IN THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, FLORIDA

Case No.: 1D23-1676
Consolidated With Case No.: 1D23-1674

ARNOLD J. HARRISON, INDIVIDUALLY AND ON BEHALF OF R.H. AND ALL THOSE SIMILARLY SITUATED,

Appellant,

vs.

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF STATE GROUP INSURANCE, AND BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Appellees.

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.

Timothy J. Conner (Timothy.Conner@hklaw.com)
Jennifer A. Mansfield (Jennifer.Mansfield@hklaw.com)
Laura B. Renstrom (Laura.Renstrom@hklaw.com)
Holland & Knight LLP
50 N. Laura Street, Suite 3900
Jacksonville, FL 32202

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. STATEMENT OF THE CASE AND FACTS

This appeal is Harrison's second trip to this Court in his misguided effort to overturn the Department of Management Services' ("DMS") decision denying coverage under the State's PPO plan. Like dismissal of Plaintiff's First Amended Complaint ("FAC") affirmed by this Court in *Harrison v. Dep't of Mgmt. Servs.*, 339 So. 3d 504 (Fla. 1st DCA 2022), Plaintiff's Second Amended Complaint ("SAC") fails to state a viable claim either individually or as a class. The trial court's orders should be affirmed in all respects.

A. The State Employee PPO Plan

Harrison is employed by the State of Florida (the "State") (R. 968, SAC, ¶ 8), and participates in the State Employees' PPO Plan ("the Plan"), evidenced by the Group Health Insurance Plan Booklet and Benefits Document ("Benefits Document") attached to the SAC. (R. 995).

By legislative mandate, the Division of State Group Insurance ("DSGI") within DMS is responsible for overseeing all aspects of the self-insured and self-funded Plan. (R. 998); Fla. Stat. § 110.123(3)(a)-(c) (establishing the State Group Insurance Program and making DMS responsible (through DSGI) for "the day-to-day management of the state employee health insurance program.").

DSGI is the final arbiter of any dispute regarding the availability of benefits under the State's self-funded Plan. (R. 998); Fla. Stat. § 110.123(5). DSGI has "final authority to determine if a service or supply is covered, limited or excluded by the Plan." (R. 1067); Fla. Stat. § 110.123(5).

The State engages the services of third-party administrators ("TPA") to assist in the operation of its Plan. *See* Fla. Stat. § 110.123(5)(c). Here, Florida Blue is a TPA functioning as the Plan's "Medical Claim Administrator." (R. 998). Florida Blue's role is to "provide claim processing services, customer service, provider network access, medical coverage guidelines, and utilization and benefit management services" for the Plan. *Id*. The Plan is self-insured. All benefits paid by the Plan—including those claimed by Harrison in this case—are paid "from a fund established by the State of Florida" and not by Florida Blue. (R. 998 ("Florida Blue does not assume any financial risk or obligation with respect to claims.")).

Florida Blue also plays a limited role in the administrative appeal procedures established by the Plan to resolve benefit disputes. (R. 1052). Florida Blue receives and adjudicates Level I Appeals submitted by Plan enrollees to contest claim denials.

If a Level I appeal is denied, Plan enrollees can seek a Level II Appeal with DSGI's Appeals Coordinator in Tallahassee. *Id*. If a Level II

appeal is denied, Plan enrollees can: (1) "submit a petition for an administrative proceeding"; or (2) "request an external review from an Independent Review Organization (IRO)." (R. 1053). Here, Harrison exercised *both* options— an administrative hearing and an external review by an IRO.

B. Harrison's Claims

Harrison seeks coverage for inpatient residential mental health services provided to his child, R.H., by McLean Hospital, an out-of-network Massachusetts psychiatric facility, from September 9, 2015, through September 22, 2015, and again from October 15, 2015, through December 11, 2015. (R. 972–73, SAC, ¶¶ 51–53, 57–58; R. 974, SAC, ¶ 62). McLean Hospital's inpatient mental health program is self-pay, and the program does not accept insurance and does not assist patients with insurance reimbursement efforts. (R. 1252).

Harrison's Plan provides coverage for the residential level of care only if the treatment is "medically necessary." (R. 970, SAC, ¶ 29; R. 1019). The general definition of "medically necessary" is set forth in the Plan. (R. 970, SAC, ¶ 30; R. 1070). Non-emergency admissions to non-network hospitals must also be pre-certified. (R. 1030). Despite Harrison's awareness that McLean Hospital was out-of-network and self-pay only, Harrison chose to

admit R.H. to McLean Hospital. Harrison's claim for that admission was denied. (R. 975, SAC, ¶ 68).

C. Harrison's Prior Administrative Proceedings

Harrison already litigated the claims in this case via the administrative procedures required by Florida law. (R. 1184–85). Harrison appealed the claim denial to Florida Blue on February 19, 2016. (R. 975, SAC, ¶ 69). Florida Blue denied the Level I Appeal on the basis that the hospital stay was not "medically necessary." (R. 1162–65).

On May 23, 2016, Harrison filed a Level II appeal with DSGI. (R. 975, SAC, ¶ 72), which DSGI denied because "[R.H.] was not pre-certified for admission and did not meet coverage criteria for inpatient hospitalization…." (R. 1167–72).

On or about August 15, 2016, Plaintiff requested an IRO review (R. 977, SAC, ¶ 85), which affirmed the denial based on lack of medical necessity. (*Id*. ¶ 86; R. 1174–82).

Plaintiff then requested an administrative evidentiary hearing, which was held on February 23, 2017, before an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"). (R. 978, 1188; SAC, ¶ 94). The ALJ recommended that DMS issue a final order denying Harrison's claim, finding that Harrison "failed to meet his burden of

demonstrating that the pre-certification requirement was met or that the services provided to R.H. were medically necessary for purposes of coverage under the Plan." (R. 1228).

Harrison filed exceptions to the Recommended Order pursuant to Fla. Stat. § 120.57(1)(k). DMS, however, rejected them and adopted the ALJ's findings of fact and conclusions of law in a Final Order dated December 19, 2017. (R. 1184–85). Harrison was advised that the Final Order constituted final agency action, and that judicial review by the First District Court of Appeal was available pursuant to Fla. Stat. § 120.68. (R. 1187). Harrison chose not to appeal DMS's Final Order to this Court.

D. Harrison's Attempts to Re-Litigate Issues in the Trial Court

Instead, despite the finality of the administrative proceedings and his choice to not appeal to this Court, Harrison filed a Complaint against Florida Blue and DMS in June 2018, which both defendants moved to dismiss. (R. 12–150). Florida Blue also filed a motion asking the trial court to take judicial notice of the docket in the matter entitled *A.H. on behalf of R.H. v. Department of Management Services*, DOAH Case No. 16-6837, and the Agency Final Order dated December 19, 2017. (R. 232–98), to which DMS joined.

In May 2019, Harrison filed his FAC, purporting to represent a putative class. (R. 352–507). Florida Blue and DMS renewed their motions to dismiss (R. 517–70; R. 571–95). Harrison responded and took the position that his lawsuit did "not challenge the Administrative Law Judge's finding" and that he was not asking the trial court to "reverse the Administrative Court's Final Order or opine that R.H.'s treatment should have been covered." (R. 681–703, 687–88). In light of this new contention, Florida Blue filed a Reply, explaining that Harrison's new argument constituted an admission that he had no injury in fact, and thus no standing to bring the action. (R. 704–12).

