argument urged by Park Place in this appeal, that an insurer's policy must completely disclaim the reasonable charge methodology to elect the schedule of maximum charges limitation. Id. at 975 (rejecting the Fourth District's holding that a "policy must make it inescapably discernable that it will not pay the 'basic' statutorily required coverage [mandate of eighty percent of reasonable expenses for medically necessary services] and will instead substitute the Medicare fee schedules as the exclusive form of reimbursement" (alteration in original) (quoting Orthopedic Specialists v. Allstate Ins. Co.,

177 So. 3d 19, 26 (Fla. 4th DCA 2015))). Because the insurer's policy "clearly and unambiguously state[d] that '[a]ny amounts payable' for medical expense reimbursements 'shall be subject to any and all limitations, authorized by section 627.736, . . . including . . . all fee schedules,'" the supreme court concluded that the policy adequately placed the insured and service providers on notice of the insurer's election of the schedule of maximum charges limitation. Id. at 977-78 (second alteration in original).

Significantly, neither Virtual Imaging nor Orthopedic Specialists applies to policies created after the 2012 amendment to the PIP statute, which the State Farm policy at issue in this case was. See Orthopedic Specialists, 212 So. 3d at 974; Virtual Imaging, 141 So. 3d at 150 ("[O]ur 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 Medicare fee schedule methodology, which was January 1, 2008, through the effective date of the 2012 amendment, which was July 1, 2012.").

In 2012 the legislature substantially amended section 627.736(5), setting forth the schedule of maximum charges limitation as a subsection of the reasonable charge calculation methodology. Ch. 2012-197, § 10, at 2743-44, Laws of Fla. As a result of this amendment, the reasonable charge and schedule of maximum charges methodologies are no longer coequal subsections of 627.736(5)(a); instead the reasonable charge method is set forth in subsection (5)(a), and the schedule of maximum charges limitation is provided

in subsection (5)(a)(1). Based on the current construction of the PIP statute, we conclude that there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer. See Bd. of Trs., Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 126 (Fla. 2016) ("When a statute is amended to change a key term or to delete a provision, 'it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment.'" (quoting Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla.1977))). The 2013 PIP statute includes the fact-dependent calculation of reasonable charges as a part of the definition of "[c]harges for treatment of injured persons" under section 627.736(5)(a). And an insurer may not disclaim the fact-dependent calculation; however, it may elect to limit its payment in accordance with the schedule of maximum charges under subsection (5)(a)(1)(a)–(f). Accordingly, we reject Park Place's argument that State Farm's policy contains an "unlawful hybrid method" of reimbursement calculation and is therefore impermissibly vague. State Farm's inclusion of the statutory factors in its definition of reasonable charges tracks the PIP statute and is not inconsistent with the policy language limiting reimbursement to the schedule of maximum charges.

"Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." Orthopedic Specialists, 212 So. 3d at 975-76 (quoting Washington Nat'l Ins.

Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013)). State Farm's policy clearly and unambiguously states that "in no event will we pay more than 80% of the . . . *No-Fault Act* 'schedule of maximum charges.'" The policy also includes language virtually identical to that of section 627.736(5)(a)(1)(a)–(f), listing verbatim all of the applicable fee schedules that it will use to limit reimbursement. State Farm's policy language is even more clear and unambiguous than that at issue in Orthopedic Specialists, which "state[d] that '[a]ny amounts payable' for medical expense reimbursements 'shall be subject to any and all limitations, authorized by section 627.736, . . . including . . . all fee schedules.'" 212 So. 3d at 977; see also Allstate Indem. Co. v. Markley Chiropractic & Acupuncture, LLC, 226 So. 3d 262, 266 (Fla. 2d DCA 2016), review denied, no. SC16-1100 (Fla. Aug. 4, 2017). Because the State Farm policy includes mandatory language expressly limiting reimbursement for reasonable medical expenses to the schedule of maximum charges set forth in section 627.736(5)(a)(1)(a)–(f), we conclude that it is sufficient to place insureds and service providers on notice as required by section 627.736(5)(a)(5). Accordingly, we reverse the trial court's order granting summary judgment in favor of Park Place, and we certify the following question 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)?

Reversed and remanded for further proceedings consistent with this opinion; question certified.

CASANUEVA and CRENSHAW, JJ., Concur.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA CIVIL DIVISION

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

MRI ASSOCIATES OF TAMPA, INC., d.b.a. PARK PLACE MRI, as assignee, and individually,

Defendant/Counter-Plaintiff /

Case No. 14-CA-008634

Division D

FINAL DECLARATORY JUDGMENT

(Filed Sep. 6, 2016)

THIS MATTER came before the Court on August 3, 2016, concerning (1) the 'Motion for Summary Judgment and Incorporated Memorandum of Law" filed on June 8, 2016 by the Plaintiff/Counter-Defendant, State Farm Mutual Automobile Insurance Company **("State Farm")**; and (2) the 'Motion for Summary Judgment" filed on June 8, 2016 by the Defendant/Counter-Plaintiff MRI Associates of Tampa, Inc., doing business as Park Place MRI **("Park Place MRI")**, as assignee and individually. On August 18, 2016, the Court entered its "Order Granting MRI Associates, Inc.'s Motion for Final Summary Judgment, and Denying State

Farm Mutual Automobile Insurance Company's Motion for Final Summary Judgment." Accordingly, the Court hereby

ORDERS AND ADJUDGES as follows:

1. With respect to the claims asserted in State Farm's Amended Complaint for Declaratory Relief, final judgment is hereby entered against State Farm and in favor of Park Place MRI, and State Farm shall go hence without day.

2. With respect to Count I of Park Place MRI's Second Amended Counterclaim seeking declaratory relief, final judgment is hereby entered in favor of Park Place MRI and against State Farm, and the Court hereby determines and declares as a matter of law:

> (a) The issue identified in the Stipulated and Agreed Case Management Order dated April 25, 2016 (i.e. "Whether State Farm's Policy Form 9810A lawfully invokes the Schedule of Maximum Charges and payment calculation methodology set forth in section 627.736(5)(a)1-5, Florida Statutes (2012-2015)") is answered in the negative,
>
> (b) Specifically, State Farm has failed to clearly and unambiguously elect the Medicare Fee Schedule Method in Policy Form 9810A, and has instead adopted an unauthorized hybrid method comprised of elements from both the Medicare Fee Schedule Method described in Section 627.736(5)(a)1-5, Florida Statutes (2012-2015) and the fact-dependent Reasonable Amount Method described in Section 627.736(5)(a), Florida Statutes (2012-2015).

(c) As a result, State Farm is required to pay Park Place MRI's PIP claims at issue in this case in accordance with the Reasonable Amount Method by default, instead of the unauthorized hybrid method described in Policy Form 9810A or the Medicare Fee Schedule Method, and State Farm is not authorized to rely on Medicare's limiting charge fee schedule.

3. The Court finds that the Park Place MRI has exercised its election of remedies under Count I, and Count II of Park Place MRI's Second Amended Counterclaim seeking injunctive relief is moot.

4. This Court reserves jurisdiction to determine claims for reasonable attorney fees and costs as authorized by law and to grant any such other relief as the court deems necessary and proper.

DONE and ORDERED, in chambers, in Tampa, Hillsborough County, Florida, this 6th day of September, 2016.

