IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 09-AP-78; DIV. CR-B

CRYSTAL LEVY,

Appellant,

v.

L.T. Case No. 16-2008-CC-020314

GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellee.

ON APPEAL FROM THE COUNTY COURT, DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Crystal Levy appeals the trial court's entry of summary final judgment in favor of the defendant/appellee, Garrison Property and Casualty Company ("Garrison"), and its denial of her summary judgment motion. (R.100-05.) In this No-Fault/Personal Injury Protection ("PIP") benefits case, the outcome turns on the narrow legal issues of whether an insured and her medical provider are forever barred from recovering PIP benefits from the insurer if: (1) the medical provider uses a Disclosure and Acknowledgment Form ("D&A Form") that varies in only minor, technical respects from the standard form; and (2) the D&A Form is signed on the insured's second medical visit instead of her first. In deciding these issues, Judge Hudson concluded that PIP benefits were not payable. (R.100-05.) Ms. Levy maintains this decision was erroneous as a matter of law.

On May 21, 2008, Ms. Levy was injured in an automobile accident. (R.67 at ¶ 2.) At that time, she had No-Fault/PIP insurance coverage through Garrison. (R.3 at ¶ 6.) Garrison admitted that it issued this insurance policy to Ms. Levy. (R.30 at ¶ 8.)

As a result of her accident, Ms. Levy sought reasonable and necessary medical treatment from Dr. Staci Bracken at Bracken Family Chiropractic in Orange Park, Florida. (R.67 at ¶ 3.) Ms. Levy's first visit to Dr. Bracken was on the date of her accident, May 21, 2008. (*Id.*) During that first visit, Ms. Levy's

treatment consisted of a chiropractic exam, adjustment and x-rays. (R.67 at ¶ 4.) Dr. Bracken fully explained to Ms. Levy all of the services she rendered. (R.68 at ¶ 5.) She also provided Ms. Levy with a D&A Form and asked Ms. Levy to review and sign it. (R.68 at ¶ 6.) The D&A Form Dr. Bracken provided to Ms. Levy contained the doctor's office address and telephone number at the top rather than the State seal and the name "Office of Insurance Regulation," as shown on the standard form. (R.96-97.) Dr. Bracken's form also did not bold certain text, but otherwise contains identical language to the standard form. (*Id.*)

In order to go to her initial appointment with Dr. Bracken, Ms. Levy had to get a babysitter for her four-year-old son. (R.68 at ¶ 7.) Ms. Levy told her babysitter that she would be home by 6:00 p.m, believing that her appointment would be over before then. (*Id.*) However, Dr. Bracken's examination and treatment took longer than Ms. Levy anticipated and was not complete until almost 7:00 p.m. (*Id.*) Accordingly, when the treatment was over, Ms. Levy hurriedly left Dr. Bracken's office, without telling Dr. Bracken she was going, to return home and relieve the babysitter. (*Id.*) Because Ms. Levy was in such a hurry to leave, she neglected to sign the D&A Form as Dr. Bracken had requested. (*Id.*)

Two days later, on May 23, 2008, Ms. Levy returned to Dr. Bracken for further treatment. (R.68 at ¶ 8.) At that second visit, Ms. Levy reviewed and signed the D&A Form after verifying that she had received all of the treatments

listed therein. (*Id.*) Ms. Levy did not know that by signing the D&A Form on May 23rd instead of May 21st, Garrison would deny Dr. Bracken compensation for all of her treatments. (R.68-69 at ¶ 9.) Ms. Levy continued to treat with Dr. Bracken through August 20, 2008 and all treatment was reasonable and necessary to help alleviate the injuries Ms. Levy sustained in her May 21, 2008 car accident. (R.65 at ¶ 5.)

In September 2008, when Ms. Levy learned that Garrison was not paying Dr. Bracken, she had her attorney request that Garrison pay Dr. Bracken's bills. (R.69 at ¶ 10.) She also requested, through her attorney, that Garrison advise her of any steps she or Dr. Bracken could take to ensure that the bills were paid. (*Id.*) Garrison did not respond to Ms. Levy's request. (*Id.*) Then, in October 2008, Ms. Levy again requested that Garrison either pay Dr. Bracken's bills or inform her of what steps to take to ensure that the bills got paid. (R.69 at ¶ 11.) Although Garrison responded this time, it indicated only that the D&A Form was not compliant with Florida Statutes and failed to advise her how to make the D&A Form compliant so that Dr. Bracken's bills could be paid. (*Id.*)

In December 2008, Ms. Levy filed a complaint against Garrison for breach of the insurance contract to recover the unpaid PIP benefits and interest thereon, as well as her attorney's fees and costs. (R.2.) Thereafter, Garrison informed Ms. Levy that the real dispute in this case was over whether the D&A Form complied

with section 627.736(5)(e), Florida Statutes. (R.52.) Because the only issue in the case was the legal interpretation of the PIP statute and no facts were in dispute, both Ms. Levy and Garrison moved for final summary judgment. (R.51-70; 71-78.)

Following a hearing, Judge Hudson entered summary judgment for Garrison and denied Ms. Levy's motion for summary judgment. (R.105.) The basis for the trial court's decision was that Garrison was not put on notice that Ms. Levy experienced a covered loss for two reasons: (1) the D&A Form utilized by Dr. Bracken was not the standard form required by section 627.736(5)(e)(7); and (2) the D&A Form was not signed on the initial date of service, pursuant to section 627.736(5)(e)(1). (R.104-05.)

This timely appeal followed. (R.118-19.)