After a hearing (R. 872–962), Judge Dodson entered final orders granting Florida Blue's and DMS's Motions to Dismiss Plaintiff's FAC, and taking judicial notice of the Final Order in the administrative proceeding (R. 716–27; R. 728–39). Although Harrison raised the issue of amending the FAC, he never submitted a proposed second amended complaint. Judge Dodson effectively denied leave to amend by granting the Motions to Dismiss with prejudice. Harrison sought rehearing, which the court granted in part, "to the extent the court ruled [Florida Blue] is not a proper party," on December 18, 2019. (R. 745–46).

On appeal, this Court "affirm[ed], without further comment, the trial court's order," but reversed and remanded to the extent that Harrison should

have been allowed leave to amend. *See Harrison*, 339 So. 3d at 505–06. This Court specified it did "not conclude that Appellant can state any particular cause of action." *Id.* at 506 n.2.

On October 21, 2022, Harrison filed the SAC now at issue (R. 967–1079), asserting claims for breach of contract (Counts I and II), negligence (Counts III and IV), negligent misrepresentation (Count V), mandatory injunctive relief (Count III 2d)[1], and breach of fiduciary duty (Count V 2d), all against Florida Blue. *Id.*

On December 2, 2022, Florida Blue and DMS filed Motions to Dismiss the SAC. (R. 1094–1364; R. 1365–80). Florida Blue contemporaneously filed a Motion to Strike the class allegations. (R. 1080–93). On April 6, 2023, the Honorable Lee Marsh, Circuit Judge, held a two-hour hearing on the motions, R. 1609-1714, and requested the parties provide proposed orders 30 days thereafter.

Thirty-two days after the hearing, on May 10, 2023, Judge Marsh entered final orders granting Florida Blue's and DMS's Motions to Dismiss, and granting Florida Blue's Motion to Strike class allegations. (R. 1467–78; R. 1479–98; R. 1499–1507). Judge Marsh found that further attempts to amend would be futile and dismissed the SAC with prejudice. (R. 1498).

[1] The SAC has two Count IIIs and two Count Vs.

Plaintiff filed Motions for Rehearing (R. 1518–39), which the Circuit Court denied on June 13, 2023. (R. 1552). Plaintiff appealed. (R. 1568–1606).

In its Order to Show Cause of September 8, 2023, this Court held that the order granting the motion to dismiss was a non-final order. As a consequence and upon request by Plaintiff, the trial court entered an Amended Order, effective as of November 7, 2023, from which this appeal proceeds. *See* Order Discharging Order to Show Cause, Nov. 29, 2023.

II. SUMMARY OF THE ARGUMENT

This case should never have been filed. Not content with the process prescribed for benefit claims under the State Plan or the result reached, Harrison seeks a do-over in this case. This Court affirmed a prior order of dismissal on the merits. Nonetheless, Plaintiff's spaghetti-against-the-wall approach re-litigates those same issues. It is time for Plaintiff to accept the finality of judgments and appellate decisions.

The trial court did not err in dismissing the SAC for several meritorious reasons:

First, the ruling of an appellate court is binding in subsequent proceedings, making the law of the case doctrine applicable here. While complaining generally that the doctrine was misapplied, Plaintiff only argues about one specific instance -- that Florida Blue was not a proper party –

which mischaracterizes the order of dismissal. Any other application of the doctrine was not challenged by Plaintiff and therefore waived.

Second, the trial court exercised independent judgment, as demonstrated by its conduct of a lengthy hearing during which the Judge was fully engaged and well-versed in all parties' arguments. The trial court also considered Plaintiff's arguments anew when determining the motion for rehearing, and entered its own order denying rehearing.

Third, Florida Blue was not a proper party because Florida appellate precedents firmly establish that a contracting party's (i.e. the State's) TPA (i.e. Florida Blue) is not independently liable for performance under the contract between the State and Plaintiff (i.e. the State Plan).

Fourth, Harrison failed to allege an injury-in-fact and thus does not have standing.

Fifth, Harrison's claims are barred for failing to exhaust his administrative remedies. He cannot avoid the exhaustion requirement by repackaging his claims into ones outside the reach of administrative authorities while still seeking the same relief. Because Harrison's claims are all based upon Florida Blue's administration of his claim, his exclusive remedy was to appeal the administrative Final Order, which he failed to do.

Neither the lower court nor this Court have jurisdiction to award benefits to Harrison under the Plan.

Sixth, *res judicata* bars Harrison's breach of contract claims because each requisite identity in the *res judicata* analysis exists.

Seventh, collateral estoppel also bars Harrison's claims because the parties and issues are identical to those of the administrative proceeding.

Eighth, alternatively and independently, dismissing the SAC was proper because Harrison failed to state a cause of action in each Count.

Additionally, the trial court's decision to strike Harrison's class allegations was not premature because the class allegations were facially insufficient and the relief was not moot because it was entered before the order of dismissal. Harrison's individual claims having failed, he could not seek relief on behalf of a class. The trial court conducted a proper analysis under Rule 1.140(f) in striking the impertinent class allegations. Contrary to Plaintiff's assertions, asserting a class is not a talisman that abrogates Plaintiff's initial requirement to plead a viable cause of action.

Harrison's SAC re-litigates the same allegations and theories that have been rejected time and again through the administrative process, two trial court judges, *and this Court*, and need to be put to rest once and for all. The lower court's orders should be affirmed in their entirety.

III. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's final disposition on a motion to dismiss for failure to state a cause of action. *See Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 601 (Fla. 1st DCA 2013). Determinations of the futility of administrative proceedings are reviewed for abuse of discretion. *See Igwe v. City of Miami*, 300 So. 3d 279, 281 (Fla. 3d DCA 2019). A trial court's order granting a motion to strike is reviewed for abuse of discretion. *See Fla. Dep't of Transp. v. Tropical Trailer Leasing, LLC,* 308 So. 3d 242, 248 (Fla. 1st DCA 2020).

Although the lower court set forth multiple alternative grounds that support dismissal and striking of the class allegations, this Court need not base an affirmance on all or any of them. *Tallahassee Mem'l Reg. Med. Ctr. v. Fla. Patient's Comp. Fund*, 466 So. 2d 379, 383 (Fla. 1st DCA 1985); *Pacific Ins. Co. v. Botelho*, 891 So. 2d 587 (Fla. 3d DCA 2005). Instead, the appellate court may affirm the trial court so long as "there is any basis which would support the judgment in the record." *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002).

"[A] trial court's findings and judgment come to a reviewing court with a presumption of correctness, and cannot be disturbed absent a record demonstrating reversible error." *Thurman v. Davis*, 321 So. 3d 341, 343–44

(Fla. 1st DCA 2021) (quoting *JP Morgan Chase Bank v. Combee*, 883 So. 2d 330, 331 (Fla. 1st DCA 2004)). "Even under a *de novo* standard of review, the trial court's final judgment 'has the presumption of correctness and the burden is on the appellant to demonstrate error.'" *Snowden v. Wells Fargo Bank*, 172 So. 3d 506, 507 (Fla. 1st DCA 2015) (quoting *Applegate v. Barnett Bank of Tallahassee*, 337 So. 2d 1150, 1151 (Fla. 1979)).