Claudia Rickert Isom
/s/ [Illegible]
14-CA-008634 9/6/2016 10:54:19 AM
Honorable Claudia Isom
Circuit Court Judge

Conformed copies furnished to:

State Farm's Counsel: Chris W. Altenbernd, Esquire, D. Matthew Allen, Esquire, Marcy Levine Aldrich, Esquire, Sandra L. Heller, Esquire, and Kenneth P. Hazouri, Esquire

Park Place MRI's Counsel: Richard A. Gilbert, Esquire, David M. Caldevilla, Esquire, Stuart C. Markman, Esquire, Kristin A. Norse, Esquire, Craig E. Rothburd, Esquire, Scott R. Jeeves, Esquire, and John V. Orrick, Jr., Esquire

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA CIVIL DIVISION

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

MRI ASSOCIATES OF TAMPA, INC., d.b.a. PARK PLACE MRI, as assignee, and individually,

Defendant/Counter-Plaintiff /

Case No. 14-CA-008634

Division D

ORDER GRANTING MRI ASSOCIATES OF TAMPA, INC.,'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT

(Filed Aug. 18, 2016)

THIS MATTER came before the Court on August 3, 2016, concerning: (1) the "Motion for Summary Judgment and Incorporated Memorandum of Law" filed on June 8, 2016 by the Plaintiff/Counter-Defendant, State Farm Mutual Automobile Insurance Company ("**State Farm**"); and (2) the "Motion for Summary Judgment"

filed on June 8, 2016 by the Defendant/CounterPlaintiff, MRI Associates of Tampa, Inc., doing business as Park Place MRI ("**Park Place MRI**"), as assignee and individually. The court has reviewed the court file, the applicable provisions of F.S. § 627.736, and the demonstrative exhibits submitted at the hearing and finds as follows:

1. The parties entered into Stipulations of Fact Related to Cross-Motions for Summary Judgment which were filed with the Clerk of Court on June 6, 2016;

2. The parties agree that there is no genuine issue as to any material fact and that the court can rule on this issue as a matter of law; and,

3. The court adopts the stipulations of fact as the factual basis for its ruling.[1]

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[1] Although not addressed by the parties at the hearing on the competing motions, State Farm's Explanation of Review relies on the 2007 "Limiting Charge of Medicare physician fee schedule" rather than the schedule in effect on March 1 of the service year. This varies significantly from both its policy language and the statutory language. It would appear that State Farm used the 2007 Medicare reimbursement rate as the maximum amount of reasonable charges, rather than the minimum amount of reimbursement available. The statute provides that the applicable fee schedule under Medicare is the fee schedule or payment limitation in effect on March 1st of the service year in which the services are rendered (the policies in this lawsuit were issued in 2013). In other words, the legislature intended the 2007 Medicare schedule be used to establish an amount below which the reimbursement rate would not go. Instead, State Farm used it to set the ceiling. This contradicts the expressed intent of the legislature.

Based on the stipulations and the court's review, it is therefore,

ORDERED AND ADJUDGED: The court **GRANTS** MRI Associates of Tampa, Inc. d/b/a Park Place MRI's Motion for Final Summary Judgment and **DENIES** State Farm Mutual Automobile Insurance Company's Motion for Final Summary Judgment on its Amended Complaint for Declaratory Judgment. It is further,

ORDERED AND ADJUDGED: Based on the court's ruling, the court **DENIES** State Farm Mutual Automobile Insurance Company's additional prayer for relief in its Amended Complaint For Declaratory Judgment filed April 1, 2015, that the court declare no additional PIP or MPC benefits or other compensation are owed to MRI Associates of Tampa, Inc. d/b/a Park Place MRI for the MRI's performed on State Farm Mutual Automobile Insurance Company's Insureds. The court directs that MRI Associates of Tampa, Inc. d/b/a Park Place MRI submit a Final Declaratory Judgment for the court's execution. The court reserves jurisdiction to award MRI Associates of Tampa, Inc. d/b/a Park Place MRI its claims for reasonable attorney fees and costs as authorized by law and to grant any such other relief as the court deems necessary and proper.

DONE and ORDERED, in chambers, in Tampa, Hillsborough County, Florida, this 18th day of August, 2016.

/s/ Electronically Conformed 8/18/2016
Hon. Claudia Rickert Isom
Circuit Judge

Electronically Conformed Copies Provided to Counsel Registered on JAWS

Supreme Court of Florida

WEDNESDAY, JANUARY 19, 2022

CASE NO.: SC18-1390
Lower Tribunal No(s).:
2D16-4036;
292014CA008634A001HC

MRI ASSOCIATES OF TAMPA, INC., ETC.	vs.	STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Petitioner(s)		Respondent(s)

Petitioner's Motion for Rehearing or Clarification is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
Clerk, Supreme Court

[SEAL]

lc
Served:

CHRIS W. ALTENBERND
CRAIG E. ROTHBURD
NANCY A. COPPERTHWAITE
KENNETH JOHN DORCHAK
MARIA ELENA ABATE
L. MICHAEL BILLMEIER JR.
D. MATTHEW ALLEN
MELISA L. COYLE

JOHN V. ORRICK JR.
EDWARD HERBERT ZEBERSKY
LAWRENCE M. KOPELMAN
SCOTT JEEVES
STUART LEE KOENIGSBERG
DAVID M. CALDEVILLA
KRISTIN A. NORSE
STUART C. MARKMAN
KENNETH PAUL HAZOURI
MAC S. PHILLIPS
MARCY LEVINE ALDRICH
HON. RONALD N. FICARROTTA, CHIEF JUDGE
HON. MARY BETH KUENZEL, CLERK
HON. CINDY STUART, CLERK

In the Florida Supreme Court

MRI ASSOCIATES OF TAMPA, INC., d.b.a. Park Place MRI,

Petitioner,

vs. **Case No. SC18-1390**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent. /

PETITIONER'S MOTION FOR REHEARING OR CLARIFICATION

(Filed Dec. 23, 2021)

Pursuant to Florida Rules of Appellate Procedure 9.300 and 9.330, the Petitioner, MRI Associates of Tampa, Inc., doing business as Park Place MRI, hereby moves for rehearing or clarification concerning this Honorable Court's appellate opinion and its order denying the Petitioner's motion for appellate attorneys' fees, both of which were issued on December 9, 2021. In support of this motion, the Petitioner states:

A. Introduction

1. This appeal involves a question that was certified as a matter of great public importance by the Second District in *State Farm Mutual Automobile Insurance Co. v. MRI Associates of Tampa, Inc.*, 252 So.

3d 773 (Fla. 2d DCA 2018), involving medical expenses covered by personal injury protection ("**PIP**") insurance.

2. In the trial court, State Farm sued the Petitioner for declaratory relief concerning 19 claims for PIP benefits for medical expenses incurred by 19 of its patients who were insured by State Farm (R 8-116) . . . [footnote omitted] The Petitioner responded with a counterclaim against State Farm for declaratory judgment and other relief (R 152-169, 176-197). The parties subsequently filed competing motions for summary judgment (R 453-524), which were based on and governed by a limited set of stipulated undisputed facts (R 170-175, 207-370). Based on those stipulated facts (R 1163, ¶3), trial court denied State Farm's motion, granted the Petitioner's motion, and held that State Farm's Policy Form 9810A does not "lawfully invoke[ ] the Schedule of Maximum Charges and payment calculation methodology set forth in section 627.736(5)(a)1-5, Florida Statutes (2012-2015)" (R 1176).

3. State Farm appealed to the Second District (R 1171-1173). In *State Farm Mut. Auto. Ins. Co. v. MRI Associates of Tampa, Inc.*, 252 So.3d 773 (Fla. 2d DCA 2018), the Second District reversed the trial court's decision, but its decision was primarily based on arguments raised *sua sponte* by the Second District itself (i.e., the Legislature's renumbering of the PIP statute's subsections), that State Farm never raised or preserved, and that the parties were never given the opportunity to brief. Notably, the Second District's

decision was not based on any analysis of Section 627.736(5)(a)5, Florida Statutes (2012-present).

4. Based on the question that the Second District's decision had certified as a matter of great public importance,[2] the Petitioner sought discretionary review from this Court, and asserted that the Second District's decision was based on arguments that were never raised by State Farm, were waived, and could not serve as a lawful basis for reversal of the trial court's judgment, and that the Second District's basis for reversal was otherwise incorrect. *See*, *e.g.*, Petitioner's Corrected Am. Initial Brief at p. 11-12 (filed 4/23/2020).

5. At page 11, this Court's Opinion acknowledges that, in this iteration of the appellate process, "the arguments the parties present to us center on the analysis adopted by the district court." Consistent with the Petitioner's briefing in this Court, this Court's Opinion rejected the Second District's reasons for reversing the trial court, and stated, "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. . . ." *See*, Opinion at p. 16. However, instead of reversing the Second District's decision, this

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[2] The certified question was, "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 *779 THE INSURER TO LIMIT ITS PAYMENT IN ACCORDANCE WITH THE SCHEDULE OF MAXIMUM CHARGES UNDER SECTION 627.736(5)(a)(1)?" Notably, the certified question does not address the notice requirements of Section 627.736(5)(a)5. *MRI Associates*, 252 So.3d at 778.

