IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D2024-0307
LT CASE NO. 2015-003378-SP-21

VELO CHIRO FIZIK, INC., a/a/o
ALFONSO QUIROGA,

Appellant,

vs.

ALLSTATE FIRE AND CASUALTY
COMPANY,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

In this appeal, Plaintiff/Appellant, VELO CHIRO FIZIK, INC., a/a/o ALFONSO QUIROGA ("Appellant") seeks review and reversal of the trial court's summary final judgment entered in favor of Defendant/Appellee, ALLSTATE FIRE & CASUALTY INSURANCE COMPANY ("Allstate").

Because the trial abused its discretion in refusing to consider Appellant's untimely response to Allstate's renewed motion for summary judgment where Appellant demonstrated excusable neglect and Allstate was not prejudiced, and because Allstate failed to demonstrate conclusively that it properly reimbursed all Appellant's claims in accordance with 200% of the Medicare Part B fee schedule, the trial court's summary final judgment should be reversed.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over the trial court's summary final judgment pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A).

ISSUES PRESENTED

There are two issues for this Court's consideration:

The first issue is whether the trial court abused its discretion when it refused to extend the deadline for Appellant to file – or more appropriately stated, when it refused to consider – Appellant's response to Allstate's renewed motion for summary judgment when Appellant's counsel demonstrated excusable when Allstate was not prejudiced. Appellant's response to Allstate's renewed motion for summary judgment was admittedly filed 9 days before the hearing on Allstate's renewed motion for summary judgment instead of the 20 days required by Florida Rule of Civil Procedure 1.510. However, Appellant's counsel filed a verified motion before the hearing asking for additional time to comply with Florida Rule of Civil Procedure 1.510 explaining that the hearing on Allstate's renewed motion for summary judgment was not properly calendared due to excusable neglect and Allstate was not prejudiced either in its papers or at the hearing. Because Appellant demonstrated excusable neglect, and because Allstate was not prejudiced, the trial court should have accepted and considered Appellant's response to Allstate's renewed motion for summary judgment.

The second issue is whether Allstate was entitled to summary judgment as to Appellant's breach of contract claim when Allstate failed to conclusively demonstrate that it paid all PIP benefits in accordance with section 627.736, Fla. Stat. The evidence in this case demonstrates that Allstate did not reimburse all of Appellant's claims pursuant to the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat. Specifically, it is undisputed that Allstate failed to properly reimburse CPT code 98941 where the amount Allstate allowed for CPT code 98941 *was less than the amount set forth in the Medicare Part B fee schedule at 200%*. Allstate, for its part, presented no evidence that it paid CPT code 98941 pursuant to the Medicare Part B fee schedule at 200%. Because Allstate failed to meet its summary judgment burden, it was not entitled to summary final judgment.

STATEMENT OF THE CASE

This is the second time this case has been before this Court. *See* No. 3D21-353. Appellant originally invoked this Court's jurisdiction based on the trial court's summary final judgment concluding that Allstate's insurance policy allowed it to reimburse Appellant's claims pursuant to the fee schedules set forth in section

627.736(5)(a)2., Fla. Stat. (R. 228-35) While this Court ultimately agreed that Allstate's insurance policy allowed it to reimburse PIP claims pursuant to the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat., this Court reversed concluding "the record is devoid of an affidavit, or any summary judgment evidence, showing that Allstate paid pursuant to the fee schedules." *Velo Chiro Fizik, Inc. v. Allstate Fire & Cas. Ins. Co.*, 374 So. 3d 94 (Fla. 3d DCA 2022). This case was remanded to the trial court "for further proceedings consistent with this opinion." *Id.*

On March 24, 2023, Allstate filed a renewed motion for summary judgment which mirrored its prior motion for summary judgment (R. 853-77), but this time attached an affidavit of a claims adjuster who merely stated that "Allstate's reimbursements were made pursuant to the limitations set forth in § 627.736(5)(a)2.," and Allstate's insurance policy. (R. 879-83). Notably, however, the affidavit did not detail how Allstate calculated the amounts that it reimbursed Appellant for each CPT code billed. (R. 879-83)

On April 13, 2023, Appellant filed a motion to strike Allstate's affidavit ("motion to strike").[1] (R. 982-85) Appellant alleged that Allstate's affidavit intentionally and falsely states that Allstate reimbursed Appellant's claims pursuant to the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat. when in fact, Allstate and its attorneys knew that Allstate did not properly reimburse CPT 98941 at 200% of the Medicare Part B fee schedule. (R. 982-85) Appellant explained that for CPT code 98941, Allstate allowed $74.96 *when in fact the proper amount that Allstate should have allowed under the Medicare Part B fee schedule at 200% is $76.48*; simply stated, Allstate paid 80% of $74.96 *when it should have paid 80% of $76.48*. (R. 983-84). Appellant included a link to the rules for calculating reimbursements pursuant to the Medicare Part B fee schedule for CPT code 98941 for the service year in support of its position. (R. 983) As Appellant explained, Allstate's awareness of this underpayment was magnified by the fact that Allstate initially