IV. ARGUMENT

A. The Trial Court Did Not Err in Dismissing the Second Amended Complaint.

Harrison re-litigates issues already decided by this Court. In any event, none of Harrison's arguments is meritorious.

i. The Trial Court Correctly Applied the "Law of the Case" Doctrine.

In the first appeal, this Court "affirm[ed], without further comment, the trial court's order" with the exception of the trial court's implicit denial of Harrison's motion for leave to amend. *Harrison*, 339 So. 3d at 505. In the order appealed here, the trial court held that "all the issues of law within the affirmed orders are now law of the case." (R. 1480). The correctness of that conclusion cannot be disputed.

Specifically, the trial court held that the following matters are law of the case: (i) taking judicial notice of the administrative proceedings; (ii) as a TPA, Florida Blue had no contract with Harrison and owed no duties to Harrison

arising from the Plan; (iii) by not challenging the administrative proceeding's denial of coverage, Harrison failed to plead an injury-in-fact to establish standing; (iv) Harrison's exclusive remedy was through the administrative review process set out in Chapter 120, Florida Statues; (v) Harrison's contract claims are barred under the doctrine of *res judicata*; and (vi) Harrison's claims are barred under the doctrine of collateral estoppel. (R. 1482; 1483; 1486; 1487).

Harrison fails to specify which of the above applications of the law of the case doctrine by the trial court are improper in his initial brief, and thus waives any alleged error in the applications of the doctrine.[2] *Doe v. Baptist Primary Care, Inc.*, 177 So. 3d 669, 673 (Fla. 1st DCA 2015) (holding that appellant's failure to address court's holding abandoned any argument for reversal).

Harrison's arguments demonstrate a misunderstanding of the "law of the case" doctrine and a refusal to acknowledge that this Court affirmed the prior order of dismissal on the merits. "The law-of-the-case doctrine is a principle of judicial estoppel that applies when multiple appeals are taken in the same case. Questions of law and issues decided by the appellate court

[2] Harrison does argue that the trial court incorrectly cited "law of the case" to hold that Florida Blue was not a proper party to the litigation. (Op. Br. p. 22). That erroneous argument is addressed elsewhere in this Brief.

in resolution of a first appeal become the law of the case and govern all subsequent proceedings." *Disc. Sleep of Ocala, LLC v. City of Ocala*, 300 So. 3d 316, 323 (Fla. 5th DCA 2020) (citations omitted). "Absent extraordinary circumstances, the ruling of the appellate court in an earlier appeal is binding on the trial court on remand and on the appellate court in a subsequent appeal." 3 Fla. Jur. 2d Appellate Review § 428.

Harrison essentially argues that the law of the case doctrine cannot apply because this Court remanded the case. But that makes no sense because that is exactly when the doctrine applies. There would be no need for the doctrine without a remand because the case would not go back to a trial court or result in a subsequent appeal.

Plaintiff would have this Court ignore the actual holding of the first appeal, *which affirmed all aspects of prior orders of dismissal on the merits*, in favor of a footnote. But this Court's footnote observations relied upon by Plaintiff (Op. Br. p. 16–18) are *dicta* and were limited by their own terms in the last line of footnote 2: "However, while any amended complaint must adhere to this Court's opinion, we do not conclude that Appellant can state any particular cause of action." *Harrison*, 339 So. 3d at 506, n.2. Indeed, during the hearing the trial court expressly challenged Plaintiff's counsel on that exact language: "But, Counsel, you left off a sentence at the end. They're

saying – they're not saying that those do or don't state a cause of action, so...." R. at 1647.

This Court did not even have a proposed SAC before it for review, as Harrison had not submitted one, and thus it was in no position to approve or disapprove any particular count in a future amended complaint. Instead, this Court held that, although he was bound by its ruling on the merits, Plaintiff should be given the *opportunity* to amend as there had yet to be a showing of futility of any amendment. No guarantee of a successful amendment was given.

ii. The Trial Court Exercised Independent Judgment.

Although the trial judges were different, just like in his first appeal Harrison argues that the "circumstances surrounding the entry of the BCBS Order of Dismissal *create doubt* as to whether the trial court exercised its own independent judgment." (Op. Br. p. 22, emphasis added). "Creating doubt" is not legally sufficient for reversal of a trial court's order, which enjoys a presumption of correctness. *Thurman*, 321 So. 3d at 343–44. Even on *de novo* review, Plaintiff must demonstrate reversible error, not just the possibility of error.

As noted at the beginning of the trial court's hearing on the motions to dismiss (R. 1611, 1612-13), the trial court read the partis' extensive briefing

(which did not all fit on his desk) and complimented the "excellent work of counsel from all of the different parties." The trial court also commented, "I had a lot of reading" that "helped a lot." (R. at 1613).

The trial court's familiarity with the parties' briefing and cited case law is aptly demonstrated by the pointed questions directed first to Florida Blue's counsel (R. 1623, 1624, 1626, 1627, 1629-34, 1640, 1641, 1682-83, 1685), and then to Plaintiff's counsel. (R. 1647, 1651-52, 1653-55, 1657, 1658, 1661-62, 1663, 1665, 1666-67, 1668, 1674). Not only does the trial court's back-and-forth questioning with the parties' counsel demonstrate a strong command of the issues and the parties' positions, but also the trial court's familiarity with the entire record before it. (*See, e.g.,* R. 1638-39, 1674). The trial court asked the parties to submit proposed orders and indicated that he would take from the proposals as he saw fit. (R. 1693).

In light of the trial court's obvious preparation and attention to detail during the two-hour hearing on the motions to dismiss, it is insulting to the lower court to claim that it blindly followed Florida Blue's proposed order without thinking independently. The hearing transcript alone shows that accusation to be unsupported.

Plaintiff does not and cannot point to any particular portion of his own proposed orders which should have been incorporated into the trial court's

orders. While Florida Blue filed its proposed orders in the court record to ensure it would be part of a record on appeal (R. 1431-1466), Plaintiff never filed his submissions.[3] Plaintiff also never supplemented the record on appeal with copies of his proposed orders. Thus, there is nothing for this Court to compare against when gauging the appropriateness of the trial court's adoption of Florida Blue's proposed orders. Much like an appellant's failure to file a transcript of a hearing, the absence of Plaintiff's proposed orders for the Court's consideration fails to preserve this issue on appeal. *See, e.g.*, *Starks v. Starks*, 423 So. 2d 452 (Fla. 1st DCA 1982).