SUMMARY OF ARGUMENT

Due to a split in opinions among county court judges, the issue raised in this case is of critical importance for the Circuit: if a self-generated but otherwise compliant D&A Form is not completed on the initial date of service, does a medical provider or insured forever forfeit its right to PIP benefits even though the treatment arose as a result of a covered accident? The trial court concluded that PIP benefits were not payable in this case because the doctor's form had minor, non-critical alterations from the standard form and because Ms. Levy signed the

form on her second date of treatment. The PIP statute does not state that a perfectly completed D&A Form is a prerequisite to payment or that a non-compliant D&A Form can never be fixed. Additionally, the PIP statute cannot be fairly construed to impose such requirements, notwithstanding its command that medical providers "shall" use the approved D&A Form and obtain the patient's signature on the initial date of treatment. If Judge Hudson's opinion is adopted as the law of the circuit, it would engraft provisions into the statute and create a forfeiture of benefits for even the most technical of missteps in completing the D&A Form. This is not the correct interpretation of the PIP statute. Instead, as other courts have found, not only can a D&A Form be amended at a later time or be accepted under the doctrine of substantial compliance, but the D&A Form is not even a prerequisite to payment in the first instance.

This brief first explains why a plain reading of section 627.736 reveals that the D&A Form is not a prerequisite to payment. While an insurer must be put on notice of a covered loss, the statute unequivocally establishes that "written notice" is provided through the submission of prescribed bills or statements. At no place in the statute does the Legislature state that the D&A Form must also be submitted to the insurer before it will be deemed to have "written notice" of a covered loss. The trial court erred as a matter of law by reading this non-existent requirement into the statute. Therefore, so long as the insurer receives written notice of a

covered loss through bills or statements, the claim is payable regardless of any deficiencies in the D&A Form.

Second, even if the D&A Form is required before an insurer must pay for reasonable and necessary medical treatment, the form in this case substantially complied with the statute. The court erred as a matter of law in concluding that a substantially identical form was inadequate to put the insurer on notice of a covered loss. The court also erred as a matter of law in ruling that a medical provider who obtains the patient's signature on the D&A Form two days after the initial treatment, solely because the patient hurriedly left the initial appointment and forgot to sign the form, has forever forfeited its right to payment for all medical treatments. Both decisions were founded on the trial court's mistaken belief that the substantial compliance doctrine does not apply to the D&A Form.

For either one of these reasons, summary judgment in favor of Garrison should be reversed with directions to enter summary final judgment in favor of Ms. Levy.

Finally, even if this Court concludes that a D&A Form is written notice *and* that Dr. Bracken's D&A Form does not substantially comply with the PIP statute, Garrison would still be required to pay for all services provided by Dr. Bracken subsequent to Ms. Levy's initial treatment date. The statutory language clearly states that the D&A Form requirements only apply to the initial treatment date.

Thus, even if Garrison did not receive "written notice" of the initial treatment because the D&A Form was noncompliant, it did receive written notice of the subsequent treatments because it received Dr. Bracken's bills and statements. Thus, even under this scenario, summary judgment should be entered for Ms. Levy on all bills subsequent to the initial treatment date.

ARGUMENT

Standard of Review. Because this Court is being asked "to interpret provisions of the Florida Motor Vehicle No-Fault Law..., the standard of review is de novo." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331 (Fla. 2007); *see also State v. Lockheed Martin Corp.*, 905 So. 2d 1017, 1020 (Fla. 1st DCA 2005) ("The issue of statutory construction is subject to de novo review.").

I. THE PIP STATUTE DOES NOT REQUIRE A MEDICAL PROVIDER TO SUBMIT A D&A FORM AS A PREREQUISITE TO RECEIVING PAYMENT.

The position endorsed by the trial court is that without a perfectly completed D&A Form, Garrison never received "written notice" of a covered loss. (R.100-05.) In contrast to the trial court's conclusion, section 627.736, Florida Statutes (2008) (the "PIP Statute") does not state or imply that a D&A Form is a prerequisite to payment or is the required "written notice" of the claim. Thus, the trial court's decision is erroneous as a matter of law.

A. Background on Florida's No-Fault Law.

The Florida Legislature enacted the Florida Motor Vehicle No-Fault Law in 1971 to provide minimal medical and other insurance benefits to car accident victims without regard to fault. *Holy Cross Hosp.*, 961 So. 2d at 331-32; *see also* § 627.731, Fla. Stat. (2008). The PIP Statute is "'an integral part of the no-fault statutory scheme'" and "requires motor vehicle insurance policies issued in Florida to provide PIP benefits for automobile-related bodily injury...." *Id.* (citations omitted). The purpose of PIP benefits is to provide "'swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption.'" *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1077 (Fla. 2006)).

The No-Fault Law must be construed "liberally in favor of the insured." *Palma v. State Farm Mut. Auto. Ins. Co.*, 489 So. 2d 147, 149 (Fla. 4th DCA), *rev. denied*, 496 So. 2d 143, 149 (Fla. 1986). "[T]he purpose of the act is to provide for insurance benefits to be paid under motor vehicle policies without regard to fault." *Id.* (quoting *Farley v. Gateway Ins. Co.*, 302 So. 2d 177, 179 (Fla. 2d DCA 1974)), The law, therefore, "was intended to broaden insurance coverage while at the same time reasonably limiting the amount of damages which could be claimed." *Id.* (emphasis omitted). Accordingly, as with any other type of insurance, the courts should construe the PIP Statute in favor of the insured.

B. The PIP Statute clearly and unambiguously designates medical bills and statements as the "written notice" that triggers the insurer's payment obligations.

Within the PIP Statute, there are four provisions that are pertinent to this appeal. First, there is a "written notice" provision that requires insurers to pay a medical provider's PIP claim within thirty days after receiving "written notice" of the claim. *See* § 627.736(4)(b), Fla. Stat. (2008) (the "Written Notice Provision"). Second, there is a provision setting forth requirements for the bills and statements that medical providers must furnish to insurers. *See* § 627.736(5)(d), Fla. Stat. (2008) ("Bills and Statements Provision"). Third, there is a non-recovery provision that enumerates six circumstances under which neither an insurer nor an insured would ever be responsible for paying a provider's bills. *See* § 627.735(5)(b)(1), Fla. Stat. (2008) ("Non-Recovery Provision"). Fourth, there is a D&A provision, added in 2003 by the Legislature, that directs medical providers to have patients sign a D&A Form on the first date of treatment.[1] *See* § 627.736(5)(e)(1)-(9), Fla. Stat. (2003) (the "D&A Provision").