[1] After the summary judgment hearing and on agreement between the parties' counsel, Appellant withdrew its motion to strike alleging that Allstate committed fraud on the court by its false affidavit. To be clear, Appellant still believed that the affidavit was false but withdrew the motion because it was undergirded by the claim that Allstate and its attorney committed fraud on the court.

sought summary judgment without an affidavit, and then on remand, argued that because of this Court's opinion in the first appeal, the trial court cannot consider any factual disputes and is required only to enter summary judgment, regardless of whether the statements in its affidavit are correct or not. (R. 982-85)

Allstate filed a response to Appellant's motion to strike. (R. 1742-47) Allstate's response is telling. Instead of making any effort to prove that it properly reimbursed CPT code 98941, Allstate instead argued that this underpayment was an "unpled issue" and a "backdoor attempt to avoid the law of the case" – referring to this Court's prior opinion. (R. 1743) This is based on Allstate's contrived and mistaken position that this Court's prior opinion in the first appeal somehow meant that Appellant could never dispute whatever evidence Allstate would eventually file and that the trial court was required to just accept whatever Allstate filed as summary judgment evidence, even if it was false. Of course, none of that is actually in this Court's prior opinion.

On September 4, 2023, Appellant filed its response to Allstate's renewed motion for summary judgment. (R. 986-1718) Appellant explained that despite Allstate's affidavit claiming it reimbursed Appellant's claims pursuant to the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat., Allstate underpaid CPT code 98941 on each date of service that code was billed. According to Appellant's response, Allstate allowed $74.96 when the proper amount allowed by the Medicare Part B fee schedule at 200% is $76.48 resulting in an actual underpayment and undisputed breach of the insurance policy. (R. 986-1718) As in its motion to strike, Appellant provided the trial court with the rules for determining what the allowable amount for CPT code 98941 is:

> The Participating Medicare Part B Fee Schedule is determined by the following formula:
>
> [(Work RVU x Work GCPI) + (PE RRVU x PE GPCI) + (MP RVU x MP GCPI)] x CF
>
> Here, the Data Tables for 2011 CPT code 98941 are as follows:
>
> **[(.65 x 1.00) + (.36 x 1.072) + (0.03 x 2.984)] x 33.9764 = $38.24**
>
> As the Medicare Part B Fee schedule is 200% of $38.24 (rounding up), the allowed amount for the service billed as 98941 should have been $76.48, **NOT** $74.96. The entire veracity of the adjuster's affidavit is in doubt, and therefore the affidavit should not be considered.

(R. 987) Appellant's response went on to explain that this Court's opinion in the first appeal should not be interpreted as Allstate advances because this Court did not resolve any factual disputes – indeed it could not have resolved any factual disputes because Allstate had, up to that point, filed no summary judgment evidence and Appellant had not had a chance to file any counterevidence – and this Court did not relieve Allstate of its summary judgment burden of demonstrating that it did not breach the insurance policy. (R. 987-92) Instead, Appellant explained that all this Court's opinion should be construed as (1) affirming the fact that Allstate's insurance policy contained sufficient notice that Allstate would reimburse PIP claims in accordance with the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat., (2) that Allstate had filed no summary judgment evidence in support of its motion for summary judgment, (3) and that Allstate must meet its summary judgment burden on remand. (R. 986-92)

On September 6, 2023, Allstate filed a reply in support of its renewed motion for summary judgment. (R. 1719-41) Again, Allstate made no effort to prove that it paid CPT code 98941 properly. Instead, Allstate continued with its argument that this

Court's first opinion did not permit the trial court to consider factual disputes. According to Allstate, all this Court required was an affidavit from Allstate stating that Allstate paid in accordance with the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat. and that Appellant could not dispute that affidavit. (R. 1719-41) Allstate also argued that Appellant's response was untimely although it made no attempt to demonstrate any prejudice. How could it? Appellant's response included the same substance as the motion to strike – the underpayment of CPT code 98941 – and Allstate identified no issue in filing a reply just 2 days after Appellant's response was filed. If Allstate paid CPT code 98941 properly all it had to do was prove it. But it didn't, because it couldn't. Allstate's only hope of success was a technicality and an unsupported argument.