Court then approved "the result reached" by the Second District, based on an analysis of the "notice" requirements contained in the first sentence of Section 627.736(5)(a)5, which was never raised by State Farm in the trial court or in the Second District, not addressed by the Second District's analysis, or by State Farm in its answer brief to this Court.[3]

6. The Petitioner respectfully submits that, like the Second District's decision below, this Court's decision reverses the trial court's decisions based on arguments that State Farm never preserved in the trial court or presented in the Second District, and which were not preserved for appeal as a basis for reversing the trial court's judgment. In addition, this Court has overlooked or misapprehended the undisputed facts of

---

[3] Like the Second District's decision below, State Farm's motion for summary judgment (R 495, 500, 506-513), its briefs in the Second District (RII 121, 134-136, 877-879), and its answer brief to this Court do not raise the specific requirements imposed by the first sentence of Section 627.736(5)(a)5. Instead, State Farm addressed the second sentence of Section 627.736(5)(a)5, and contended that State Farm's policy form 9810A was approved by the Florida Office of Insurance Regulation. *See*, State Farm's Answer Brief (filed 10/25/2019) at p. 17, 30-32. That issue was thoroughly briefed in the trial court and in the Second District, and was not a basis of the Second District's reversal. In its reply brief to this Court, the Petitioner argued, among other things, that "Section 627.736(5)(a)5 allows insurers to rely on the schedule of maximum changes 'only' if the insurance policy has 'a notice at the time of issuance or renewal' of intent to limit payments 'pursuant to' the fee schedule. Here, there is no evidence State Farm provided any of the 19 insured patients such 'a notice at the time of issuance or renewal' or that the policy agrees to pay anything 'pursuant to' the fee schedule." *See*, Petitioner's Reply Brief on the Merits, at p. 7 (filed on 1/3/2020).

this case, as well as the plain and complete text of the PIP statute (§627.736, Fla. Stat.) as amended in 2012.

7. As a result, this Court's opinion gives State Farm and other insurers doing business in Florida the ability to sell illusory PIP insurance coverage that leaves insureds, their health care providers, and the courts with no way to objectively predict, determine, or enforce the precise amount that health care provider can charge and collect, that State Farm must pay, and that insured patients must pay, for medical expenses incurred by insured patients.

* * *

B. This Court and the Second District have reversed the trial court based on arguments that were never raised by State Farm

9. For the second time in two consecutive appeals, the Petitioner is once again faced with an appellate opinion which reverses the trial court's judgment based on arguments that State Farm never preserved as a basis for reversing the trial court's judgment.

10. It is well-settled that an appellate court will not consider arguments not presented to the trial judge. *Dober v. Worrell*, 401 So.2d 1322, 1323-24 (Fla.1981). To preserve an argument on appeal as a basis to reverse the trial court's judgment, that argument must first be presented to the trial judge. *See*, *e.g.*, *City of Orlando v. Birmingham*, 539 So.2d 1133, 1134-35 (Fla. 1989). Moreover, 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).

11. It is "inappropriate" for appellate court to depart from role of neutral tribunal and develop arguments that have not been presented; rather, the appellate court should "work within the framework of the briefs." *See Manatee County School Board v. NationsRent, Inc.*, 989 So.2d 23, 25 (Fla. 2d DCA 2008). *See also*, *City of Miami v. Steckloff*, 111 So.2d 446, 447 (Fla.1959) ("points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs"); *Castor v. State*, 365 So.2d 701, 703 (Fla. 1978) ("As a general matter, a reviewing court will not consider points raised for the first time on appeal."); *Branch Banking & Trust Co. v. Kraz, LLC*, 114 So.3d 273, 275, n. 3 (Fla. 2d DCA 2013) (arguments not raised in initial brief "are not properly before this court"); *J.A.B. Enters. v. Gibbons*, 596 So.2d 1247, 1250 (Fla. 4th DCA 1992) ("an issue not raised in an initial brief is deemed abandoned").

12. When a court *sua sponte* decides issues that are not raised by the parties, it is a violation of procedural 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) .

13. The bases for reversing the trial court's decision expressed in the appellate opinions issued by the Second District and this Court were not raised by State Farm, were waived by State Farm, and could not serve as a lawful basis for reversing the trial court's judgment. As a result, both decisions effectively offer an advisory opinion on issues never raised as a basis for reversing the trial court.

14. For all intents and purposes, an appellate court's reversal of a trial court's decision based on arguments never raised by the party seeking reversal presents an "anti" tipsy coachman approach to appellate review. Under the tipsy coachman doctrine, an appellate court should affirm the trial court's judgment if the trial court reached the right result but for the wrong reasons. *See*, *e.g.*, *Dade County School Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999). Under that doctrine, it is the appellee (i.e., the party seeking to affirm the trial court's judgment), not the appellant (i.e., the party seeking to reverse the trial court's judgment) that may present arguments not previously raised in the trial court. *See*, *Malu v. Sec. Nat'l Ins.* Co, 898 So.2d 69, 73 (Fla. 2005).

15. The Fourth District explained this problem in *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So.3d 866, 868-869 (Fla. 4th DCA 2012). In that case, a circuit court appellate panel reversed a county court's decision on grounds that were not raised by the appellate briefs. On its own initiative, the circuit court *sua sponte* relied on an unpreserved argument to reverse the county court's trial-level

decision. The Fourth District subsequently quashed the circuit court's appellate decision and held:

> [The appellee-plaintiff] has filed a second-tier petition for writ of certiorari directed at a decision of the appellate division of the circuit court. The circuit court reversed county court final orders on an issue that was neither preserved in the county court nor raised in the appellant's brief on appeal. Because **this amounts to a denial of due process**, we grant the writ, quash the appellate decision of the circuit court, and remand for reinstatement of the county court orders.
>
> . . . .
>
> **The . . . appellate panel of the circuit court reversed the county court order on grounds different from those raised by [the appellant-defendant] in its brief. . . .**
>
> . . . .
>
> **An appellate court's reversal based on an unpreserved error, on a ground not argued in a brief, amounts to a denial of due process, which is a departure from a clearly established principle of law. . . . Here, [the appellant-defendant] waived the [arguments] relied upon by the circuit court to reverse by not raising objections at the hearing . . . [and] did not rely on those purported errors as a basis for reversal in its appellate brief in the circuit court. <u>This is a case of "double waiver."</u>**

. . . .

> **. . . We note that the circuit court could not have reversed based upon the tipsy coachman doctrine. That doctrine permits an appellate court to affirm a trial court's decision on a ground other than that raised below, and argued on appeal, where there is "support for the alternative theory or principle of law in the record before the trial court." . . . The tipsy coachman doctrine does not permit a reviewing court to reverse on an unpreserved and unargued basis.**

Advanced, 103 So.3d at 868-869 (emphasis added; citations omitted). This same reasoning should govern the instant case, and prevents the trial court's judgment from being reversed on unpreserved arguments presented for the first time by the appellate court in its written opinion.

C. Timeline of events

16. Assuming arguendo that the Court's basis for reversing the trial court's decision is preserved in record, it also appears that this Court's Opinion overlooks or misapprehends the relevant sequence of events.

17. In this regard, it is especially important to note that State Farm submitted its proposed new insurance policy form 9810A to the Florida Office of Insurance Regulation ***before*** the creation of the new Section 627.736(5)(a)5 requiring "a notice," ***before*** any

appellate court decision mentioned any required notice, ***before*** the Florida Office of Insurance Regulation issued its "Informational Memorandum" concerning approval of "a notice," and ***before*** this Court issued any decisions construing the pre-2012 version of the PIP statute:

10/1/2007	The Florida Motor Vehicle No-Fault Law (including the PIP statute) was automatically repealed by a "sunset" provision. *See*, Ch. 2003-411, §19, Laws of Fla. (2003).
1/1/2008	Effective date of a new version of the Florida Motor Vehicle No-Fault Law. *See*, Ch. 2007-324, §8, Laws of Fla. (2007). Among other things, Section 627.736(5) was amended to include a new reimbursement limitation methodology based on a "schedule of maximum charges" which was governed by various terms and conditions in Section 627.736(5)(a)2-5.
5/18/2011	*Kingsway Amigo Insurance Company v. Ocean Health, Inc.*, 63 So.3d 63, 67 (Fla. 4th DCA 2011) held that Section 627.736 "allows an insurer to **choose between** two different payment calculation methodology options" and "anticipates that an insurer will make a **choice**." (Emph. added).
2/6/2012	State Farm submits its proposed new insurance policy form 9810A to the Florida Office of Insurance Regulation (R 208, 217-264). The "declarations page" is

	defined as being a component part of the insurance policy (R 219) but was not included as part of policy form 9810A submitted to the agency (R 208, 217-264).
3/9/2012	The Florida Legislature passed CS/CS/HB 119 (2021). Among other things, Section 10 of this Bill proposes to create a new Section 627.736(5)(a)5, which would require PIP insurance policies to include "**a notice** at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges. . . ." (www.flsenate.gov/Session/Bill/2012/119/?Tab=BillHistory). Notably, this "notice" provision did not appear in any previous versions of HB 119.
3/12/2012	*DCI MRI, Inc. v. Geico lndem. Co.*, 79 So.3d 840, 842 (Fla. 4th DCA 2012) held that "[s]imply indicating that the insurer would pay in accordance with the [PIP] law 'as amended,' is insufficient to place the insured **on notice** of its intent to pay less than 80% of reasonable expenses incurred as stated in the policy." (Emph. added). Prior appellate decisions concerning the PIP statute's schedule of maximum charges did not mention a "notice" requirement.
5/4/2012	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 [proposed] Section 627.736(5)(a)5., Florida Statutes, resulting from the passage of House Bill 119" which included "a new statutory requirement that insurers provide **a notice** of the schedule of medical charges or 'fee schedule' to insureds if the insurer is limiting reimbursement."

The memorandum instructed insurers that "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**." (R 266; emph. added).

7/1/2012 Effective date of the new Section 627.736(5)(a)5, which requires "a notice" in the insurance policy.

10/5/2012 The Florida Office of Insurance Regulation approved State Farm's new insurance policy form 9810A, without any indication of whether the form was approved for purposes of Section 627.736(5)(a)5, as opposed to the "standard form review process of Section 627.410" referenced in Informational Memorandum OIR-12-02M (R 47, 208, 217-264, 266).

5/4/2012 Chapter 2012-197, Laws of Fla. (2012) (Committee Substitute for Committee Substitute for House Bill No. 119) was approved by the Governor.

7/3/2013 *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So.3d 147 (Fla. 2013) –

- Approved the Fourth District's decisions in *Kingsway* and *DCI MRI*. *Virtual*, 141 So.3d at 150.
- Rejected Geico's argument that there are not two methodologies for determining reasonableness. *Id.* at 156.
- Held that "there *are* two different methodologies for calculating reimbursements to satisfy the PIP statute's reasonable medical expenses coverage mandate." *Id.* at 156.
- Held that PIP insurers have "a **choice** in dealing with their insureds as to whether to limit reimbursements based on the Medicare fee schedules **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 [former] section 627.736(5)(a)1 [now (5)(a)]." *Virtual*, 141 So.3d at 157 (emph. added).
- Dissent by Justice Canady observed that "the view adopted by the majority . . . rest[s] on the interpretive

> fallacy **that §627.736(5)(a)1 and §627.736(5)(a)2, Florida Statutes (2008), respectively established mutually exclusive payment methodologies**." *Virtual*, 141 So.3d at 160 (emph. added).

18. The foregoing sequence of events firmly establishes that State Farm's new insurance policy form 9810A could not have been submitted to the Florida Office of Insurance Regulation for purposes of complying with any "notice" requirement, because the version of HB 119 proposing to enact the "notice" requirement of Section 627.736(5)(a)5 did not yet exist, because *DCI MRI* (holding for the first time that PIP insurers must "place the insured on notice" that they will rely on the schedule of maximum charges) had not yet been issued, and because Informational Memorandum OIR-12-02M (explaining how to submit "filings necessary to implement the notice requirement in Section 627.736(5)(a)5") had not yet been issued.

19. Moreover, State Farm's new policy form was submitted to the Florida Office of Insurance Regulation about 17 months before this Court issued its decision in *Virtual*. So, it is also clear that when State Farm submitted that policy form, it was not trying to comply with any decisions issued by this Court concerning the schedule of maximum charges.

D. The parties' competing motions for summary judgment are strictly governed by a limited set of stipulated facts

20. In its Opinion, it also appears that this Court has overlooked or misapprehended the stipulated undisputed facts that control this lawsuit.

21. The parties' competing motions for summary judgment in this case were strictly governed by a "Stipulated and Agreed Case Management Order" (R 170-174), which required the parties to file a stipulation containing "all facts and evidence on which the parties [would] rely in support of their respective motions for summary judgment" and that "no party [could] rely on additional facts or evidence not contained in or attached to the fact stipulation" (R 172).

22. Thereafter, the parties filed a joint "Stipulation of Fact Related to Cross-Motions for Summary Judgment" (R 207-370). According to that stipulation:

> 6. The document attached hereto as "Exhibit 2" [R 265267] is a true, correct, and authentic copy of Informational Memorandum OIR-12-02M issued by the Florida Office of Insurance Regulation ("FOIR") on or about May 4, 2012. However, Park Place MRI 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).
>
> 7. State Farm filed its Policy Form 9810A with FOIR on February 6, 2012 and FOIR approved the Policy Form 9810A on

> October 5, 2012. However, Park Place MRI does not concede that this has the legal effect of constituting approval within the meaning of Section 627.736(5)(a)5, Florida Statutes (2012-2015), or that FOIR 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. The parties agree that the effect of the FOIR's October 5, 2012 action and the extent (if any) to which FOIR has subject matter jurisdiction or other authority are purely legal issues to be determined by the Court based solely on the facts set forth in this Stipulation and the documents referenced herein and attached hereto.

(R 208-209).

23. Importantly, the parties' stipulation does not establish that State Farm actually submitted its insurance policy form 9810A for purposes of seeking approval of "a notice" for purposes of Section 627.736(5)(a)5, or that the Florida Office of Insurance Regulation actually approved that policy form as including "a notice" required by Section 627.736(5)(a)5, or that State Farm otherwise provided such "a notice" to any of the Petitioner's 19 insured patients at the time of issuance or renewal of their respective insurance policies.

24. To the contrary, it is clear that State Farm submitted the proposed form of an expansive new insurance policy (not merely an isolated "endorsement" which "only contains language to implement the notice

requirement") to the Florida Office of Insurance Regulation on February 6, 2012, without any request for approval of "a notice" required by Section 627.736(5)(a)5 (R 208, 217-264). It is also undisputed that Informational Memorandum OIR-12-02M specifically instructed insurers that "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.**" (R 266; emph. added).

25. Indeed, the parties affirmatively stipulated that the Petitioner did not concede that State Farm's policy form 9810A complies with Informational Memorandum OIR-12-02M or Section 627.736(5)(a)5, or that the Florida Office of Insurance Regulation's approval of that policy form constituted approval within the meaning of Section 627.736(5)(a)5, or that the Florida Office of Insurance Regulation approved that policy form for purposes of Section 627.736(5)(a)5, or that State Farm otherwise complied with Section 627.736(5)(a)5 (R 208-209). These were disputed issues of material fact for which State Farm presented no evidence to establish any compliance with the plain text of Section 627.736(5)(a)5.

E. State Farm presented no evidence of compliance with the requirements imposed by the plain text of Section 627.736(5)(a)5

26. This Court's Opinion quotes U.S Supreme Court Justice Clarence Thomas to embrace the "cardinal canon" of statutory construction which requires courts to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Opinion*, at p. 13 (quoting *Page v. Deutsche Bank Tr. Co. Americas*, 308 So.3d 953, 958 (Fla. 2020) and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)).

27. This Court also embraces the "supremacy-of-text" principle, which holds that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946-947 (Fla. 2020) (quoting, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 56 (2012)).

28. To be certain, the Petitioner also embraces those same principles. However, to properly apply them in this case, it is necessary to read **all** of the related provisions of the PIP statute in *pari materia*, and to give meaning to **all** of the text therein. Indeed, as explained by U.S. Supreme Court Justice Antonin Scalia, "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and

logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 167 (2012). *See also*, *State v. Riley*, 638 So.2d 507, 508 (Fla.1994) (subsections of the same statute "must be read in *pari materia*").

29. At pages 5 and 16 of the Opinion, this Court's analysis focuses on and quotes the first sentence of Section 627.736(5)(a)5, while omitting any reference to or quotation of the remaining sentences therein. The entire text of Section 627.736(5)(a)5 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.