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[1]The D&A Provision provides in pertinent part:

> **1.** At the initial treatment or service provided, each physician, other licensed professional, clinic, or other medical institution providing medical services upon which a claim for personal injury protection benefits is based shall require an insured person... to execute a disclosure and acknowledgment form, ...
>
> **2.** The physician ... for which payment is being claimed has the affirmative duty to explain the services

The primary issue of this appeal is whether the D&A Form is the "written notice" medical providers are required to give insurers to alert them that the provider is making a claim for PIP benefits. The PIP Statute, when read in its entirety, is clear and unambiguous that the D&A Form is not the "written notice" medical providers must supply to insurers.

> rendered to the insured ... so that the insured ... countersigns the form with informed consent.
>
> ***
>
> **4.** The licensed medical professional rendering treatment for which payment is being claimed must sign, by his or her own hand, the form complying with this paragraph.
>
> **5.** The original completed disclosure and acknowledgement form shall be furnished to the insurer pursuant to paragraph (4)(b) and may not be electronically furnished.
>
> ***
>
> **7.** The Financial Services Commission shall adopt, by rule, a standard disclosure and acknowledgment form that shall be used to fulfill the requirements of this paragraph, effective 90 days after such form is adopted and becomes final. The commission shall adopt a proposed rule by October 1, 2003. Until the rule is final, the provider may use a form of its own which otherwise complies with the requirements of this paragraph.
>
> ***
>
> **9.** The requirements of this paragraph apply only with respect to the initial treatment of service of the insured by the provider. For subsequent treatments or service, the provider must maintain a patient log signed by the patient, in chronological order by date of service, that is consistent with the services being rendered to the patient as claimed. ...

See § 627.736(5)(e), Fla. Stat. (2008).

The Written Notice Provision provides in pertinent part:

> Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.

§ 627.736(4)(b), Fla. Stat. (2008) (emphasis added). The PIP Statute does not define "written notice" in the Written Notice Provision, but it does state the following in the Bills and Statements Provision:

> For purposes of [the Written Notice Provision,] an insurer shall not be considered to have been furnished with notice of the amount of covered loss or medical bills unless the statements or bills comply with this paragraph, and unless the statements or bills are properly completed in their entirety as to all material provisions, with all relevant information being provided therein.

§ 627.736(5)(b), Fla. Stat. (2008) (emphasis added.) This provision demonstrates a clear legislative intent that only "statements or bills" are required to constitute "written notice" under the Written Notice Provision.

Earlier this year, Judge Arias specifically adopted this interpretation of the PIP Statute when he stated that a provider's written notice is the properly completed CMS 1500 form identified in the Bills and Statements Provision. *See N. Fla. Med. Clinics, Inc. v. USAA Cas. Ins. Co.*, 16 Fla. L. Weekly Supp. 323a, Case No. 16-2007-SC-13110 (Fla. Duval County Ct. Jan. 30, 2009). Similarly, in a thorough opinion from a Pinellas County court, the court stated:

> Clearly, if the Legislature intended the submission of a disclosure and acknowledgment form to be a prerequisite to payment of PIP benefits then it would have stated it as clearly as it did when addressing the billing forms in [the Bills and Statements Provision]. This Court cannot read into the statute that which is not there.

Theodore P. Vlahos, Inc. v. USAA Cas. Ins. Co., 15 Fla. L. Weekly Supp. 996a (Fla. Pinellas County Ct. July 9, 2008); *see also Theodore P. Vlahos, Inc. v. USAA Cas. Ins. Co.*, 16 Fla. L. Weekly Supp. 92b (Fla. Pinellas County Ct. Oct. 22, 2008) ("There is no language in [the D&A Provision] that states, or even suggests, that failure to provide the properly completed form to the insurer is failure to provide 'notice of the covered loss' to the insurer. As this Court stated in its original order, it is the basic principle of statutory construction that courts are not at liberty to add words to statutes that were not placed by the Legislature." (citing *Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001)).

Likewise, Judge Higbee also implicitly found that the statement of medical charges, and not the D&A Form, is "written notice." *See Steven L. Rhodes, D.C., P.A. v. Garrison Prop. & Cas. Ins. Co.*, 16 Fla. L. Weekly Supp. 857a, Case No. 16-2008-SC-8239 (Fla. Duval County Ct. May 27, 2009). There, the medical provider supplied Garrison with a D&A Form that did not contain a description of the provided medical services. *Id.* The provider then corrected the form, had the patient resign it months after the initial service, and resubmitted it to Garrison. *Id.* Although not signed on the initial date of service, Judge Higbee found that the

D&A Form substantially complied with the PIP Statute. *Id.* Moreover, the court declined Garrison's invitation to find that it did not receive notice of the covered loss until the date it received the resubmitted form. *Id.* The court reasoned that "[a]s all statements of charges for the medical services rendered were submitted to Defendant on a timely basis, as acknowledged by the parties, this Court is not persuaded by Defendant's argument." *Id.* Thus, the court implicitly found that the submission of medical bills put Garrison on notice of the covered loss, regardless of whether it had received a compliant D&A Form. This Court should find likewise.

C. A non-compliant D&A Form is not a designated reason under the PIP Statute for insurers to deny PIP benefits.

In another provision under the PIP Statute, the Non-Recovery Provision, the Legislature specifically enumerates six instances in which a provider cannot recover for services.