On September 12, 2023, Appellant filed a verified motion asking the trial court to extend the time to file its response to Allstate's renewed motion for summary judgment and requesting the trial court accept and consider its response as timely filed based on its verified claim of excusable neglect. (R. 1748-49) According to Appellant, the date of the hearing on Allstate's renewed motion for

summary judgment was not correctly calendared because the hearing date in this case was coordinated at the same time as summary judgment hearings in several other similar cases and the hearing dates were mistakenly jumbled on the spreadsheet created by Appellant's counsel. Because of this calendaring error, Appellant's response to Allstate's renewed motion for summary judgment was not filed more than 20 days before the hearing. (R. 1748-49) Appellant pointed out that this calendaring mistake was further exacerbated by the fact that no notice of hearing was filed by Allstate on the docket of this case. (R. 1748-49)

On September 13, 2023, the trial court conducted a hearing on Allstate's renewed motion for summary judgment. (R. 1885-1931) First, the trial court considered Appellant's verified motion requesting the trial court accept and consider Appellant's untimely response. (R. 1895-1911) Appellant's attorney explained that, for a variety of likely reasons, the hearing date on Appellant's renewed motion for summary judgment was mis-calendared and thus Appellant's response was not timely filed. (R. 1896-97) Appellant's counsel explained that this case was one of several cases that were set for a summary judgment hearing and that the dates got jumbled

up on his spreadsheet which also contributed to him not properly calendaring the hearing on Allstate's renewed motion for summary judgment. (R. 1896-97) Appellant's counsel further explained that while Allstate objects to the relief requested, Allstate was not prejudiced because it was able to file a complete reply in support of its motion for summary judgment after Appellant's response was filed. (R. 1897-98) Allstate's attorney responded by arguing that Appellant has demonstrated neglect but not excusable neglect. (R. 1901-03) Importantly, Allstate's counsel did not identify any prejudice or how Appellant's untimely response may prevent Allstate from proceeding. (R. 1901-03) The trial court then questioned whether there was a rule of procedure that allowed it to extend the summary judgment deadline. (R. 1903-04) In response, Appellant's counsel explained that Florida Rule of Civil Procedure 1.090(b) allowed the trial court to extend the deadline for excusable neglect. (R. 1903-06) Allstate's attorney argued that it would not be an abuse of discretion if the trial court denied Appellant's motion in this case. (R. 1906-08) Ultimately, the trial court concluded that Appellant's counsel had not demonstrated excusable neglect. (R. 1909-11) Finding no evidence in the record to refute Allstate's

renewed motion for summary judgment, the trial court stated on the record that it was granting Allstate's renewed motion for summary judgment. (R. 1914-15) Again, Allstate made no attempt to demonstrate that it properly reimbursed CPT code 98941.

On January 19, 2024, the trial court entered its order denying Appellant's verified motion for retroactive extension of the deadline to respond to Allstate's renewed motion for summary judgment based on excusable neglect and granting Allstate's renewed motion for summary judgment. (R. 1957-58)

Appellant timely appealed. (R. 1932-36)

SUMMARY OF THE ARGUMENT

Admittedly, Appellant's response to Allstate's renewed motion for summary judgment was not timely filed. It was filed 11 days late. The trial court, however, abused its discretion when it refused to consider Appellant's response. Appellant filed a verified motion demonstrating excusable neglect, Appellant diligently moved for relief, Allstate could not be prejudiced, and the response forcibly forecloses Allstate's entitlement to summary judgment. It is respectfully asserted and requested that this case be decided on its merits not on a technicality.

Moreover, because it is undisputed that Allstate did not properly reimburse CPT code 98941, Allstate failed meet its summary judgment burden and was therefore not entitled to summary final judgment.

STANDARD OF REVIEW

A trial court's conclusion regarding excusable neglect is reviewed for an abuse of discretion. *See Dep't of Transp. v. Southtrust Bank*, 886 So. 2d 393, 396 (Fla. 1st DCA 2004). The proper standard for determining excusable neglect in failing to comply with a procedural rule involves taking "into account all of the relevant circumstances, including prejudice to the other party, the reason for the delay, the duration of the delay, and whether the movant acted in good faith." *Carter v. Lake Cty.*, 840 So. 2d 1153, 1157 (Fla. 5th DCA 2003) (*citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)).

A trial court's grant of summary judgment is reviewed *de novo*. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *Chandler v. Geico Indem. Co.*, 78 So. 3d 1293, 1296 (Fla. 2011).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO EXTEND THE DEADLINE FOR APPELLANT TO FILE ITS RESPONSE AND IN REFUSING TO CONSIDER APPELLANT'S RESPONSE TO ALLSTATE'S RENEWED MOTION FOR SUMMARY JUDGMENT; APPELLANT DEMONSTRATED EXCUSABLE NEGLECT AND ALLSTATE WAS NOT PREJUDICED.