As confirmed by Justice Scalia, the "whole-text canon" requires this Court to consider the entire text of Section 627.736(5)(a)5, which is both relevant and applicable in this case.

30. The plain text of the first sentence of Section 627.736(5)(a)5 requires (a) the insurance policy to include "a notice," (b) which must be provided "at the time of issuance or renewal," and (c) must state that

"the insurer may limit payment pursuant to the schedule of charges specified in" Section 627.736(5)(a).

31. With respect to that first sentence of Section 627.736(5)(a)5, the parties stipulated and the trial court ordered that the parties' competing motions for summary judgment would be based only upon the discreet set of facts contained in the parties' stipulation of fact (R 172). That stipulation of fact does not establish that any of the insurance policies issued to the Petitioner's 19 insured patients in this lawsuit included "a" notice, that such "a" notice was included in any of those insurance policies "at the time of issuance or renewal," or that such "a" notice stated that State Farm "may limit payment pursuant to the schedule of charges. . . ." In other words, the undisputed facts fail to demonstrate that State Farm complied with the plain text of the first sentence of Section 627.736(5)(a)5.

32. Consistent with the "supremacy-of-text" and "whole-text" principles embraced by this Court, "significance and effect must be given to **every word**, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *See*, *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So.2d 599, 606 (Fla. 2006) (emph. added). "No part of a statute, **not even a single word,** should be ignored, read out of the text, or rendered meaningless, in construing the provision." *Scherer v. Volusia County Dept. of Corr.*, 171 So. 3d 135, 139 (Fla. 1st DCA 2015) (emph. added).

33. Accordingly, as correctly explained by this Court in quoting Justice Thomas, when the Florida Legislature inserted the indefinite article "a" before the word "notice" in Section 627.736(5)(a)5, we must "presume that [the] legislature . . . says . . . what it means and means . . . what it says there." *Opinion*, at p. 13 (quoting *Page*, 308 So.3d at 958 and *Germain*, 503 U.S. at 253-254).

34. Although the word "a" is one of the smallest words in the English language, it does have meaning and grammatical significance. The word "a" is an indefinite article that is used to denote "singular nouns." *Schmidt v. State*, 310 So. 3d 135, 137 (Fla. 1st DCA 2021) (citing *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) ("a" is "used as a function word before singular nouns")).

35. The meaning and grammatical significance of the word "a" has even been litigated in the U.S. Supreme Court. Justice Neil Gorsuch, when speaking for the majority of the U.S. Supreme Court (including Justice Clarence Thomas), recently explained that when a statute requires one to provide "a notice," that is not the same thing as merely "providing notice":

> Start with customary usage. Normally, indefinite articles (like "a" or "an") precede countable nouns. . . . While you might say "she wrote a manuscript" or "he sent three job applications," no one would say "she wrote manuscript" or "he sent job application." See The Chicago Manual of Style § 5.7, p. 227 (17th ed. 2017); see also R. Huddleston & G.

Pullum, The Cambridge Grammar of the English Language § 3.1, p. 334 (2002).

By contrast, *noncountable* nouns—including abstractions like "cowardice" or "fun"—"almost never take indefinite articles." The Chicago Manual of Style § 5.7, at 227; see also Huddleston, supra, § 3.1, at 334. After all, few would speak of "a cowardice" or "three funs."

These customs matter because the key term before us (notice) can refer to *either* a countable object ("a notice," "three notices") *or a* noncountable abstraction ("sufficient notice," "proper notice"). Congress's decision to use the indefinite article "a" thus supplies some evidence that it used the term in the first of these senses—as a discrete, countable thing. All of which suggests that the government must issue a single statutorily compliant document to trigger the stop-time rule. If [the subject statute] had meant to endow the government with the flexibility it supposes, we would have expected the law to use "notice" in its noncountable sense. A statute like that would have said the stop-time rule applies after the government provides "notice" (or perhaps "sufficient notice") of the mandated information—indicating an indifference about whether notice should come all at once or by installment.

Niz-Chavez v. Garland, -- U.S. --, 141 S. Ct. 1474, 1481 (2021) (emph. added).

36. Consistent with Justice Gorsuch's above-quoted explanation, the Florida Legislature chose to use the "countable" form of the word "notice" in Section 627.736(5)(a)5, and thereby required insurance policies to include "a notice" in the form of "a discrete countable thing," instead of a "noncountable abstraction" giving insurance companies "flexibility" to merely provide "mandated information" to its insured in whatever format or medium selected by the insurance companies.

37. Indeed, the PIP statute is replete with provisions which expressly require that "a notice" be provided as opposed to merely providing notice in the form of a "noncountable abstraction." *See*, §627.736(5)(c) and (5)(c)3 (requiring health care providers to submit "to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant"); §627.736(14) ("an insurer shall provide a notice to the insured or to a person for whom a claim for reimbursement for diagnosis or treatment of injuries has been filed" concerning fraud violations); §627.736(16) ("A notice . . . required or authorized under ss. 627.730-627.7405 may be transmitted electronically"). In sharp contrast, Section 627.736(4)(c) merely requires insureds to provide a "noncountable" or "flexible" form of "notice of an accident that is potentially covered by personal injury protection benefits," which can be provided orally by a telephone call to the insurance company.

38. Many other statutes governing the business of insurance also require "a notice" in the "countable" sense of the word. *See*, *e.g.*, §627.162(4), Fla. Stat. (requiring insurer to mail "a notice of default to the insured"); §627.4133(8)(c), Fla. Stat. (requiring "a notice of change of policy terms to the policyholder"); §627.421(1), Fla. Stat. (requiring electronic transmissions of insurance policies to "include a notice to the insured or to the person entitled to delivery of a policy of his or her right to receive the policy via United States mail rather than via electronic transmission"); §627.70152(3)(b), Fla. Stat. (claimant under a property insurance policy "must serve a notice of intent to initiate litigation"); §627.712(2)(c), Fla. Stat. (requiring insurer to "provide a notice to the mortgageholder or lienholder indicating the policyholder has elected coverage that does not cover wind").

39. Case law discusses insurance policies that include "a notice" within them. *See*, *e.g. Jefferson Ins. Co. v. Fischer*, 166 So. 2d 129, 130 (Fla. 1964) (insurance policy included a "Special Notice" explaining that the policy does not apply unless named insured is operating the automobile outside a military reservation); *Nieves v. N. River Ins. Co.*, 49 So. 3d 810, 812 (Fla. 4th DCA 2010) (insurance policy contained "an endorsement entitled 'Important Notice,' which pertains to excess UM/UIM coverage"); *Sterling v. Ohio Cas. Ins. Co.*, 936 So. 2d 43, 45 (Fla. 2d DCA 2006) (insurance policy was issued with a form entitled "An Important Notice to Our Commercial Automobile Policyholders Regarding Changes to Your Uninsured Motorist Coverage").

40. Case law confirms that State Farm has issued other insurance policies that included "a notice." *See*, *e.g.*, *State Farm Fire & Cas. Co. v. Ward*, 2021 WL 2981594, *3 (D. Mont. July 15, 2021) (State Farm's insurance policy contained a section titled "Important Notice" concerning changes to the policy); *Allen v. State Farm Fire & Cas. Co.*, 59 F.Supp.2d 1217, 1220 (S.D. Ala. 1999) (State Farm issued an endorsement form entitled "Important Notice . . . Concerning Your Hurricane Deductibles" and highlighted the addition of the new hurricane deductible endorsement to the policy). In this case, however, State Farm did not present any evidence that policy form 9810A includes such "a notice" or that such "a notice" was provided to any of the Petitioner's 19 insured patients.

41. The contents of State Farm policy form 9810A states that the insurance policy includes "the most recently issued Declarations Page" (R 219), without any explanation of how often it issues declaration pages. Notably, State Farm did not include **any** declarations page forms in its submission to the Florida Office of Insurance Regulation (R 208, 216-264). However, in several **other** PIP cases (decided **after** the trial court's August 2016 summary judgment order in this lawsuit),[4] State Farm actually presented evidence establishing that it had sent its insured a policy declarations page that included an "Important Notice" stating:

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[4] The trial court's nonfinal summary judgment order was entered on August 18, 2016 (R 1163-1164), and the final summary judgment was entered on September 6, 2016 (R 1165-1166).