> An insurer or insured is not required to pay a claim or charges:
>
> a. Made by a broker or by a person making a claim on behalf of a broker;
>
> b. For any service or treatment that was not lawful at the time rendered;
>
> c. To any person who knowingly submits a false or misleading statement relating to the claim or charge;

> d. With respect to a bill or statement that does not substantially meet the applicable requirements of [the Bills and Statements Provision];
>
> e. For any treatment or service that is upcoded, or that is unbundled when such treatment or services should be bundled...; and
>
> f. For medical services or treatment billed by a physician and not provided in a hospital unless such services are rendered by the physician or are incident to his or her professional services and are included on the physician's bill, including documentation verifying that the physician is responsible for the medical services that were rendered and billed.

See § 627.736(5)(b)(1), Fla. Stat. (2008). Garrison did not identify any of these conditions in the Non-Recovery Provision as its reason for denying benefits. Rather, Garrison informed Ms. Levy that her PIP benefits would not be paid because Dr. Bracken's D&A Form did not comply with the D&A Provision. (R.16.)

However, had the Legislature intended a non-compliant D&A Form to be a basis for denying PIP benefits, it easily could have added a seventh condition in the Non-Recovery Provision. (R.160-61.) That the Legislature did not list a non-compliant D&A Form in the Non-Recovery Provision as a basis for insurers to deny payment of PIP benefits indicates Legislative intent that the D&A Form *not* be the written notice that is a prerequisite to payment under the Written Notice Provision. *See generally Jackson Nat. Life Ins. Co. v. Lovallo*, 8 So. 3d 1242, 1243 n.2 (Fla. 1st DCA 2009) (applying the "principle of *expressio unius est exclusion*

alterius, which means 'the mention of one thing implies the exclusion of another'" to insurance statutes to determine Legislative intent). In other words, had the Legislature intended the D&A Form to be a prerequisite to payment, it would have added a non-compliant D&A Form to the list of reasons an insurer can deny a claim.

D. Nothing in the D&A Provision purports to make the D&A Form the required "written notice" of the claim.

Garrison argued, and the trial court agreed, that because subparagraph (5) of the D&A Provision states that the D&A Form shall be "furnished to the insurer pursuant to [the Written Notice Provision]...," that all of the language and requirements relating to "written notice" are engrafted into the D&A Provision. (R.76; 125.) This is an erroneous reading of the statute.

As an initial matter, subparagraph (5) of the D&A Provision does not merely state that the D&A Form shall be furnished pursuant to the Written Notice Provision, it also states "and may not be electronically furnished." When considering this identical issue of how to interpret the D&A Provision's reference to the Written Notice Provision, the three-judge appellate panel in *King v. United Auto. Ins. Co.*, 15 Fla. L. Weekly Supp. 430a (Fla. 11th Cir. Ct. Feb. 28, 2008), found "the initial language of [the Written Notice Provision] is wholly ancillary to the *manner* in which *any* forms are to be furnished." *Id.* "Finally, tacked to the end, the statute states plainly, 'payment shall be treated as being made on the date a

draft or other valid instrument which is equivalent to payment was *placed in the United States mail in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery.*'" *Id.* (emphasis added). Accordingly, by directing physicians to furnish D&A Forms pursuant to the [Written Notice Provision], the [D&A Provision] "does no more than insist upon the elements set forth in [the Written Notice Provision] for proper furnishing of the disclosure and acknowledgement form." *Id.; see also Vlahos*, 15 Fla. L. Weekly Supp. 996a (finding that subparagraph (5) of the D&A Provision "is merely a mailing provision.").[2]

Moreover, in no way does subparagraph (5) suggest that the D&A Form is the "written notice" that triggers the payment requirements of the Written Notice Provision. *See King*, 15 Fla. L. Weekly Supp. 430a (rejecting contention that subparagraph (5) of the D&A Provision was meant to incorporate the Written Notice Provision *in toto*). Indeed, the Written Notice Provision itself makes clear that the D&A Form cannot be the "written notice of the fact of a covered loss and of the amount of same" for two reasons. *See* § 627.736(4)(b), Fla. Stat. (2008)

[2] The face of the D&A Form establishes this is the correct statutory interpretation, as the form states at the bottom: "Note: The **original** of this form must be furnished to the insurer pursuant to [the Notice Provision], Florida Statutes and may **not** be electronically furnished." (R.96.). Indeed, it makes sense that the original form must be furnished by mail, since original signatures of the patient and health care provider are required. *See* subparagraphs (1)(a) and (4) of the Notice Provision.

(emphasis added). First, nowhere on the D&A Form is there any place for a medical provider to include the amount of the services provided for a covered loss. (R.96-97.) Second, the Written Notice Provision further states that

> [i]f such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer.

Section 627.736(4)(b), Fla. Stat. (2008) (emphasis added.) If the D&A Form were the required "written notice," all of this quoted language would be extraneous. There is no way to submit and support only part of a claim on a D&A Form that is to be completed on the initial date of service and has no place to include the amount of the charges.

"It is a cardinal rule of statutory interpretation that courts should avoid readings that would render part of a statute meaningless." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992). Thus, rather than read "written notice" as the D&A Form, this Court should properly interpret the statute to find that "written notice" is provided when a medical provider submits statements or bills for medical services on a standard, approved form as required by the Bills and Statements Provision. Indeed, when read together with the Written Notice Provision, the Bills and Statements Provision makes clear that

"written notice of the fact of a covered loss and of the amount of same" is provided upon submission of a fully-completed, form statement or bill. "It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole." *Forsythe*, 604 So. 2d at 455. "Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another." *Id.*

Moreover, "[t]he primary guide to statutory interpretation is to determine the purpose of the legislature." *Palma*, 489 So. 2d at 149. Any "[u]ncertainty should be resolved by an interpretation that best accords with the public benefits." *Id.* If "the wording of the [No-Fault] Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law.'" *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82, 85 (Fla. 2001). Here, while the statute could have been written more clearly, the legislative intent shines through when the statute is read in its entirety and when meaning is given to all words and phrases: bills or statements constitute the required written notice of "a covered loss and the amount thereof" while the D&A Form is merely a way to help prevent insurance fraud and assure that patients give informed consent for treatment. *Compare* the Written Notice Provision *with* the D&A Provision. Any other interpretation of the statute

cuts against the plain intent of the Legislature and the mandate that courts construe insurance statutes "liberally in favor of the insured." *Palma*, 489 So. 2d at 149.