Under the new summary judgment rule, a party opposing summary judgment must "serve the movant's supporting factual position" and "serve a response that includes the nonmovant's supporting factual position" at least 20 days before the summary judgment hearing. Fla. R. Civ. P. 1.510(c)(5). However, a trial court has discretion to consider untimely evidence at a summary judgment hearing:

> **Materials Not Cited**. The court need consider only the cited materials, *but it may consider other materials in the record.*

Rule 1.510(c)(3), Fla. R.Civ. P. (emph. added)

In addition to this broad discretion, Florida Rule of Civil Procedure 1.510(c)(3), subsections 1.510(d)(3) & (e)(4) permit the trial court to "issue any other appropriate order," such as considering untimely evidence, if there the non-movant "cannot

present facts essential to justify its opposition" or "fails to properly support an assertion of fact."

This broad discretion to reject or accept untimely summary judgment evidence is not unlimited. A court has discretion to reject an untimely summary judgment evidence or an untimely response only where there are no "compelling or exigent circumstances that excused the tardiness" of the late counter-affidavit. *See Pangilinan v. Broward County*, 914 So. 2d 1094, 1098 (Fla. 4th DCA 2005); *AC Holdings 2006, Inc. v. McCarty*, 985 So. 2d 1123, 1126 (Fla. 3d DCA 2008); *Dalrymple v. Franzese*, 944 So. 2d 1240, 1242-43 (Fla. 4th DCA 2006). Here, the excusable neglect of Appellant's counsel, as more fully discussed in the statement of facts section above was a compelling or exigent circumstance that should have warranted the trial courts acceptance of the affidavit.

Enlargements of time are also regulated by Florida Rule of Civil Procedure 1.090(b) which provides:

> **Enlargement**. When an act is required or allowed to be done at or within a specified time by order of court, by these rules or by notice given thereunder, for cause shown the court at any time in its discretion .... (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when *failure to act was the result*

> *of* ***excusable neglect*** but it may not extend the time for making a motion for new trial, motion for rehearing or motion to alter or amend a judgment or a motion for relief from a judgment under Rule 1.540(b) or for taking an appeal or filing petition for certiorari or for making a motion for a directed verdict.

Rule 1.090(b), Fla. R.Civ. P. (emph. added)

The question of what constitutes "excusable neglect" is an equitable one, which considers all the relevant circumstances, including prejudice to the other party, the reason for the delay, the duration of the delay, and whether the movant acted in good faith. *See Carter*, 840 So. 2d at 1157 (holding that excusable neglect provisions in the various rules of civil procedure should be interpreted similarly and consistently, utilizing the same liberal standard applied by the courts in Florida Rule of Civil Procedure 1.540, to make excusable neglect determinations).

Courts routinely find that calendaring mistakes, like this one, constitute excusable neglect. "Excusable neglect" is "an honest mistake made during the regular course of litigation, including those that result from oversight, neglect, or accident." *Ocwen Loan Servicing, LLC v. Brogdon*, 185 So. 3d 627, 629 (Fla. 5th DCA 2016) (citation omitted). Excusable neglect is found "where inaction

results from clerical or secretarial error, reasonable misunderstanding, *a system gone awry or any other of the foibles to which human nature is heir*." *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985).

Specific to the circumstances here, failing to timely file a response to a summary judgment motion due to a calendaring error is exactly the type of mistake that the excusable neglect doctrine is meant to address. *Id.* (failure to substitute personal representative of an estate within 90 days after suggestion of death was filed constituted excusable neglect because the mistake was a "secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir"); *Wilson v. Woodward*, 602 So. 2d 547 (Fla. 2d DCA 1992) (attorney's failure to file affidavit opposing summary judgment and failure to appear at summary judgment hearing due to calendaring error constituted excusable neglect); *Ocwen Loan Services, LLC*, 185 So. 3d at 629 ("Therefore, the claim that a failure to appear due to a calendaring or clerical error is the type of excusable neglect or mistake that warrants relief under rule 1.540(b) is well-supported in Florida law."); *J.J.K. Int'l, Inc. v. Shivbaran*, 985 So. 2d 66, 68-69

(Fla. 4th DCA 2008) (holding it was error to deny 1.540(b) motion seeking relief from order of dismissal entered after counsel failed to appear at hearing on motion to dismiss because secretary mistakenly marked hearing as "cancelled"); *Wilson*, 602 So. 2d at 549 (holding it was abuse of discretion to deny 1.540(b) relief from summary judgment after plaintiff's counsel failed to appear for hearing due to secretary's failure to calendar); *Crystal Lake Golf Course v. Kalin*, 252 So. 2d 379 (Fla. 4th DCA 1971) (failure to attend pretrial conference deemed to have been caused by excusable neglect of counsel's secretary, who failed to diary same; judgment reversed and remanded for proceedings on the merits); *Travelers Ins. Co. v. Bryson*, 341 So. 2d 1013 (Fla. 4th DCA 1977) (failure to appear at hearing on motion for default deemed to have been caused by excusable neglect because counsel failed to properly note the hearing date on his calendar – cause reversed and remanded for proceedings on the merits).