> IMPORTANT NOTICE: Under No-Fault Coverage, the only medical expenses we will pay are reasonable medical expenses that are payable under the Florida Motor Vehicle No-Fault Law. The most we will pay for such reasonable medical expenses is 80% of the "schedule of maximum charges" found in the Florida Motor Vehicle No-Fault Law and in the Limits section of the Florida Car Policy's No-Fault Coverage.

See, *e.g.*, *James A. Voglino, M.D., P.A. a.a.o. Francisco Aguila v. State Farm Mut. Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 817a (Miami-Dade County Ct. Nov. 9, 2017); *Gary Spanier, D.C., P.A. a.a.o. Thomas Osa v. State Farm Mut. Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 831b (Broward County Ct. Oct. 24, 2017). In this case, however, State Farm did **not** present such evidence for any of the Petitioner's 19 insured patients or for any other insureds.

42. Instead of presenting any evidence of "a notice" or a declarations page purporting to include such "a notice," State Farm voluntarily opted to enter into, and be bound by, a written stipulation of the relevant enumerated set of facts that would govern the outcome of this lawsuit[5] (R 170-175, 207-370). Both State Farm and this Court are bound by and strictly limited to that stipulated set of facts. *See*, *e.g.*, *Godshalk v. City of Winter Park*, 95 So.2d 9, 10 (Fla. 1957) (in declaratory suit,

[5] As part of that same stipulation, the Petitioner was required to (and did) to voluntarily dismiss the class action allegations of its counterclaim (R 171).

where in reliance upon stipulation of the parties as to issues, no testimony was offered upon other issues, on appeal the Supreme Court was bound to consider only those issues which were placed before the trial court); *Knespler v. State*, 314 So.3d 287, 291 (Fla. 3d DCA 2020), *rev. den.*, 2020 WL 4524679 (Fla. Aug. 5, 2020) (district court of appeal was bound by parties' stipulation concerning various facts); *Landmark Am. Ins. Co. v. Pin-Pon Corp.*, 267 So. 3d 411, 413 (Fla. 4th DCA 2019) (trial court was bound to factual stipulation made by insured and mistake of law in interpretation of insurance policy was not good cause to withdraw from stipulation).

43. Even if State Farm had presented any evidence that the Petitioners' 19 insured patients received the same declarations page with the same "Important Notice" that State Farm placed into evidence in cases like *Voglino* and *Spanier*, that presentation would still be insufficient to carry the day in this particular lawsuit. The document that State Farm filed with the Florida Office of Insurance Regulation as policy form 9810A does not include that declarations page form or the "Important Notice" quoted in those cases (R 208, 217-264), and there is no stipulation or evidence that the Florida Office of insurance Regulation ever approved that form as passing muster as "a notice" required by Section 627.736(5)(a)5.

44. Although the "supremacy-of-text" principle and the plain text of Section 627.736(5)(a)5 requires "a" notice, this Court's discussion and analysis of that requirement, overlooks or misapprehends the

Legislature's use of the indefinite article "a" preceding the word "notice," and concludes that Section 627.736(5)(a)5 merely "requires that an insurer provide notice of its election to use the schedule of maximum charges." Opinion at p. 5. *See also*, Opinion at p. 16-17 ("if the policy contains notice").

45. In addition to not including "a" notice, the insurance policy form in this record (R 208, 217-264) never once states that State Farm "may limit payment pursuant to the schedule of charges specified in" Section 627.736(5)(a), which is what "a notice" complying with Section 627.736(5)(a)5 must state under the "supremacy-of-text" principle. Instead of telling insureds that State Farm "may limit payment ***pursuant to*** the schedule of charges" as required by the plain text of Section 627.736(5)(a)5 or that State Farm "may limit reimbursement ***to*** 80 percent of the . . . schedule of maximum charges" as stated in the plain text of Section 627.736(5)(a)1, State Farm's insurance policy states, "***in no event will we pay more than*** 80% of the . . . 'schedule of maximum charges" (R 232). In other words, State Farm does not ever promise to pay the precise amount fixed "pursuant to" the schedule of maximum charges, but instead promises to never pay "more than" that amount. This plain text means that State Farm reserves the right to pay less than the schedule of maximum charges--at its whim.

46. For example, assume that an employment contract states the employer may limit the employee's reimbursements for work-related mileage charges "to" the standard mileage rate approved by the IRS for the

year 2022, that means the employer is agreeing to pay the employee at least 58.5 cents per mile. *See*, "IRS issues standard mileage rates for 2022," IR-2021-251 (Dec. 17, 2021) (https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2022). In contrast, if that contract stated that the employer will "in no event pay more than" the standard mileage rate approved by the IRS for the year 2022, that means that the employer is reserving the right to pay less than 58.5 cents per mile. The same situation is presented in this case.

47. Thus, in the trial court, State Farm did not meet its burden as the party seeking summary judgment to establish by undisputed facts that it complied with any of the three requirements of the first sentence of Section 627.736(5)(a)5. There is **no evidence** that any of the 19 insured patients' insurance policies included "a notice," **no evidence** that such "a notice" was provided "at the time of issuance or renewal," and **no evidence** that such "a notice" stated "that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph."

48. The second sentence of Section 627.736(5)(a)5 states that "A policy form approved by the office satisfies this requirement." The parties' stipulation of fact and the Florida Office of Insurance Regulation's Informational Memorandum OIR-12-02M confirm that State Farm did not present undisputed facts to obtain a summary judgment establishing this requirement was satisfied as a matter of law. State Farm submitted the policy form before the notice requirement was ever identified in any case law or in any version of

CS/CS/HB 119, and before that Informational Memorandum was issued. Absent clairvoyance or the ability to predict the future or the possession of inside information (none of which is established by this record), State Farm could not have been seeking approval of "a notice" and there is no evidence that State Farm actually did seek approval of "a notice." Further, the Informational Memorandum instructed insurers that "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." (R 266). Because State Farm submitted an expansive policy form (not "one" endorsement "only" containing a notice) without requesting approval of "a notice" for purposes of Section 627.736(5)(a)5, and because the Florida Office of Insurance Regulation did not specifically state that it was approving the policy form for purposes of Section 627.736(5)(a)5 (as opposed to the standard form review process of Section 627.410), State Farm failed to present any undisputed facts that could support a summary judgment holding as a matter of law that it complied with the second sentence of Section 627.736(5)(a)5.

49. The third sentence of Section 627.736(5)(a)5 states, "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." This third sentence has no bearing on the issue of whether State Farm's policy includes "a notice," but is important in this case because it identifies the only time that a PIP insurer who has elected the schedule of maximum charges can lawfully limit reimbursement to any amount that is less than the amount fixed pursuant to the schedule of maximum charges. Nowhere else in the various terms and conditions of (5)(a)1-5 that govern the "schedule of maximum" limitation of reimbursement methodology charges does the Legislature identify any other situation where the PIP insurer is authorized to pay less than the amount fixed pursuant to the schedule of maximum charges. If the Legislature had intended to allow PIP insurers to pay less than the amount fixed pursuant to the schedule of maximum charges, the third sentence of Section 627.736(5)(a)5 is rendered meaningless surplusage in a manner that eschews the "supremacy-of-text" and "whole-text" principles. Scalia & Garner, *Reading Law*, at 167 ("no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts"). *See also*, *Gulfstream*, 948 So.2d at 606 (significance and effect must be given to "every word" of the statute); *Scherer*, 171 So.3d at 139 ("not even a single word" of the statute should be ignored).

50. In sum, under the limited set of stipulated undisputed facts that control the outcome of this particular case, there is no evidence (undisputed or

otherwise) demonstrating, as a matter of law, that State Farm is entitled to a summary judgment declaring that it complied with any of the requirements imposed by the plain text of Section 627.736(5)(a)5 with respect to the Petitioner's 19 PIP claims. The Second District, therefore, erred in reversing the trial court's judgment as to those 19 PIP claims.

* * *

H. Conclusion

66. It is respectfully submitted that the Second District and this Court should not reverse the trial court on the basis of arguments that were not presented to the trial court and that were not raised by State Farm in its appeal as a basis to reverse the trial court. Under the tipsy coachman doctrine, appellate courts should look for ways to affirm the result reached by the trial court, not to reverse the trial court on the basis of arguments raised *sua sponte* for the first time in the appellate court's decision.