Accordingly, since the D&A Form is not a prerequisite to payment of PIP benefits, Garrison's defense that it did not receive "written notice" of the claim due to an imperfect D&A Form is without merit and summary judgment in its favor should be reversed.

II. EVEN IF THE D&A FORM IS A PREREQUISITE TO PAYMENT, DR. BRACKEN'S D&A FORM SUBSTANTIALLY COMPLIED WITH THE PIP STATUTE.

Even if this Court finds that the D&A Form is required for "written notice," the summary judgment in favor of Garrison should still be reversed because Dr. Bracken notified Garrison of the covered loss through a D&A Form that substantially complied with the statute. The trial court erroneously granted summary judgment in favor of Garrison because it found Dr. Bracken's D&A Form was non-compliant with the D&A Provision and that the doctrine of substantial compliance does not apply to D&A Forms. (R.100-05.)

Ms. Levy concedes that Dr. Bracken's form differs in two minor, technical respects from the standard form adopted by the Financial Services Commission. Instead of having the State seal and the Office of Insurance Regulation's name the top of the D&A Form, Dr. Bracken has her business contact information. (R.96-97.) Also, although Dr. Bracken's D&A Form transcribed the standard form word

for word, Dr. Bracken's form did not bold any text, whereas the Commission-approved form has certain text bolded. (*Id.*) Ms. Levy also acknowledges that she signed the D&A Form on the second date of service rather than the first date. (R.96.) Because the trial court refused to apply the substantial compliance doctrine, it found that any defects in D&A Form, no matter how minor or technical, were enough to require Ms. Levy and Dr. Bracken to forfeit payment for all services rendered to Ms. Levy. This simply cannot be the law or the intent of the Legislature.

A. Dr. Bracken's D&A Form is substantially identical to the form created by the Financial Services Commission.

Subparagraph (7) of the D&A Provision requires the Financial Services Commission to adopt by October 1, 2003 "a standard disclosure and acknowledgement form that shall be used to fulfill the requirements of this paragraph, effective 90 days after such form is adopted and becomes final." Pursuant to this mandate, the Financial Services Commission adopted a standard D&A Form. (R.97.) Once adopted, medical providers are required to use the standard form. *Id.*

Dr. Bracken's D&A Form complies with subparagraph (7) because it copies the standard D&A Form language verbatim. (R.96.) The only differences between the Commission's D&A Form and Dr. Bracken's form are that: (1) Dr. Bracken's identifying information is contained at the top of the form instead of the State seal

and the name of the Office of Insurance Regulation; and (2) Dr. Bracken's form does not have any words bolded. *Compare* R.96 *with* R.97. Aside from these differences, Dr. Bracken's form is fully filled out and signed by both the doctor and Ms. Levy. *Id.* The form also contains all of the language required by the D&A Provision. *Id.* Yet, despite only insignificant differences between the two forms, the trial court concluded that Dr. Bracken's D&A Form did not put Garrison on notice that Ms. Levy had suffered a covered loss. (R.104 at ¶ 20.) This conclusion is erroneous as a matter of law.

As an initial matter, the doctrine of substantial compliance should apply to the D&A Form. Garrison argued, and Judge Hudson agreed, that the concept of substantial compliance does not apply to the D&A Form. (R. 103 at ¶ 17.) While it is true that the PIP Statute only mentions substantial compliance in the Bills and Statements Provision, virtually every court considering a non-compliant D&A Form has considered the substantial compliance doctrine. *See e.g., Lahodik v. Progressive Express Ins. Co.*, 16 Fla. L. Weekly Supp. 175c, Case No. 16-2006-SC-10736 (Fla. Duval County Ct. June 12, 2008) (on which the trial court expressly relied as persuasive authority); *Rhodes,* 16 Fla. L. Weekly Supp. 857a; *N. Fla. Med. Clinic, Inc. v. Progressive Select Ins. Co.*, 14 Fla. L. Weekly Supp. 689b, Case No. 16-2006-SC-8650 (Fla. Duval County Ct. May 1, 2007); *Ft.*

Lauderdale Pain Ctr., Inc. v. Allstate Ins. Co., 13 Fla. L. Weekly Supp. 1006a, Case No. 05-5279 CC 23 (Fla. Miami-Dade County Ct. July 17, 2006).

Use of the substantial compliance doctrine is appropriate in situations, as here, where a party has attempted compliance and missed the mark by only a small margin. For example, in *Fla. Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666, 675 (Fla. 1st DCA 2007), the First District Court of Appeal found that the Secretary of State substantially complied with the notice requirements of article XI, section 5 of the Florida Constitution for publishing proposed constitutional amendments before an election, even though notice was not published in four counties and ran a week earlier than required. Likewise, in *Dep't of Highway Safety and Motor Vehicles v. Dehart*, 799 So. 2d 1079, 1081 (Fla. 5th DCA 2001), the court found that the DMV substantially complied with a statute allowing admissibility of breath-test results on form affidavits even though information provided on the form varied slightly from that required by statute. In neither of these cases was the concept of substantial compliance addressed in the controlling law. *See Cobb,* 953 So. 2d at 675; *Dehart*, 799 So. 2d at 1080 (finding substantial compliance with section 316.1934(5), Florida Statutes (1999)). Just as applied in those cases, the substantial compliance doctrine should be applied when considering D&A Forms.