Wilson v. Woodard provides a prime example of excusable neglect pertinent to the instant case. There, a party's attorney did not appear at an adverse summary judgment hearing, nor did the attorney timely file an affidavit in opposition to the motion for

summary judgment, as required by Florida Rule of Civil Procedure 1.510. *Wilson*, 602 So. 2d at 548. The trial judge entered an order granting the motion for summary judgment. The attorney filed a motion for relief from judgment, arguing that the "attorney was not present at the hearing and an affidavit in opposition to the motion was not timely filed because the attorney's secretary made a mistake and did not calendar the hearing pursuant to the notice of hearing." *Id.* at 548-49. The Second District held that the attorney demonstrated excusable neglect and his motion for relief from judgment should have been granted:

> As reflected in Appellant's verified motion, Appellant's counsel failed to timely file Appellant's response to Allstate's renewed motion to dismiss due to a proverbial "system gone awry." As Appellant's counsel explained, multiple summary judgment hearings were scheduled at the same time, Appellant's counsel attempted to keep track of the different hearing dates for all cases on a spreadsheet, and ultimately the hearing dates got jumbled on the spreadsheet. This type of accident is precisely the type of accident and excusable neglect for which Florida Rule of Civil Procedure 1.090(b) exists.

Id. at 549.

The Fifth District's decision in *Asset Recovery Ctr. Ivs. LLC v. Estate of Hossairati*, 113 So. 3d 1035 (Fla. 5th DCA 2013) is also on point. *Asset Recovery* was decided after the 2005 amendment to

Florida Rule of Civil Procedure 1.510(c) which required an identification of the matters to be relied on at the hearing prior to the hearing. The Fifth District reversed a summary judgment based on excusable neglect which prevented an attorney's attendance at hearing and filing of a timely counter affidavit. The Fifth District concluded:

> We conclude that the trial court abused its discretion in denying Appellant's motion for rehearing, which established excusable neglect by Appellant's counsel in failing to appear at the summary judgment hearing and failing to file a counter-affidavit. The late-filed affidavit creates an issue of material fact precluding summary judgment.

Id.

The *Asset Recovery* Court relied exclusively on this Court's decision in *Marco Surfside, Inc. v. Velez*, 438 So. 2d 911, 912 (Fla. 3d DCA 1983). In *Marco*, this Court reversed a summary judgment finding that the trial court abused its discretion when it refused to consider summary judgment evidence that was not timely filed because of a calendaring mistake. This Court concluded:

> The final summary judgment under review is reversed and the cause is remanded to the trial court for further proceedings upon a holding that: (a) the trial court abused its discretion in failing to grant a rehearing in this cause and accept a late-filed affidavit when

> defendant/appellant's counsel failed to attend the summary judgment hearing and timely file the subject affidavit *due to an excusable error by counsel in noting on his calendar* the date of the summary judgment hearing herein, …, and (b) *the late-filed affidavit defeats the plaintiff/appellee's entitlement to a summary judgment in this cause because it creates a genuine issue of material fact* as to whether the plaintiff/appellant was furnished the required property report herein prior to signing the contract between the parties.

Id. (emph. added) (internal citations omitted). *See also*, *Mitchell v. Kelly*, 639 So. 2d 66, 67 (Fla. 3d DCA 1994) ("The instant case is analogous to those in which counsel has failed to appear by reason of a calendaring error.").

The same analysis applies here. Appellant's response was filed just 11 days late. As reflected in Appellant's verified motion, Appellant's counsel failed to timely file Appellant's response to Allstate's renewed motion to dismiss due to a proverbial "system gone awry." As Appellant's counsel explained, multiple summary judgment hearings were scheduled at the same time, Appellant's counsel attempted to keep track of the different hearing dates for all cases on a spreadsheet, and ultimately the hearing dates got jumbled on the spreadsheet. This type of accident is precisely the

type of accident and excusable neglect for which Florida Rule of Civil Procedure 1.090(b) exists.

Moreover, Appellant exercised due diligence when it timely sought to remedy the issue by filing its verified motion just 6 days after Allstate raised the issue and before the summary judgment hearing. *See Winn Dixie Stores v. Danielsen*, 544 So. 2d 320 (Fla. 4th DCA 1989) (failure to file answer due to secretarial error was excused, given that there was "due diligence in seeking relief on the same day default was discovered"). Indeed, no argument was raised by Allstate that Appellant did not exercise due diligence, and the trial court did not make any such finding. This was not a hidden issue; Allstate clearly understood the issue.