67. Assuming arguendo that it is preserved, the cornerstone of this Court's analysis is that State Farm's insurance policy satisfies the requirements of Section 627.736(5)(a)5. However, under the "supremacy-of-text" and "whole-text" canons of statutory interpretation, as well as the limited set of stipulated facts to which the parties and this Court are bound, there is simply no evidence (undisputed or otherwise) establishing as a matter of law that State Farm is entitled to a summary judgment declaring that it complied with the first and second sentences of Section

627.736(5)(a)5 with respect to the Petitioner's 19 PIP claims in this lawsuit. Because State Farm failed to meet its burden, the result reached by the trial court is correct and its judgment should be affirmed, at least with respect to those 19 claims.

68. Beyond the 19 PIP claims at issue in this particular lawsuit, State Farm's policy language presents an untenable situation that leaves insureds, their health care providers, and the courts with no way to objectively predict, determine, or enforce the precise amount that health care provider can charge and collect, that State Farm must pay, and that the insured patients must pay, for medical expenses incurred by those insured patients.

69. If State Farm's unique policy language is approved by this Court, then State Farm (and other insurers who decide to adopt that same policy language) will have the unmitigated ability to sell illusory PIP insurance coverage, based on a hollow promise to pay an unpredictable amount of PIP benefits, which is obviously contrary to the Legislature's intent when it adopted a schedule of maximum charges generating fixed reimbursement amounts. To the extent that State Farm and other PIP insurers do not pay the precise amount fixed "pursuant to" the schedule of maximum charges, there will be more litigation and the insured patients will be subjected to balance billing by their short-paid health care providers. *See*, § 627.736(5)(a)4, Fla. Stat. ("If an insurer limits payment as authorized by subparagraph 1., the person providing such services, supplies, or care may not bill or attempt to collect

from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits."); §817.234(7)(a), Fla. Stat. (it is "insurance fraud" and a felony if a health care provider does not seek to collect the insured patient's portion of the total medical bill).

70. Instead of giving meaning to the plain text of all provisions that "govern" the schedule of maximum charges reimbursement limitation methodology as required by the "supremacy-of-text" principle, the Second District and this Court have overlooked the plain text of (5)(a)2-5 and have awarded a summary judgment to State Farm despite its failure to present any evidence (much less undisputed evidence) that it provided "a notice" that complied with any of the several requirements imposed by the plain text of (5)(a)5. Accordingly, regardless of whether PIP insurers are now lawfully authorized by the 2012 version of the PIP statute to simultaneously adopt both methods in their insurance polices, this Court should grant rehearing and hold that the trial court reached the correct result by denying State Farm's motion for summary judgment, at least as to the 19 PIP claims at issue in this particular case, due to the lack of undisputed facts to sustain State Farm's motion for summary judgment.

* * *

WHEREFORE, the Petitioner respectfully requests this Honorable Court to grant rehearing or

clarification, to affirm the trial court's decision, and to grant the Petitioner's motion for appellate attorneys' fees.

IN THE FLORIDA SECOND DISTRICT COURT OF APPEAL

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs. **Case No. 2D16-4036**

MRI ASSOCIATES OF TAMPA, INC., d.b.a. Park Place MRI,

Appellee. /

APPELLEE PARK PLACE'S MOTION FOR REHEARING AND/OR CLARIFICATION

(Filed Jun. 4, 2018)

Pursuant to Florida Rules of Appellate Procedure 9.300 and 9.330, the Appellee, MRI Associates of Tampa, Inc., doing business as Park Place MRI ("**Park Place**"), hereby moves for rehearing and/or clarification concerning this Court's appellate opinion issued on May 18, 2018, and its order denying Park Place's motion for appellate attorneys' fees issued on May 18, 2018. In support of this motion, the Appellee states:

Introduction

As this Court's opinion acknowledges, Op. 10, this appeal involves issues of great public importance concerning personal injury protection ("**PIP**") coverage

provided by State Farm's insurance policy 9810A ("**Policy 9810A**"). The resolution of this case will impact not only thousands of State Farm insureds and their healthcare providers, but may also impact every other PIP insurer, insured, and provider.

This Court's opinion includes a holding of first impression: That the Florida Legislature's 2012 amendments to the PIP statute abrogate the Florida Supreme Court's decisions in *Geico General Insurance Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013) ("***Virtual III***"), and *Allstate Insurance Co. v. Orthopedic Specialists*, 212 So. 3d 973 (Fla. 2017), as well as a number of other district court decisions, so that after the 2012 amendments, insurers no longer need to elect or choose between two separate methods of calculating PIP reimbursements. The practical effect of this Court's holding is that PIP insurers can pay medical bills based on the schedule of maximum charges whenever they desire, or pay a different amount whenever they desire.

The Court's holding is not one that either party advocated. State Farm's reply brief, for example, argued: "[T]he basic principles set forth in *Virtual* [*III*] and its progeny apply to this appeal and to all similar disputes involving notice questions under the PIP statute." That is, State Farm did not contend the 2012 amendments meant there was now only a single method for calculating reimbursements and so it no longer had to elect between the two methods as *Virtual III* required. Instead, State Farm simply contended it had made such an election as required by *Virtual III*.

* * *

A. The Court's opinion misapprehends the legal effect of the legislature's renumbering of the subparagraphs of section 627.736(5)(a) in 2012.

At pages 8-9 of the opinion, this Court concludes that because the legislature "substantially amended section 627.736(5)" in 2012 by renumbering some of its paragraphs, "there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer." Neither party presented this argument in the trial court or on appeal. The undersigned attorneys do not recall the Court questioning either party about this theory at oral argument.

As an initial matter, State Farm did not preserve this argument for review and so it cannot be the basis for a reversal in State Farm's favor. *See Aills v. Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010) ("Appellate review is therefore limited to the specific grounds . . . raised at trial."). Had this argument been raised—and had Park Place had an opportunity to address it—Park Place could have explained why it is incorrect. In 2012, the legislature did renumber the subparagraphs within section 627.736(5)(a). But that renumbering was editorial in nature and does not support the Court's conclusion that the renumbering alone means "there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer." Op. 9.

From 2008 to mid-2012, the fact-dependent method of calculating "reasonable" charges was described in subparagraph (5)(a)(1), and the schedule-of-maximum-charges method was described in subparagraphs (5)(a)(2) to (5). Although this Court's opinion notes that section 627.736(5) was "substantially amended" in 2012, only two changes are pertinent to this appeal.

First, the structure of subsection (5) was changed. Previously under subsection (5), there was no independent subparagraph (5)(a). Instead, there was (5)(a)(1), which stated that healthcare providers could charge a "reasonable amount" and set forth the factors to determine if the charge was reasonable. Notably, the lack of an independent subparagraph (5)(a) was inconsistent with the Florida House of Representative's legislative drafting rules.[3] Subparagraph (5)(a)(2) then permitted the insurer to "limit reimbursement to 80 percent of the following schedule of maximum charges." And subparagraphs (5)(a)(3), (4), and (5) included additional provisions that applied only if the insurer limited reimbursement under subparagraph (5)(a)(2).

The 2012 amendments removed the anomaly of having no independent subparagraph (5)(a), but otherwise left the structure of the statute intact. So now subparagraph (5)(a) includes substantially the same

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[3] *See Guidelines for Drafting Legislation*, Florida House of Representatives House Bill Drafting Service (2014), p. 91 ("Subdividing a section"), https://bit.ly/2spna7l.

text that was previously in (5)(a)(1), stating healthcare providers can charge a "reasonable amount" and setting forth the fact-dependent method an insurer and a trial court must apply to determine if the charged amount is reasonable. What was previously subparagraph (5)(a)(2) is now (5)(a)(1), which permits an insurer alternatively to limit reimbursement under the schedule of maximum charges. And subparagraphs (5)(a)(2), (3), (4), and (5) now set forth the additional provisions that apply only if the insurer limits reimbursement under the schedule-of-maximum-charges method in (5)(a)(1).

Second, the 2012 amendments added a new provision, subparagraph (5)(a)(5), that also applies only to the schedule-of-maximum-charges method, which states:

> 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.

See ch. 2012-197, Laws of Fla. (2012).