Additionally, use of the term "shall" in the D&A Provision is directory rather than mandatory. The word "shall" is merely directory when statutory provisions relate to the "orderly and prompt conduct of business...." *DeGregorio v. Balkwill*, 853 So. 2d 371, 374 (Fla. 2003). In this case, the D&A Provision falls into this category because it relates to the orderly and prompt payment of PIP claims by alleviating concerns of possible insurance fraud by the insurer. *See N. Fla. Med. Clinic, Inc. v. Progressive*, 14 Fla. L. Weekly Supp. 689b, (recognizing that "the purpose of the form is to prevent insurance fraud ...."). Because the paragraph is procedural in nature, it should not be read to defeat the purpose of the statute, *Mills v. Martinez*, 909 So. 2d 340, 343 (Fla. 5th DCA 2005), which is to ensure the prompt, virtually automatic payment of PIP claims. *Nichols*, 932 So. 2d at 1077. Accordingly, although the Legislature used the term "shall" as part of the D&A Provision, the substantial compliance doctrine can, and should, still apply.

Moreover, the Legislature demonstrated its intent throughout the PIP statute to make substantial compliance the benchmark by which medical providers would be judged. For example, the Legislature uses the word "shall" five times in the Bills and Statements Provision. But the Non-Payment Provision, which delineates when an insurer is not required to pay for services, states that it is enough for a physician to "substantially meet" the Bills and Statements Provision requirements. *See* § 627.726(5)(b) and (5)(d). Additionally, subparagraph (1)(b) of the Non-

Payment Provision provides that an insurer is not required to pay for any "treatment that was not lawful at the time rendered." Yet, in section 627.732(11), Florida Statutes (2008), which is the definitions section for the PIP Statute, the Legislature states that an act can be "lawful" so long as it is in "substantial compliance with all relevant applicable criminal, civil, and administrative requirements...." Thus, in accordance with the goal of ensuring quick and virtually automatic payment of PIP claims, the Legislature expressed its intent for a medical provider's substantial compliance with the PIP Statute to trigger an insurer's payment obligations. (R.169-70.)

When the substantial compliance doctrine is applied to Dr. Bracken's D&A Form, there is no question that her verbatim form, differing only with respect to the name appearing at the top and the bolding of certain words, substantially complies with the statute and affects its purpose. Indeed, Dr. Bracken's D&A Form did not just substantially comply with the statute, it is substantially identical to the form required by the statute. (R.146.) In cases where the courts have found a D&A Form does not substantially comply with the statute, critical information has been missing. For example, in *N. Fla. Med. Clinic, Inc. v. Progressive,* 14 Fla. L. Weekly Supp. 689b, Judge Moran was asked to consider whether a D&A Form that omitted the "services ... actually rendered" substantially complied with the statute. *Id.* Because he found that the "description goes to the heart and purpose

of the form," a D&A Form omitting this information does not substantially comply with the statute. *Id.* However, he recognized that the doctrine of substantial compliance would apply "under certain circumstances." *Id.; see also Ft. Lauderdale Pain Ctr.,* 13 Fla. L. Weekly Supp. 1006a (no substantial compliance with statute because D&A Form omitted "services ... actually rendered.")

Likewise, *Lahodik*, 16 Fla. L. Weekly Supp. 175c, on which the trial court relied as persuasive authority, is distinguishable for the same reasons. There, the self-generated D&A Form lacked both the provider affirmations and a description of the services rendered. *Id.* Because of those two omissions, the court found that the provider's self-generated form "has not substantially complied with the statutory requirements." *Id.*

In contrast, courts in other circuits have found that a D&A Form can substantially comply with the PIP Statute even if it is self-generated. In *Gary H. Weiss, D.C. v. Progressive Express Ins. Co.*, 13 Fla. L. Weekly Supp. 513b, Case No. 0-5SC-0091 (Fla. Seminole County Ct. Feb. 6, 2006), the court denied the insurer's summary judgment motion, which was premised on the fact that the plaintiff submitted a self-generated D&A Form. In addition to being self-generated, the form did not have any declarations from the provider and listed the services rendered on an attached page. *Id.* Nonetheless, the court found that the insurer was hiding behind a technicality and that the plaintiff's self-generated form

"provides substantial compliance with [the PIP Statute]." *Id.; see also Exclesior Health Clinic, Inc. v. Progressive Auto Pro Ins. Co.*, 15 Fla. L. Weekly 1233a, Case No. 0-5SC-3645 (Fla. Seminole County Ct. Oct. 15, 2008) (failure to use standard form does not preclude payment for services); *Eric G. Friedman, D.C., P.A. v. United Auto. Ins. Co.*, 13 Fla. L. Weekly 825a, Case No. 04-12106 (Fla. Miami-Dade County Ct. May 25, 2006) (form with nearly identical language substantially complied with PIP Statute); *Fla. Ctr. for Orthopedics v. Allstate Ins. Co.*, 13 Fla. L. Weekly Supp. 491b (Fla. Orange County Ct. March 3, 2006) (self-generated D&A Form substantially complied with PIP Statute); *Hollywood Diagnostics Ctr., Inc. v. S. Group. Indem., Inc.*, 12 Fla. L. Weekly Supp. 1180a, Case No. 04-18074-SP-05 (Fla. Miami-Dade County Ct. June 16, 2005). Certainly, if self-generated forms lacking an entire section can substantially comply with the PIP Statute, then Dr. Bracken's D&A Form, which is substantially identical to the standard form, complies with the statute.

B. The fact that Ms. Levy did not sign the D&A Form until her second date of service does not absolve Garrison from paying Ms. Levy's reasonable and necessary medical bills resulting from a covered automobile accident.