Plaintiff's first argument for rehearing was the supposed lack of independent judgment, so he did have the opportunity to object to Florida Blue's proposals. (R. 1518-19, 1533-34). But, just like in this Court, Plaintiff did not actually compare or contrast the competing proposed orders to explain why Plaintiff's proposed orders (or portions of them) should have been adopted over Florida Blue's. Ultimately, according to Plaintiff, the fact

[3] Plaintiff's proposed order on Florida Blue's motion to dismiss was approximately three pages long, for the most part stating that the issues were more appropriately addressed at summary judgment, and on Florida Blue's motion to strike was approximately two pages, stating that issues of class certification were not appropriate until after class discovery. Neither proposed order provided alternative holdings to the specific findings proposed by Florida Blue and Plaintiff did not raise any in his motion for rehearing.

that the trial court agreed with Florida Blue's legal analyses is what shows a lack of independent judgment. That simply does not support reversing the trial court's orders.

The cases cited by Plaintiff do not help him either. For example, in *Perlow v. Berg-Perlow*, the Florida Supreme Court limited its holdings to marital dissolutions when holding that the trial court erred in adopting the wife's 25-page proposed final judgment *two hours* after the trial concluded, without the husband submitting his own proposed order or allowing the husband to object to the wife's proposal. 875 So. 2d 383, 384, 389 (Fla. 2004). *Carlton v. Carlton*, 888 So. 2d 121, 122 (Fla. 4th DCA 2004) is similarly inapposite. Likewise, in *King v. Farah & Farah*, 358 So. 3d 1271 (Fla. 5th DCA 2023), the appellate court noted that adoption of a detailed order, by itself, does ***not*** mandate reversal. *Id.* at 1272. Yet, the appellate court reversed a trial court's verbatim adoption of a 40-page proposed order *because it used the wrong summary judgment standard*, contained overly harsh and injudicious language, and "[m]ore importantly, the trial judge specifically instructed the parties to *not* allow one another to see their proposals." *Id.* at 1272.

In *King v. King*, 363 So. 3d 1099, 1101 (Fla. 4th DCA 2023), another marital dissolution case, the appellate court noted that "a judgment need not

be reversed ***solely*** because a trial court adopts a proposed order verbatim," (emphasis added), but on the merits of the order itself. The same is true of *West v. West*, 228 So. 3d 727, 729 (Fla. 5th DCA 2017). All cases cited by Plaintiff are completely distinguishable from this case.

Here, the trial court adopted Florida Blue's proposed orders two days after Florida Blue submitted them (R. 1431; 1479), and over a month after conducting an extensive hearing. Harrison submitted his own proposed order for the Court's consideration. (Op. Br. p. 20). Having appealed on this issue before, Harrison certainly could have provided objections to Florida Blue's order within that time frame or sought leave to file objections, but he failed to do so. Then, when Harrison moved for rehearing, he failed again to raise objections about specific provisions in the orders. Harrison has never identified any conflicting information or other inconsistency within the court's orders. Instead, he references a few typographical errors, which have no substantive effect on the reasoning or findings of the orders, especially considering the trial court's extensive knowledge of the record and the parties' positions. In sum, Harrison fails to demonstrate that the trial court did not exercise independent judgment.

iii. The Trial Court Correctly Concluded that Florida Blue Was Not a Proper Party.

(a) The trial court correctly held that specific findings upheld on appeal led to the conclusion that Florida Blue was not a proper party.

Harrison misconstrues the trial court's ruling in the second order of dismissal, as it did ***not*** rule that it was bound by the law of the case by citing a ruling withdrawn on rehearing before the first appeal. (R. 1483). Rather, the trial court's order reads: "This Court already held that, in light of its status as a third-party administrator, Florida Blue had no contract with Harrison[4] and owed no duties to Harrison.[5] Those holdings were affirmed on appeal and are now law of the case." (R. 1483 at ¶ 10).[6] Based on that law of the case, the trial court independently concluded that Florida Blue is not a proper party. (R. 1483-85 at ¶¶ 11-17). Harrison's argument is incorrect because it mischaracterizes what the trial court correctly ruled.

---

[4] R. at 735, 737.

[5] R. at 737.

[6] The first order of dismissal also held "[t]here is no contract between Plaintiff and Florida Blue. . . Florida Blue did not issue a health insurance policy to Plaintiff, and is not in privity of contract with Plaintiff" at 731 in the section titled "Florida Blue is Not a Proper Party." If the Court reads the order, R. 745, denying rehearing "except to the extent the court ruled Blue Cross and Blue Shield of Florida is not a proper party" as withdrawing the entire paragraph instead of just the one-sentence holding, the portions cited in the above footnotes are independent holdings of law affirmed by this Court.

(b) The trial court properly held that, in light of its status as a TPA, Florida Blue had no contract with Harrison and owed no duties to him.

Likewise, the trial court did not make improper findings of fact by construing the Plan's plain language and applying Florida Statutes. The prior order's holdings were based on the trial court's construction of the Plan and Florida Statutes, both of which are matters of law, not fact. *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999) ("A decision construing a contract presents an issue of law"); *Keene v. Chicago Bridge & Iron Co.*, 596 So. 2d 700, 704 (Fla. 1st DCA 1992) ("whether a duty exists between the defendant and the plaintiff is a question of law for the court.").

Plaintiff cannot create an issue of fact by alleging that Florida Blue is a party to the Plan when the plain language of the Plan (and Florida Statutes) says otherwise. Rather, the Plan, as an exhibit, controls. *Fladell v. Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000).

As held and affirmed previously, the Plan is not a contract between Plaintiff and Florida Blue, nor the source of a legal duty owed by Florida Blue to Plaintiff. When Harrison filed his SAC, he did not allege additional facts to explain how Florida Blue owed it any duties or was in privity of contract. The simple truth is that Plaintiff failed to allege the existence of a contract or the source of a duty beyond the Plan – precisely what was held to not state a

viable claim. Accordingly, having obtained the opportunity to try to amend, Plaintiff failed to adequately allege a viable contractual or legal duty. Since all of the Plaintiff's claims continue to rely upon the Plan and Florida Blue's role as a TPA for the Plan, the trial court correctly concluded (again) that there still was no contract between Harrison and Florida Blue, and no duty between the two parties arising from the Plan.

Finally, Harrison's argument that a finding that Florida Blue owed no duty to Harrison would allow Florida Blue to "deny claims without recourse" is patently false. (Op. Br. p. 24). Harrison's argument ignores the duties Florida Blue has to the State to properly administer the terms, conditions, and benefits in accordance with the Plan's terms and its TPA contract. Additionally, DSGI is the final arbiter of any dispute regarding the availability of benefits under the State's self-funded Plan, and can overrule any coverage decision. (R. 998); Fla. Stat. § 110.123(5). The Plan's multi-step administrative appeal procedure to resolve benefit disputes remains and is not affected by this Court upholding the trial court's decision.

iv. Harrison Did Not Allege Injury-in-Fact to Establish Standing.

The trial court correctly found that Harrison's claims were barred by standing principles. As noted by Judge Dodson in the first order of dismissal, Plaintiff initially asserted in the FAC that he was wrongfully denied benefits

under the Plan. (R. 732-33). In an effort to avoid the consequences of having previously litigated the facts and issues in this case through the administrative process, Harrison "shifted his position" (R. 733) and argued that he is not challenging the outcome of the administrative proceedings. *Id.* As held in the prior order and the order under review, the consequence of staking out a position of not challenging the correctness of the benefit denial is that Harrison has not alleged an injury-in-fact. (R. 733, 1486 at ¶¶ 19-20). As noted in the current order, "Plaintiff has not pled anything new to avoid that law of the case." (R. at 1486 at ¶ 20).