Additionally, there is and could be no prejudice to Allstate if the trial court had accepted and considered Appellant's response. Indeed, Allstate never claimed below that it was prejudiced by Appellant's untimely response and the trial court made no such finding. The reality is that the argument presented in Appellant's response to Allstate's renewed motion for summary judgment was the exact same argument presented in Appellant's motion to strike Allstate's affidavit which was filed just days after Allstate's renewed

motion for summary judgment. Importantly, Allstate was able to file a response to Appellant's motion to strike and was able to file reply to Appellant's response. There was no material difference in either of those documents. Ultimately this is a relatively simple issue, either Allstate reimbursed CPT code 98941 properly or it did not. Allstate understood what the issue was. Importantly, Allstate made no attempt to dispute Appellant's claim, a claim that was raised multiple times, that Allstate failed to properly reimburse CPT code 98941. Instead, Allstate hoped for and secured what is nothing more than a technical victory.

To the contrary, the prejudice to Appellant due to the trial court's refusal to consider its untimely response is substantial. Appellant's response clearly defeats Allstate's entitlement to summary judgment in this case because it indisputably demonstrates that Allstate did not properly reimburse CPT code 98941. Fundamentally, the trial court should have accepted Appellant's untimely response to facilitate a ruling on the merits in this case, rather than elevate procedure over substance. "Summary judgment should be granted cautiously, with full recognition of the right of a litigant to a jury trial on the merits of his cause." *Cox v.*

CSX Intermodal, Inc., 732 So. 2d 1092, 1096 (Fla. 1st DCA 1999). Appellant's response demonstrated a legitimate and forcible factual dispute – one that Allstate never tried to avoid. Because the factual issue in this is glaring, Allstate should not have prevailed on a technicality.

The "excusable neglect" inquiry engaged by the trial court should have but did not consider all the relevant circumstances, including prejudice to the other party, the reason for the delay, its duration, and whether the movant acted in good faith. *Madill v. Rivercrest Community Association, Inc.*, 273 So. 3d 1157 (Fla. 2d DCA 2019); *Carter*, 840 So. 2d at 1157. Properly considered, these factors all support an extension of time for Appellant to file its response to Allstate's renewed motion for summary judgment. Accordingly, because the trial court abused its discretion when it declined to consider Appellant's untimely response to Allstate's renewed motion for summary judgment, the summary final judgment should be reversed and this matter remanded with instructions to the trial court to consider Appellant's response.

II. ALLSTATE WAS NOT ENTITLED TO SUMMARY FINAL JUDGMENT; IT IS UNDISPUTED THAT ALLSTATE DID NOT PROPERLY REIMBURSE CPT CODE 98941 AND THUS BREACHED THE INSURANCE POLICY.

Having demonstrated that the trial court abused its discretion in refusing to consider Appellant's response to Allstate's renewed motion for summary judgment, the next inquiry is whether Allstate was entitled to summary final judgment as to Appellant's breach of contract claim. Because Allstate failed to conclusively demonstrate that no jury could return a verdict for Appellant, particularly as it relates to the question of whether Allstate properly reimbursed CPT code 98941, it was not entitled to summary final judgment.

When the Florida Supreme Court amended Rule 1.510 it adopted the federal summary judgment standard laid out in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). According to *Celotex Corp.*, summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at 322.

"An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Reina-Leon v. Home Depot U.S.A. Inc.*, 2019 WL 1745378 (M.D. Fla 2019) (*citing Mize v. Jefferson City Bd. of Educ.*, 93 F3d 739, 742 (11th Cir. 1996)). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the complete absence of genuine issues of material fact. *Shiver v. Chertoff*, 549 F. 3d 1342, 1343 (11th Cir. 2008). The moving party can satisfy its summary judgment standard only if it can show there is "*an absence of evidence* to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325 (emph. added).

Once the moving party has discharged its summary judgment burden, the nonmoving party must then designate specific facts showing that there is a genuine issue of material fact. *Id.* at 324. However, a plaintiff is not required to supply conclusive and irrefutable proof of her claims to survive summary judgment. *Britt v.*

Wal-Mart Stores E. LP., No. 18-61323-CIV, 2019 WL 3890458 (S.D. Fla. May 13, 2019). Instead, a trial court must determine — as is the case with a motion for a directed verdict — whether the nonmovant's "evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. That is to say, the nonmovant's evidence must be of sufficient weight and quality that "reasonable jurors could find by a preponderance of the evidence that [the nonmovant] is entitled to a verdict." *Id*. at 252.