The trial court also erroneously concluded that because Ms. Levy hurriedly left Dr. Bracken's office without signing the D&A Form—as Dr. Bracken requested—neither Garrison nor Ms. Levy have to pay for Dr. Bracken's services. (R.124 at ¶ 21.) Moreover, the court concluded that Dr. Bracken could not correct

the form's "deficiency" because the form must be completed on the first date of service. (*Id.*) This finding results not only in a disfavored forfeiture, but also does not comport with Legislative intent.

As Florida appellate courts have explained:

> 'if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.' [*United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)] (citations omitted). The Court reasoned that, when Congress had included various "promptness" requirements in certain statutes but included no penalty for failure to meet those requirements, the Court would not impose its own sanction of dismissal. *Id.* at 64-65. We find that analysis to be compelling here, because it furthers, not frustrates, the purpose of the rule and statute.

Mills, 909 So. 2d at 343. Because the D&A Provision in particular, and the PIP Statute in general, create no penalties for a medical provider's failure to comply with the mandate of having the D&A Form signed on the initial date of service, the courts are not at liberty to create a penalty. While the Legislature expressed a preference for having the D&A Form signed on the initial date of service, it did not frustrate the overall intent of the PIP Statute to provide for the swift payment of PIP benefits by allowing insurers to escape their payment obligations on a technicality.

Recently, Judge Higbee rejected Garrison's extreme position regarding D&A Forms in *Rhodes,* 16 Fla. L. Weekly Supp. 857a. There, the court expressly

disagreed with Garrison's position that "[o]nce the original disclosure and acknowledgment form has been received and it is not correct than neither USAA nor the patient owes these medical bills." *Id.* Rather, it found that a noncompliant D&A Form could be corrected, resigned by the patient, and mailed to the insurer months after the initial date of service. *Id.* As a result, the court agreed with the medical provider that it had substantially complied with the statute. *Id.* Because of this finding, Judge Higbee denied Garrison's summary judgment motion and entered judgment for the plaintiff. *Id.*

Likewise, Judge Collins recently entered summary judgment for a plaintiff medical provider against a defendant insurer where the provider signed a D&A Form and mailed it to the insurer, but neglected to have the insured sign the form. *Roosevelt Rehab & Chiropractic, Inc. v. United States Auto. Ass'n*, Case No. 2008-SC-3021 C at pg. 2 (Fla. Clay County Ct. Sept. 24, 2009).[3] When the insurer notified the provider that the D&A Form was deficient, the provider obtained the insured's signature on a copy of the original D&A Form and sent the copy to the insurer. *Id.* The court concluded that the revised D&A Form was sufficient to meet the requirements of the PIP Statute. *Id.*

[3] Because this opinion has not yet been published, a conformed copy of the order is attached hereto in Appendix tab A.

Thus, even where information or signatures are missing from the D&A Form, courts in this circuit have still found that the provider substantially complied with the PIP Statute by correcting the form and resubmitting the form to the insurance company. In this case, nothing was missing from the D&A Form and Ms. Levy signed the form two days after receiving her initial treatment. (R.96.) If the medical providers in *Rhodes* and *Roosevelt Rehab* can substantially comply by getting a patient signature on a D&A Form months after the initial treatment, then Dr. Bracken's form—signed just two days after treatment—must also be compliant with the PIP Statute.

III. FINALLY, EVEN IF DR. BRACKEN'S D&A FORM IS NON-COMPLIANT, GARRISON IS STILL OBLIGATED TO PAY FOR ALL SERVICES RENDERED AFTER THE INITIAL TREATMENT DATE.

Finally, if the Court resolves both of these issues against Ms. Levy, it still must resolve a conflict in this circuit over whether a non-compliant D&A Form only effects payment of services rendered on the initial treatment date or whether all services rendered to the insured are non-payable. (R.153-54.)

In *Donald W. Lowery, D.C. v. Progressive Select Ins. Co.*, 16 Fla. L. Weekly Supp. 755a (Fla. Duval County Ct. July 10, 2008), Judge Arias found that a defective D&A Form only impacts payment for services rendered on the initial date of treatment, but that all subsequent treatments would be payable. In that case, the medical provider improperly faxed its D&A Form along with its

treatment notes, but did not list the services actually rendered on the form. *Id.* Although Judge Arias found that the D&A Form was not compliant with the D&A Provision, the deficient form only impacted the provider's ability to be paid for the initial treatment. *Id.* He noted that subparagraph (5) of the D&A Provision states that the D&A Form requirements "apply only with respect to the initial treatment or service of the insured by a provider." *Id.* (emphasis added); *see* § 627.736(9)(e), Fla. Stat. (2008) ("The requirements of this paragraph apply only with respect to the initial treatment or service of the insured by the provider.")[4] Likewise, the only appellate panel to have considered this issue similarly sided with the medical provider or insured. In *King*, the court held that "[t]o whatever extent the initial disclosure failed to comply with [the PIP Statute], that failure in no way excused the insurer from paying subsequently filed bills." 15 Fla. L. Weekly Supp. 430a.

Contrary to these holdings, other courts in this circuit have rejected the argument that an incomplete D&A Form precludes payment for only the initial

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[4] Judge Arias further found that "[s]hould the insurer receive an incomplete Form, the insurer may legally toll the time period to make payment until proper documentation is received and, if not received, the payment may be denied." *Id.* Thus, having properly read and interpreted the Notice Provision, Judge Arias concluded that a non-compliant D&A Form may toll payment obligations until all information is received, but an insurer cannot deny payment altogether if the provider supplies a complete D&A Form. *See also* R. 96-97 ("Failure to furnish this form *may* result in nonpayment of the claim.) (emphasis added). Thus, other courts' belief that the lack of a forfeiture penalty for non-compliance renders the D&A Form Provision of the statute meaningless are incorrect. *See e.g., Martin infra.*

date of service. *See N. Fla. Med. Clinics, Inc. v. Progressive*, 14 Fla. L. Weekly Supp. 689b (Judge Moran found that "[w]here the disclosure and acknowledgment form is not properly completed when submitted, no subsequent dates of service are payable."); *Martin v. Progressive Auto Pro Ins. Co.*, 14 Fla. L. Weekly Supp. 394a, Case No. 16-2005-SC-8073 (Fla. Duval County Ct. Feb. 2, 2007) (Judge Tanner rejected argument that failure to provide the D&A Form impacts only initial date of service.)