Harrison's SAC is purposefully vague; although he did not explicitly allege that his benefits were wrongfully denied, he did allege he had been damaged by Florida Blue's reliance on certain undisclosed criteria when administering his claim. (R. 983, 986, SAC, ¶¶ 137, 165). At the same time, he takes the contradictory position that he accepts the ALJ's ruling denying coverage, which also affirmed the use of medical necessity criteria ("MNC"). (R. 1407). Fundamentally, if the claim was not wrongly denied, then Florida Blue's administration of the claim was not wrong either, there are no damages, and Harrison has no standing.

Harrison does not dispute that he is not challenging the outcome of the administrative proceedings, but he also does not clarify what his injury is if it

is not the denial of benefits. Instead, he argues that "all that is needed under Florida law" to establish standing is an allegation that he and the class were injured by Florida Blue's wrongful conduct. (Op. Br. p. 25). Harrison is incorrect.

To meet the standing requirement, a plaintiff must demonstrate: (1) an injury-in-fact "which is 'concrete,' 'distinct and palpable,' and 'actual or imminent;'" (2) "a causal connection between the injury and the conduct complained of;" and (3) "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (quoting *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). If a plaintiff cannot meet the standing requirement, the court has no subject matter jurisdiction and must dismiss the complaint. *Rogers & Ford Const. Cmp. v. Carlandia Corp.*, 626 So. 2d 1350, 1352 (Fla. 1993).

This three-part standing test is so well-established that Harrison cannot cite any cases to the contrary. *Terzis v. Pompano Paint & Body Repair, Inc.*, clearly states that a plaintiff must allege a threatened or actual injury. 127 So. 3d 592, 596 (Fla. 4th DCA 2012). *Romo v. Amedex Ins. Co.*, has no analysis of standing whatsoever. 930 So. 2d 643 (Fla. 3d DCA 2006). Finally,

Hutchinson v. Tompkins is about the requirements for pleading *damages*, not injury-in-fact. 259 So. 2d 129, 132–33 (Fla. 1972).

In the absence of a concrete injury-in-fact, Harrison lacks standing, and the Court lacks jurisdiction to entertain the case. Harrison's position—that his claims are ***not*** based on the denial of benefits—demonstrates that he lacks standing as a matter of law. The trial court agreed and this Court affirmed. Having not added allegations of material fact to his SAC from those in the FAC, the trial court properly dismissed the SAC with prejudice.

v. The Trial Court Did Not Err in Concluding that Harrison's Claims were Barred for Failure to Exhaust Administrative Remedies.

The trial court correctly held that Harrison's exclusive remedy was through the administrative review process mandated by Chapter 120, Florida Statutes, and that this is law of the case. (R. 1486–87). The trial court also held that Harrison's attempt to get around the law of the case – by arguing that an appeal would have been futile – was conclusory and "fail[ed] to allege facts upon which a conclusion of futility could be based." Despite a chance to amend, the central core of Plaintiff's claims still rests on issues about Florida Blue's administration of his claim that were adjudicated in the administrative proceeding. (R. 1487).

Administrative rulings are "given preclusive effect when the administrative proceeding affords the essential requirements of adjudication." *Fla. Transp. Serv., Inc. v. Miami-Dade Cnty.*, 757 F. Supp. 2d 1260, 1271 (S.D. Fla. 2010) (applying Florida law). Here, Harrison has not argued or alleged that the administrative proceeding did not have the essential elements of adjudication. By filing suit in the Circuit Court, Harrison collaterally attacks the final administrative judgment, despite his denials.

The administrative proceeding determined that R.H.'s residential treatment was not medically necessary under the MNC and therefore not covered under the Benefits Document. (R. 1184–85). Not only does this bar the SAC's two counts for breach of contract (since the contract supposedly breached is the State's Plan), it also bars Harrison's other counts because they are each based upon how Plaintiff's claim was administered. Since Harrison's claims were not covered under the Plan, Harrison necessarily was not damaged by Florida Blue's administration of his claim. Indeed, Florida Blue's administration of Harrison's claim was not even the last word on whether the benefits would be covered. Rather, DSGI has the last word, in this case *after* a level II appeal, an independent medical review, and an administrative proceeding.

Although this Court could have had the last word on Harrison's claim, he did not take the final step prescribed by Florida law to appeal DMS's Final Order, even though that is the only route for obtaining judicial review of the administrative decision. *See State Farm Mut. Auto. v. Gibbons*, 860 So. 2d 1050, 1052 (Fla. 5th DCA 2003) (affirming dismissal of complaint in Circuit Court because "[o]nce administrative review is completed, the exclusive jurisdiction for judicial review is in the District Court of Appeal"); *Brooks v. Sch. Bd. of Brevard Cnty.*, 382 So. 2d 422, 422–23 (Fla. 5th DCA 1980) ("Where administrative review procedures are available, a party must exhaust these remedies before judicial review is appropriate.").

By failing to complete the process provided by Florida law for reviewing the coverage decision, Harrison failed to fully exhaust his administrative remedies. Harrison is foreclosed from re-litigating the underlying issues adjudicated in the administrative hearing under any cause of action. *Cole v. City of Deltona*, 890 So. 2d 480, 483 (Fla. 5th DCA 2004) ("[I]t is appropriate to dismiss a suit when a party fails to exhaust his or her administrative remedies.").

Notwithstanding Harrison's assertion that his claims for relief for negligence, class relief, and "amendment" of the Plan documents through the use of MNC were outside the scope and jurisdiction of the administrative

proceeding (Op. Br. p. 26), nothing in the SAC supports his position that his claims are premised on any facts other than those related to his coverage dispute with DMS and Florida Blue's role as TPA. At every step, DMS/DSGI approved the use of MNC (R. 1192 at ¶ 6 (finding them to be consistent with general practice in the field)) and determined that residential treatment was not medically necessary (R. 1286), i.e., that Florida Blue properly applied the terms of the Plan when administering Harrison's claim. Harrison cannot state a claim for negligently making the correct coverage decision.

The dispositive issue in each of Harrison's claims is whether Florida Blue acted improperly in its administration of Harrison's claims by applying the MNC to determine his claims were not covered. DSGI agreed with that determination and itself relied upon the MNC when it issued a Final Order finding no coverage, which Harrison chose not to appeal. He cannot avoid the exhaustion requirement by repackaging his claims into those that are purportedly outside the reach of administrative authorities while still seeking essentially the same relief. Harrison was required to appeal to this Court from that proceeding, but he chose not to do that and must live with the consequences.