In determining whether a genuine issue of material fact exists, the court must consider all the evidence in the light most favorable to the nonmoving party. *Celotex*, 477 U.S. at 323. In evaluating a motion for summary judgment, courts consider the evidence in the record, including "depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Rule 1.510(c)(1)(A), Fla. R. Civ. P. A court must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the non-moving party. *Furcron v. Mail Ctrs. Plus, LLC*,

843 F.3d 1295, 1304 (11th Cir. 2016); *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). Courts do not weigh conflicting evidence or make credibility determinations. *Furcron*, 843 F.3d at 1304; *Skop v. City of Atlanta*, 485 F.3d 1130, 1140 (11th Cir. 2007). Courts generally have great flexibility regarding the evidence that may be considered in a summary judgment proceeding. *A.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1289 (11th Cir 2018) ("[t]he court need not consider only the cited materials…it may consider other materials in the record."). If a genuine dispute of material fact exists, the trial court must deny summary judgment. *Skop*, 485 F.3d at 1140.

"If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor." *Reina-Leon*, *supra* (*citing Shotz v. City of Plantation*, 344 F.3d 1161, 1164 (11th Cir. 2003)). Even if there are no facts in dispute, summary judgment should not be granted if "different inferences can be reasonably drawn from the uncontroverted facts." *Albelo v. Southern Bell*, 682 So. 2d 1126 (Fla. 4th DCA 1996) (*citing Pan Am. Distrib. Co. v. Sav-A-Stop, Inc.*, 124 So. 2d 753 (Fla. 1st

DCA 1960)). If there is the slightest doubt that an issue might exist, that doubt must be resolved against the moving party, and summary judgment must be denied. *Tretten v. Irrgang*, 654 So. 2d 1297 (Fla. 4th DCA 1995) (*quoting Hervey v. Alfonso*, 650 So. 2d 644 (Fla. 2d DCA 1995)). If a reasonable jury evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine dispute of material fact, a court should not grant summary judgment. *Samples ex rel. Samples v. City of Atlanta*, 846 F. 2d 1328, 1330 (11th Cir. 1988). This is because summary judgment is authorized "only where moving party is entitled to judgment as a matter of law, where it is clear what the truth is, … (and where) no general issue remains for trial…(for) the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (*citing Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)).

In *Anderson*, the United States Supreme Court stated that "[o]ur holding…does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

from the facts are jury functions, not those of a judge…" *Anderson*, 477 U.S. at 255. In *Celotex Corp.*, 477 U.S. at 327, the United States Supreme Court again made sure to note that the Federal Rule of Civil Procedure 56 "must be construed with due regard…for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried before a jury…" Thus, summary judgment is not a substitute for the trial of disputed fact issues.

This Court has previously held that Allstate's insurance policy allowed Allstate to reimburse this PIP claim pursuant to the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat. The relevant fee schedule is Medicare Part B at 200%. § 627.736(5)(a)2.f., Fla. Stat. After this Court reversed the trial court's final summary judgment in the first appeal because Allstate's motion for summary judgment was not supported by any summary judgment evidence, Allstate filed a renewed motion for summary judgment. This time, Allstate included an affidavit of a claims adjuster who merely stated that "Allstate's reimbursements were made pursuant to the limitations set forth in § 627.736(5)(a)2.," and Allstate's insurance policy. Notably, however, the affidavit did not

detail how Allstate calculated the amounts it allowed for each CPT code billed.

In response to Allstate's renewed motion for summary judgment, Appellant demonstrated that Allstate did not properly reimburse CPT code 98941. Appellant provided the trial court with the rules for calculating reimbursement under Medicare Part B and a link to those rules:

> The Participating Medicare Part B Fee Schedule is determined by the following formula:
>
> [(Work RVU x Work GCPI) + (PE RRVU x PE GPCI) + (MP RVU x MP GCPI)] x CF
>
> Here, the Data Tables for 2011 CPT code 98941 are as follows:
>
> **[(.65 x 1.00) + (.36 x 1.072) + (0.03 x 2.984)] x 33.9764 = $38.24**
>
> As the Medicare Part B Fee schedule is 200% of $38.24 (rounding up), the allowed amount for the service billed as 98941 should have been $76.48, **NOT** $74.96. The entire veracity of the adjuster's affidavit is in doubt, and therefore the affidavit should not be considered.

The rules demonstrate that the proper allowable amount for CPT code 98941 for the applicable locale and service year is $38.24, and 200% of that amount is $76.48. Allstate, however, only allowed $74.96 for each time CPT code 98941 was billed. Allstate breached the insurance policy when it only paid 80% of $74.96 when it should have paid 80% of $76.48. As such, Allstate was not entitled to summary final judgment because it failed to demonstrate that it

in fact properly reimbursed all claims submitted by Appellant pursuant to 200% of Medicare Part B.

Allstate filed a reply to Appellant's response. Instead of demonstrating that it did in fact properly reimburse CPT code 98941 to satisfy its summary judgment burden, Allstate argued that Appellant could not dispute its claim adjuster's generic affidavit with actual evidence because of this Court's prior appellate opinion.