The biggest fallacy with these findings – in addition to being contrary to the language of the statute – is that they endorse a forfeiture by a medical provider in favor of an insurance carrier who would otherwise be legally responsible for payment. In essence, these holdings find that no matter how much reasonable and necessary treatment an insured receives, if the provider somehow slips up in completing or transmitting the D&A Form on the initial date of service, no PIP benefits are ever payable to that provider.[5] This is the very definition of a forfeiture, which the law abhors. *See Butterworth v. Caggiano*, 605 So. 2d 56, 58 (Fla. 1992) (noting that "[f]orfeitures are considered harsh penalties that are historically disfavored in law and equity...."); *see also M R S Sports Med. Inc. v. USAA Cas. Ins. Co.*, 16 Fla. L. Weekly Supp. 355a (Fla. Broward County Ct. Feb.

[5] Under this reasoning, the only way an insured could get her PIP benefits is to change doctors. (R.82-83.) This result does not comply with the statutory intent of securing quick and virtually automatic payment so an insured can get on with her life. *See Nichols*, 932 So. 2d at 1077.

12, 2009) (insurer's failure to acknowledge validity of a corrected D&A Form evidences its intent to treat original noncompliant form as a forfeiture, which is disfavored under Florida law; summary judgment entered for plaintiff).

If the Court finds that the D&A Form is *not* the "written notice" contemplated by the Written Notice Provision, then a non-compliant form should not impact payment for either the initial or any subsequent treatments provided the insurer ultimately receives proper documentation. However, if the Court concludes that the D&A Form is required for "written notice," then it should further find, pursuant to subparagraph (9) of the D&A Provision, that it is only "written notice" for the initial treatment date and any subsequent treatments for which the insurer receives timely bills or statements are payable. If this is the Court's ultimate decision, than summary judgment should still be entered for Ms. Levy on all claims except for her initial treatment date.

CONCLUSION

For the foregoing reasons, the Judgment below should be reversed and remanded for entry of summary judgment in favor of Ms. Levy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to **James C. Rinaman, III, Esq.** (counsel for Garrison) 1054 Kings Avenue, Jacksonville, FL 32207; and **D. Scott Craig, Esq**. (trial counsel for Ms. Levy), P.O. Box 600935, Jacksonville, FL 32260, by U.S. Mail, this 29th day of September, 2009.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Attorney

INDEX TO APPENDIX

TAB

IN THE COUNTY COURT, IN
AND FOR CLAY COUNTY,
FLORIDA.

CASE NO. 2008-SC-3021 C

ROOSEVELT REHAB & CHIROPRACTIC, INC.
D/B/A BLANDING REHAB & CHIROPRACTIC,
(AS ASSIGNEE OF KIMBERLY CRAVEY),

Plaintiff,

vs.

UNITED STATES AUTOMOBILE ASSOCIATION,

Defendant.

ORDER PARTIALLY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S EMERGENCY MOTION FOR SUMMARY JUDGMENT

THIS cause came to be heard on the Plaintiff's Motion for Summary Final Judgment and Defendant's Emergency Motion for a Final Summary Judgment and the Court, having considered the affidavits, argument of counsel, and the memorandums provided, finds as follows:

A. This is a Personal Injury Protection (PIP) benefits case filed pursuant to Chapter 627, Florida Statutes.

B. The Plaintiff is a medical provider who provided chiropractic care for the Defendant's insured as a result of an automobile accident covered by the Defendant's PIP policy issued to the insured.

C. The Defendant's Motion for Final Summary Judgment raises several issues, one of which is whether or not the "Disclosure and Acknowledgement" form requirement of the statute was complied with in this case.

D. Both counsel agree that the initial "Disclosure and Acknowledgement" form was signed only by the doctor on April 30, 2008. It was later mailed to the Defendant within the time limits required by Chapter 627.

E. When the Defendant notified the Plaintiff that the "Disclosure and Acknowledgement" form had not been signed by the insured, the Plaintiff's doctor made a copy of the form in his file and took the form to the insured. Thereafter, the insured signed the form, and it was mailed to the Defendant.

F. As a result the Defendant was provided with an original document signed by the doctor without the insured's signature and a copy of the original document which was signed by the insured.

G. This Court finds that the "Disclosure and Acknowledgement" form meets the requirements of Chapter 627.

H. The other issue raised by the Defendant's Emergency Motion for Summary Judgment relates to the Defendant's belief that since the Plaintiff now concedes that one of the billing entries listed on its initial bill (and demand letter) was in error that the entire case should be dismissed.

I. The Court finds this argument to be without merit. If the Defendant's argument was followed to its logical conclusion, then any case where the Plaintiff was able to prove even the most inconsequential billing mistake would have to be dismissed and re-filed. This, the Court believes, is not the intent of the legislature.

J. Finally, the Court does believe, however, that an issue of material fact does exist as to what is owed with regard to another billing entry. Therefore, the Plaintiff's Motion for Final Summary Judgment cannot be fully granted.

Therefore it is,

ORDERED AND ADJUDGED:

1. The Defendant's Emergency Motion for Final Summary Judgment is Denied.

2. The Plaintiff's Motion for Final Summary Judgment, to the extent consistent with this opinion, is granted, in part.

DONE AND ORDERED in Chambers in Green Cove Springs, Clay County, Florida on this 24 day of September 2009.

TIMOTHY R. COLLINS
COUNTY JUDGE

Copies furnished to:

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