The fact that Harrison claims to seek relief on behalf of a class does not change the analysis. Harrison's pleading standard is not lessened,

altered, or modified in any way because he seeks relief on behalf of a class. A class plaintiff must state a claim to establish the requisite standing to pursue his claims on behalf of a class. *Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So. 2d 374, 377 (Fla. 3d DCA 2006) ("[I]f none of the named plaintiffs purporting to represent a class establishes a requisite of a case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class."). If Harrison cannot state claims against Florida Blue individually, he cannot do so on behalf of a class. *See Ramon v. Aries Ins. Co.*, 769 So. 2d 1053, 1054 (Fla. 3d DCA 2000) (plaintiff lacked standing because he received full payment from insurer and did not have a pending case or controversy with the insurer, even though plaintiff wanted to pursue the class action "so that the insurer would 'change the way they do things.'").

Finally, Harrison does not explain how exhaustion of his administrative remedies would have been futile. "As a general rule, a litigant must exhaust available administrative remedies, but exceptions exist, such as when doing so would be futile or exigent circumstances exist that justify going directly into circuit court." *Fla. Carry, Inc. v. Thrasher*, 315 So. 3d 771, 772 (Fla. 1st DCA 2021). "To substantiate a claim of futility as an excuse for not exhausting administrative remedies, a claimant must make a clear and

positive showing of futility." *Igwe*, 300 So. 3d at 282 (quoting *S. Fla. Blood Bank, Inc. v. Futch*, 764 So. 2d 724, 726 (Fla. 4th DCA 2000)). Harrison fails to explain how an appeal to this Court from the administrative proceeding would have been futile. Harrison fails to allege *facts* supporting a clear and positive showing of futility. A "mere allegation" of futility is not enough. *Id.*

vi. The Trial Court Correctly Applied *Res Judicata* to Counts I and II.

The trial court correctly held that Harrison's breach of contract claims in Counts I and II are barred by *res judicata*. (R. 1488). Harrison is wrong when arguing that the trial court found that *all* of Harrison's claims were barred by *res judicata* (Op. Br. p. 28). Consequently, many of Harrison's arguments fail because they are inapplicable to Counts I and II.

As to Counts I and II, *res judicata*, also referred to as claim preclusion, provides that a final judgment or decree on the merits by a court of competent jurisdiction constitutes an absolute bar to a subsequent suit between the same parties *or their privies* on the same cause of action and is conclusive of *all issues which were raised or could have been raised* in the action. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013) (emphasis added). As Harrison acknowledges, *res judicata* applies when all four of the following conditions are present: (1) identity of the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and

(4) identity of quality in persons for or against whom claim is made. *AMEC Civil, LLC v. PTG Const. Services Co.*, 106 So. 3d 455, 456 (Fla. 1st DCA 2012) ("*AMEC II*"). "The policy 'underlying *res judicata* is that if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in *any court* (except, of course, for appeals by right).'" *Zikofsky v. Marketing 10, Inc.*, 904 So. 2d 520, 523 (Fla. 4th DCA, 2005) (quoting *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004)).

Both *res judicata* and collateral estoppel (discussed below) apply to decisions of administrative agencies acting in their judicial capacities. *See M.C.G. v. Hillsborough Cnty. School Bd.*, 927 So. 2d 224, 226 (Fla. 2d DCA 2006); *Andela v. Univ. of Miami*, 692 F. Supp. 2d 1356, 1372 (S.D. Fla. 2010).

Here, the first appeal affirmed that Harrison's claims are barred by *res judicata*, making it law of the case. Even if it were not, however, applying the four elements of *res judicata* to Counts I and II shows the trial court did not err. Florida Blue cannot be held to have breached the terms of the Plan when acting as DMS/DSGI's administrator when it adjudicated Plaintiff's claim correctly, as found in the administrative proceedings.

(a) Identity of the thing sued for exists.

As to the first element, "the identity of the thing sued for," in both Harrison's administrative proceedings and this lawsuit, Harrison seeks the same relief: damages for the denial of coverage for R.H.'s treatment at McLean Hospital allegedly resulting from Florida Blue's administration of the Plan. Harrison attempts to differentiate the SAC from the administrative proceeding by arguing that the identity of the thing sued for in the SAC is different because he seeks class and injunctive relief in the SAC. (Op. Br. p. 28–29). But Harrison does not seek injunctive relief in Count I or Count II of the SAC. (R. 981–84). As for the class relief, none of the three cases cited by Harrison hold that asserting class action relief changes the identity of the thing sued for. (Op. Br. p. 29).

(b) Identity of the cause of action exists.

The second element, "identity of the cause of action," is also satisfied, as Plaintiff asserted a breach of the Plan in each proceeding. "In determining whether identity of causes of action exists, a court must consider the relationship between the facts and issues asserted to constitute a single transaction." *AMEC Civil, LLC v. State of Florida*, 41 So. 3d 235, 240 (Fla. 1st DCA 2010) ("*AMEC I*"). Courts consider not only the claims actually litigated in the first suit, but also "every other matter which the parties might

have litigated and had determined, within the issues as [framed] by the pleadings or as incident to or essentially connected with the subject matter" of the first litigation. *Id.* at 239 (quoting *Zikofsky*, 904 So. 2d at 523).

Harrison's counts for breach of contract were adjudicated in the administrative proceeding. The contract allegedly breached by Florida Blue is the State's PPO Plan (even though the express terms of the Plan demonstrate that Florida Blue is not a party to the contract). The facts and issues determined in the administrative proceedings are the same facts and issues implicated by the breach of contract claims in Counts I and II. The administrative Final Order held that no benefits were due to Harrison under the State's PPO Plan, and in reaching that decision rejected the same arguments made here regarding the MNC allegedly not being disclosed. *Res judicata* prevents Harrison from asserting his breach of contract claims again. *See Hotchkiss v. Blue Cross and Blue Shield of Florida, Inc.*, 277 So. 3d 760, 761 (Fla. 1st DCA 2019) ("This breach of contract claim had already been brought before an administrative law judge (ALJ) who had denied that a breach of contract occurred. Because this issue had already been adjudicated on the merits, the trial court properly dismissed the claim.").

Harrison claims that there is no identity of causes of action because of his claims for negligence, negligent misrepresentation, and breach of

fiduciary duty, (Op. Br. p. 31), but the trial court did not hold that *res judicata* barred those claims.

(c) Identity of persons and parties to the action exists.

The third element, "identity of persons and parties to the action" is also met. The identity of persons and parties element requires that a "judgment on the merits rendered in a former suit [be] between the *same parties or their privies*. . . ." *AMEC II*, 106 So. 3d at 456 (quoting *Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984)); *see also Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998). "A privy is one who is identified with the litigant in interest. Privity is a mutuality of interest, an identification of interest of one person with another, and includes privity of contract, the connection or relationship which exists between contracting parties." *Id.* (quoting *Progressive Am. Ins Co. v. McKinnie*, 513 So. 2d 748, 749 (Fla. 4th DCA 1987); *Radle v. Allstate Ins. Co.*, 758 F. Supp. 1464, 1467 (M.D. Fla. 1991)) (citations omitted). To be in privity with a party to the prior proceeding, "one must have an interest in the action such that she will be bound by the final judgment as if she were a party." *Stogniew v. McQueen*, 656 So. 2d 917, 920 (Fla. 1995).