It is simply inconceivable that this Court's prior reversal based solely on the fact that Allstate filed no summary judgment evidence would mean that Appellant could never dispute the summary judgment evidence that Allstate would eventually file, whatever that may be. First, there is no instruction in this Court's prior opinion to the trial court to enter summary judgment for Allstate upon the filing of an affidavit such that the trial court's function on remand was purely ministerial. When the appellate court remands with general instructions for further proceedings, the lower court has discretion to direct the course of the proceedings on remand. *See Veiner v. Veiner*, 459 So. 2d 381 (Fla. 3d DCA 1984). It is only "when the appellate court issues specific instructions, as in this

case, the lower court must carry out those instructions and not stray." *Mobley v. Mobley*, 920 So. 2d 97, 102 (Fla. 5th DCA 2006). This Court's prior appellate opinion reversed because "the record is devoid of an affidavit or other summary judgment evidence showing that Allstate paid the proper amount due under the fee schedules" and then remanded this case "for further proceedings consistent with this opinion." The only way to interpret this Court's prior opinion is that Allstate is required to demonstrate that it properly reimbursed Appellant's claims. There is no way to interpret this Court's prior opinion as foreclosing Appellant's right to dispute whatever summary judgment evidence Allstate may file.

In fact, this Court could have never made such a proclamation because the trial court had not previously considered the sufficiency of Allstate's summary judgment evidence nor any counterevidence in opposition. As this Court has held, appellate courts do not "decide issues not ruled on by the trial court in the first instance." *Milan Inv. Grp., Inc. v. City of Miami*, 172 So. 3d 458, 463 n.11 (Fla. 3d DCA 2015) (*citing Akers v. City of Miami Beach*, 745 So. 2d 532 (Fla. 3d DCA 1999)).

Allstate also argued below that Appellant's challenge to Allstate's affidavit represented unpled issues. This argument is specious at best. Appellant's complaint alleged that Allstate failed to reimburse all amounts due and owning for the subject claim. (R. 018-26) In response, Allstate alleged an affirmative defense that it reimbursed all Appellant's claims pursuant to the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat. (R. 028-32) Appellant filed a reply, although it did not need to, stating its position that, *inter alia*, "Defendant utilized the incorrect methods of calculating the reimbursement and/or fee schedules and has not paid at the schedule of maximum charges." (R. 040-41) Allstate's affidavit filed in support of its renewed motion for summary judgment documents each time Appellant billed CPT code 98941. (R. 945, 953, 956, 966-67, 976-77) There are no unpled issues here.

This Court should not allow Allstate to conflate the issue before this Court. From the filing of the complaint in the case and the years that followed, the parties were on notice of the issues in this case. The initial issue was whether Allstate's insurance policy allowed it to reimburse Appellant's claims pursuant to the fee schedules set forth in section 627.736(5)(a)2., Fla. Stat. Once this

Court confirmed that it did, the secondary issue was whether Allstate could conclusively demonstrate that it properly reimbursed all of Appellant's claims pursuant to the relevant fee schedule – 200% of Medicare Part B. The harsh reality for Allstate is that it simply cannot meet this secondary burden.

Sometimes cases are just so cut and dry that a party – in this case Allstate – recognizing that it cannot overcome a legal defect in its case – that it underpaid CPT code 98941 – engages in a win at all costs campaign in hopes to avoid the law and prevail on what amounts to a technicality. In such cases, the harder the flailing – like taking intellectually dishonest legal positions – the more obvious the defect. In this case, there is no dispute that Allstate did not properly reimburse Appellant for CPT code 98941.

Allstate simply cannot avoid the fact that this Court instructed Allstate to file summary judgment evidence demonstrating that it properly reimbursed Appellant's claims. Because the evidence in this case demonstrates that Allstate did not properly reimburse all of Plaintiff's claims, it was not entitled to summary final judgment. As such, the trial court's summary final judgment should be

reversed and this matter remanded for a determination on its merits.

CONCLUSION

Based on the arguments presented herein, Appellant respectfully requests that this Court reverse the trial court's summary final judgment and remand this case for a resolution on the merits.

Dated: November 1, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was filed with the Clerk of the Court using the e-filing portal and that a copy hereof has been furnished to Daniel E. Nordby, Esquire and Garrett A. Tozier at dnordby@shutts.com and gtozier@shutts.com on this 1st day of November 2024.

s/Chad Barr
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CERTIFICATE OF COMPLIANCE

Pursuant to the Florida Rules of Appellate Procedure 9.045(b), 9.045(e), and 9.210(a)(2), I hereby certify that this brief is drafted and filed using 14-point Bookman Old Style font, is computer-generated and contains less than 13,000 words excluding those pages exempted by Florida Rule of Appellate Procedure, 9.210(a)(2)(E).

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