This Court's opinion posits that the renumbering of subsection (5) was, in and of itself, dramatically significant—that it eliminated what Florida courts have

consistently ruled were two distinct and mutually exclusive methods of calculating reimbursements that an insurer had to elect between. According to the Court's opinion, the renumbering itself means that "there are no longer two mutually exclusive methodologies" that an insurer must elect between—effectively abrogating case law that held otherwise under the 2008 to mid-2012 law.

Neither the 2012 amendments nor the legislative history support the Court's interpretation. As renumbered in 2012, the fact-dependent method is worded the same as before, but it now appears in subparagraph (5)(a) instead of (5)(a)(1)—thus removing the anomaly of a subparagraph with no text. And the schedule-of-maximum-method remains largely the same, except that it is now described in subparagraphs (5)(a)(1)-(5), instead of (5)(a)(2)-(5). None of these amendments altered any of the language from the 2008 to mid-2012 statute that had led Florida courts, including the Florida Supreme Court in *Virtual III*, to conclude the statute established two different methods of calculating PIP reimbursements. If anything, the renumbering made the schedule-of-maximum-charges method described in (5)(a)(1)-(5) subordinate to the fact-dependent method described in (5)(a), consistent with the First District's holding that the fact-dependent method is the "default" method. *See Allstate Fire & Cas. Ins. v. Stand-Up MRI of Tallahassee*, *P.A.*, 188 So. 3d 1, 2-3 (Fla. 1st DCA 2015).

In addition, subparagraphs (5)(a)(2), (3), (4), and (5) all include a provision expressly limiting their

application to subparagraph (5)(a)(1), giving further credence to the case law that holds the schedule-of-maximum-charges method is an alternative method to the fact-dependent determination in subparagraph (5)(a). And the one new substantive provision the legislature added, (5)(a)(5), now requires insurers to provide "a notice" if they intend to avail themselves of the schedule-of-maximum-charges method. So even after the 2012 amendments, the fact-dependent method stands on its own in (5)(a) and the schedule-of-maximum-charges method stands on its own in (5)(a)(1)-(5).

The legislative history of the 2012 amendments likewise confirms that the legislature expressed no intent to substantively change subsection (5) when it renumbered the subparagraphs, much less an intent to abrogate existing case law and combine two existing reimbursement methods into one. The 2012 amendments were based on the final version of House Bill 119. The Senate later introduced a companion bill (Senate Bill 1860). From the beginning, both bills contained the renumbering. None of the legislative history reports make any mention of the renumbering of the subparagraphs or suggest that the renumbering was intended to have any substantive effect.

The Florida Senate issued four Bill Analysis and Fiscal Impact Statements regarding the 2012 amendments. None suggested the amendments would combine the two methods. Instead, each report focused on the changes to the schedule-of-maximum-charges method:

PIP Medical Fee Schedule

The bill makes the following changes regarding the content and application of the PIP medical fee schedule:

- Specifies that the Medicare fee schedule in effect on January 1 will apply to all medical care and supplies rendered in that calendar year.
- **Effective July 1, 2012, an insurer may only limit reimbursement pursuant to the PIP fee schedule if the insurer provides a notice at the issuance or renewal of the auto insurance policy that the insurer will provide reimbursement pursuant to the fee schedule.**
- Authorizes insurers to use Medicare coding policies and payment methodologies so long as they do not constitute a utilization limit.
- Specifies that the Medicare Part B fee schedule applies to services, supplies and care provided by ambulatory surgical centers and clinical laboratories under the PIP fee schedule.
- Specifies that durable medical equipment is reimbursed at 200 percent of the Durable Medical Equipment Prosthetics/ Orthotics and Supplies fee schedule of Medicare Part B.

See Florida Senate Bill Analysis & Fiscal Impact Statement, SB 1860 (Banking & Ins. Comm. Jan. 20, 2012);[4] Florida Senate Bill Analysis & Fiscal Impact Statement, CS/SB 1860 (Banking & Ins. Comm. Feb. 2, 2012);[5] Florida Senate Bill Analysis & Fiscal Impact Statement, CS/SB 1860 (Budget Comm. Feb. 24, 2012);[6] Florida Senate Bill Analysis & Fiscal Impact Statement, CS/CS/SB 1860 (Budget Comm. Mar. 2, 2012)[7] (emph. added). Surely if the legislature considered the renumbering to be a substantive change to existing reimbursement methods and practices—combining two mutually exclusive methods into one—that would have been summarized in these reports.

The House of Representatives Final Bill Analysis issued on May 7, 2012, confirms that the substantive changes were limited to tweaking the schedule-of-maximum-charges method and requiring an insurer to give **a notice** of its election of that alternative method.

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[4] https://www.flsenate.gov/Session/Bill/2012/1860/Analyses/2012s1860.pre.bi.PDF

[5] https://www.flsenate.gov/Session/Bill/2012/1860/Analyses/2012s1860.bi.PDF

[6] https://www.flsenate.gov/Session/Bill/2012/1860/Analyses/2012s1860.pre.bc.PDF

[7] https://www.flsenate.gov/Session/Bill/2012/1860/Analyses/2012s1860.bc.PDF

House of Representatives Final Bill Analysis, CS/CS/HB 119 (May 7, 2012).[8]

* * *

Like the Senate analyses, the Final Bill Analysis also summarizes the "Effect of Proposed Changes." Again, this analysis focuses on the changes to the schedule of maximum charges and the new notice requirement. House of Representatives Final Bill Analysis, CS/CS/HB 119 (May 7, 2012). There is no mention of, or significance attached to, the renumbering of the subparagraphs. There is no indication that the renumbering was intended to combine the two reimbursement methods into one or eliminate their mutually exclusive nature.

In sum, the legislative history of the 2012 amendments confirms the renumbering of the subparagraphs within (5)(a) was nothing more than an editorial change to comply with standard drafting guidelines. It did not alter the meaning of the statute.

* * *

G. State Farm did not present any evidence it complied with section 627.736(5)(a)(5).

As noted, the 2012 amendments to section 627.736 added subparagraph (5)(a)(5). Under section 627.736(5)(a)(5), State Farm can rely on the schedule of maximum charges "only if the insurance policy includes ***a notice*** at the time of issuance or renewal that

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[8] https://www.flsenate.gov/Session/Bill/2012/119/Analyses/h0119z1.INBS.PDF

the insurer may limit payment pursuant to the schedule of charges specified in this paragraph." If State Farm did not comply with (5)(a)(5), it cannot limit reimbursement based on the schedule of maximum charges.

At page 10 of the opinion, this Court concludes that State Farm's policy "is sufficient to place insureds and served providers *on notice* as required by section 627.736(5)(a)(5)." (Emph. added.) But in truth, State Farm presented no evidence it provided the 19 insureds at issue a notice that complied with the notice requirement of section 627.736(5)(a)(5).

In *Florida Birth-Related Neurological Injury Comp. Assoc. v. Michael*, 98 So. 3d 64, 68 (Fla. 2d DCA 2010), this Court explained "[t]he moving party carries the heavy burden of showing conclusively that the nonmoving party cannot prevail" and "[i]f the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *See also Hervey v. Alfonso*, 650 So. 2d 644, 645-6 (Fla. 2d DCA 1995). State Farm did not carry that heavy burden in this case. It did not provide conclusive proof it complied with (5)(a)(5).

State Farm has contended that evidence of a Policy 9810A form stamped "approved" by the OIR conclusively proves compliance with the notice requirement of (5)(a)(5). Not so. There are multiple statutes requiring OIR approval of insurance policy forms to show compliance with various other requirements. *See*, *e.g.*, §§ 627.410, .411, .4145, Fla. Stat. (2018). For the

schedule-of-maximum-charges notice specifically, OIR will only review the schedule-of-maximum-charges notice if "the insurer has only submitted **one** endorsement in the file and that **one** endorsement **only** contains language to implement the notice requirement." R266-67. State Farm presented no evidence it complied with these instructions and no evidence that the OIR's "approval" stamp on its policy was approval of its schedule-of-maximum-charges provision as opposed to approval for any other purpose. It did not satisfy the "heavy burden" required to obtain summary judgment on its claim it complied with section 627.736(5)(a)(5).

* * *

WHEREFORE, Park Place respectfully requests this Honorable Court to grant rehearing and clarification, to affirm the trial court's decision, and to grant Park Place's motion for appellate attorneys' fees.