Florida Blue was not just a witness in the administrative hearing, but is the State's contractor for administering medical claims and testified as to the actions it took to adjudicate Plaintiff's claim for the State. Under binding

precedent, that establishes privity. *See AMEC II*, 106 So. 2d at 456 (holding that a contractor for a state agency was a privy of the state agency and thus identity of the parties was met for *res judicata* purposes).

Trial courts regularly consider *res judicata* at the motion to dismiss stage without making improper fact finding where, as here, the existence of the defense is clear on the face of the complaint. *See, e.g.*, *Bess v. Eagle Capital, Inc.*, 704 So. 2d 621, 622 (Fla. 4th DCA 1997); *Duncan v. Prudential Ins. Co.*, 690 So. 2d 687, 688 (Fla. 1st DCA 1997); *Jasser v. Saadeh*, 103 So. 3d 982, 984 n. 2 (Fla. 4th DCA 2012).

Harrison cites non-binding non-published cases from the Southern District of Florida and cites to *Seaboard Coast Line R. Co. v. Indus. Contracting Co.*, 260 So. 2d 850, 864 (Fla. 4th DCA 1972), which does not address whether privity can be properly determined on a motion to dismiss.

Plaintiff attached a copy of the Plan to the SAC and specifically alleged that Florida Blue was contracted as the State's TPA, while DMS retained all decision making authority regarding coverage for itself. (R. 998). DMS was Harrison's insurer, not Florida Blue (R. 995). Unquestionably, on the face of the SAC, Harrison alleges that DMS and Florida Blue are in privity of contract, and Florida Blue must act pursuant to the terms of that contract, which includes acting on the final decision made by DMS as to coverage.

Thus, the facts appear on the face of the pleadings and judicially noticed documents (as affirmed on appeal) and are not disputed. Rather, Plaintiff resists the legal implication arising from those facts. But, frankly, if these facts do not establish privity, nothing would. The trial court correctly held that DMS was Florida Blue's privy at the administrative proceeding.

(d) Identity of quality in persons for or against whom claim is made exists.

The last element, "identity of quality in persons for or against whom claim is made" is also met. This identity exists when the capacities in which the parties were sued is the same in both actions. *AMEC I*, 41 So. 3d at 240. In the administrative proceedings and in this lawsuit, Florida Blue was (and is) DMS's TPA for the State Plan. In both cases, Plaintiff is the beneficiary of insurance benefits under the exact same policy issued by DMS. Plaintiff is the insured; DMS is the insurer; and Florida Blue is the TPA. The capacity of the parties is the same.

Having established all of the requisite elements of *res judicata*, the trial court did not err in finding that it bars Plaintiff's claims for breach of contract, whether individually or as a class. As with the first appeal, the trial court's order on *res judicata* should be affirmed in all respects.

vii. The Trial Court Did Not Err in Applying Collateral Estoppel to Harrison's Claims.

The trial court correctly held that collateral estoppel bars all claims in the SAC and that this holding is law of the case. (R. 1487; 1489). Collateral estoppel is a separate and distinct doctrine from *res judicata*. The elements of collateral estoppel are that the parties and issues be identical and that the particular matter be fully litigated and determined in a contest which results in a final decision by a court of competent jurisdiction. *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977). "The doctrine is intended to prevent repetitious litigation of what is essentially the same dispute." *Provident Life and Accident Ins. Co. v. Genovese*, 138 So. 3d 474, 477 (Fla. 4th DCA 2014).

The difference between *res judicata* and collateral estoppel is that collateral estoppel applies even when the causes of action asserted in the separate proceedings are different. *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995) (quoting *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952)). The key inquiry is whether the same underlying issues which were adjudicated in the administrative proceeding are the same as the issues presented in the SAC. As shown in the chart below, the issues raised are the same:

Issue	In SAC	In Administrative Proceeding
Florida Blue favoring its own financial interests	"[Florida Blue] designed a claims process to obstruct approval and payment of claims for mental health care to increase its own revenue and profit." (R. 968, SAC, ¶ 2). "…[Florida Blue] never covers residential care or prolonged hospitalization treatments for mental health patients." (R. 989, SAC, ¶ 191). "[Florida Blue] has an inherent conflict of interest as it relates to its administration of claims under the Plan, as [Florida Blue] has a financial relationship with DSGI, and because its agreement with DSGI provides that [Florida Blue] shall pay for all claims exceeding 105% of the previous year's claims." (R. 991, SAC, ¶ 204).	"Petitioner's presentation implied that Florida Blue and/or Prest & Associates base their coverage decisions on financial considerations rather than strictly on the merits of the claims…. Petitioner offered no direct evidence that Florida Blue or Prest & Associates directly pressure their physician employees to reject meritorious claims, and there is no evidence that Dr. Santamaria or Dr. Center based their recommendations on anything other than their assessment of R.H.'s medical records in light of the relevant medical necessity criteria." (R. 268). "While at McLean Hospital, R.H. engaged in restricting and purging behaviors that led to medical instability. She was discharged to Cambridge Eating Disorder Center on September 23, 2015. She remained at the Cambridge Center until October 15, 2015. R.H.'s stay at the Cambridge Center was pre-certified by New Directions and is not at issue in this proceeding." (R. 248).
Florida Blue	"[Florida Blue] never	"Petitioner raised questions

Issue	In SAC	In Administrative Proceeding
not considering sufficient medical records	contacted R.H.'s physicians: (a) to determine the medical basis for their recommendation that R.H. receive Intensive Adolescent DBT therapy in a residential environment, (b) to further investigate Plaintiff's Claim, or (c) to determine facts relevant to Plaintiff's Level II Appeal." (R. 976, SAC, ¶ 82). "[Florida Blue] never requested records of the inpatient, partial hospitalization, and intensive outpatient treatment R.H. received at The Renfrew Center during the six-month period which ended just days prior to her admission to McLean Hospital." (R. 976–77, SAC, ¶ 83). "[Florida Blue] disregarded available medical records regarding R.H.'s suicidal ideation and history of self-harm behaviors, including cutting, and smashing her hand, wrist, and arm with a hammer." (R. 977, SAC, ¶ 84).	about the completeness of the records examined by Dr. Santamaria and Dr. Center and sounded a skeptical note as to the diligence of the physicians' efforts to obtain additional documentation. As found above, both Dr. Santamaria and Dr. Center testified that they had adequate documentation to render an opinion as to medical necessity in this case." (R. 269). "Nothing prevents the member from providing any documentation whatsoever during the appeal process. . . . If something Petitioner asserted to be relevant to the decision was missing from the files, it was not the fault of the reviewing physicians. It is ultimately the member's responsibility to provide appropriate documentation for review." (R. 270).
Pre-certification/ pre-	"[Florida Blue] informed Plaintiff's representatives that preauthorization or	"The Plan's pre-certification requirement was not met. Neither A.H. nor McLean

Issue	In SAC	In Administrative Proceeding
authorization	precertification was not necessary to obtain coverage for R.H.'s treatment. Later, [Florida Blue] denied Plaintiff's claim, in part, because Plaintiff failed to obtain preauthorization or pre-certification of R.H.'s treatment." (R. 988, SAC, ¶¶ 179–80). "Plaintiff suffered damages by relying on [Florida Blue]'s statements in this regard." (R. 988, SAC, ¶ 183).	Hospital requested precertification. Mr. Shaw [New Directions' utilization management team leader] testified that he spoke to three different people at McLean Hospital, all of whom stated that the 3 East DBT program does not accept or work with insurance. Mr. Shaw was unable to generate the paperwork needed to begin the pre-certification process because McLean Hospital declined to share with him the necessary clinical information about R.H." (R. 257). "Although pre-certification was not obtained for R.H.'s stays at McLean Hospital, Florida Blue conducted a post-service review to determine whether the claim was eligible for reimbursement." (R. 257). "Petitioner provided no evidence that he sought precertification. At best, the evidence indicates that Petitioner, or some person on his behalf, made inquiries regarding coverage for the McLean Hospital stay shortly before R.H.'s first admission. The evidence established that New Directions attempted to

Issue	In SAC	In Administrative Proceeding
		address the issue but was rebuffed by McLean Hospital, which steadfastly refused to cooperate with the insurer, in keeping with its self-pay only policy." (R. 280–81). "His failure to obtain pre-certification notwithstanding, Petitioner was afforded the opportunity to have Florida Blue review the claim for medical necessity on a post-service basis." (R. 281).
Disclosure of New Directions' medical coverage guidelines	"[Florida Blue] breached the Plan by failing to provide R.H. with the Undisclosed Criteria." (R. 983, SAC, ¶ 132). "[Florida Blue] did not, prior to notification of R.H.'s Level I Appeal decision, provide R.H. with copies of the Eating Disorder Criteria used in determining the Level I Appeal. R.H. did not have an opportunity to respond to [Florida Blue]'s use of the Eating Disorder Criteria." (R. 983, SAC, ¶¶ 135-36). "[Florida Blue]'s use of Undisclosed Criteria and New Directions Behavioral Health make it impossible for Plan members to know	"At the hearing, Petitioner complained that, prior to receiving the letter denying the Level II appeal, he had no inkling that medical necessity determinations were based on criteria produced by New Directions. The Plan's definition of 'medically necessary' does not reference the fact that Florida Blue relies on the New Directions criteria for medical necessity determinations in psychiatric and eating disorder admissions. Petitioner basically argues that not having the precise language of the New Directions medical necessity criteria deprived him and the medical providers of the ability to frame the coverage requests in such a way as to

Issue	In SAC	In Administrative Proceeding
	how to prove their claims for mental health benefits." (R. 989, SAC, ¶ 189).	satisfy the criteria." (R. 275). "…Dr. Santamaria's statement is basically accurate: the medical records determine whether the criteria have been met. Petitioner's awareness of the particulars of the criteria would not change the substance of the medical record." (R.276). "…Petitioner failed to show how the outcome would have been different if the New Directions medical necessity criteria had been available to him or McLean Hospital. Every expert who examined the medical records agreed that R.H. did not meet the criteria for medical necessity. Their opinions are credited." (R. 276–77).
Use of New Directions' medical coverage guidelines.	"Brief, passing mentions in the Plan of 'medical coverage guidelines' without explanation of those guidelines or without explanation of the additional criteria which will be used to determine coverage is not sufficient to put Plan Members on notice of the criteria which will be used to determine whether their medical treatment will be covered under the Plan."	"The Plan clearly states that the determination of medical necessity is made by Florida Blue and DSGI, not by the patient's treating physician. In this context, 'medical necessity' is a definition used to establish coverage under the Plan. 'Medical necessity' does not limit the treating physician's diagnostic and prescriptive options or prevent the Plan member from following the advice of

Issue	In SAC	In Administrative Proceeding
	(R. 984, 987, SAC, ¶¶ 145, 173). "[Florida Blue]'s failure to determine medical necessity in accordance with the Plan's provisions and failure to provide the additional criteria used to determine coverage constitutes a breach of the Plans [sic] terms." (R. 984, 987, SAC, ¶¶ 147, 175).	the treating physician. However, the member must understand that the Plan is not required to cover the costs associated with a service outside the bounds of 'medical necessity.'" (R. 281–82). "Petitioner failed to meet his burden of demonstrating that the pre-certification requirement was met or that the services provided to R.H. were medically necessary for purposes of coverage under the Plan." (R. 282).

Based upon the Administrative Record and the SAC, the trial court properly held (again) that the underlying issues are plainly the same.

The same privity rules in the *res judicata* analysis apply to a collateral estoppel analysis. *See Massey v. Davis*, 831 So. 2d 226, 232 (Fla. 1st DCA 2002). Accordingly, for the reasons listed above, Florida Blue is in privity with DMS and was bound by the final decision of the ALJ as adopted by DMS. The trial court did not err in concluding that Harrison's claims in the SAC are barred by collateral estoppel.

B. Harrison Did Not Adequately Allege the Elements of Each Cause of Action.

i. Harrison did not state a claim for breach of contract in Counts I and II.

As has been briefed extensively, the Benefits Document attached to the SAC makes clear that there is no contract between Harrison and Florida Blue. (R. 998). Florida Blue is a TPA for the State of Florida. (*Id.*; R. 968–69, SAC, ¶¶ 13-14). The Benefits Document tracks Florida's statute when it specifically provides that Florida Blue is not the party responsible for final decision-making concerning benefits, as that responsibility is specifically retained by DSGI. (R. 998). The first order of dismissal specifically held that the Plan was not a contract between Florida Blue and Plaintiff. (R. 730, 731, 735. 737, 739). Plaintiff could not convert the Plan into a contractual relationship between Florida Blue and him by merely alleging so. His allegations do not change the Plan's terms. Instead, the Plan's terms negate Plaintiff's allegations to the contrary. *Age of Empire, Inc. v. Ocean Two Condo. Ass'n, Inc.*, 367 So. 3d 1278, 1280 (Fla. 3d DCA 2023) ("Where the allegations in the complaint are contradicted by the complaint's attached exhibits, the plain meaning of the exhibits control and may be the basis for a motion to dismiss."). The trial court correctly concluded that Harrison did not

plead the existence of a contract between him and Florida Blue because the Benefits Document attached to the SAC negates that claim.

The Southern District of Florida reached a similar conclusion when it held that, under Florida law, a TPA could not be held liable for breach of the insurance plan and dismissed the complaint:

> The Plan [attached to the complaint] also undermines HPC's claim that CGLIC breached the contract. By the terms of the Plan, CGLIC is not the insurer and CGLIC never contracted with the beneficiaries to provide the Plan's benefits. Indeed, under the clear terms of the plan, CGLIC is not a party obligated to pay claims thereunder. Accordingly, CGLIC cannot be said to be in breach for refusing to reimburse a health care provider, such as HPC, for costs associated with treatment rendered to Plan beneficiaries.

Hialeah Physicians Care, LLC v. Conn. Gen. Life Ins. Co., Case No. 13-21895-CIV 2013 WL 3810617 at *2 (S.D. Fla. July 22, 2013).

Here, as in *Hialeah Physicians Care*, any benefits to be awarded under the Plan are paid by the State, not by Florida Blue, and Florida Blue is not the final arbiter of Plan interpretations or benefit determinations, as the State retains such authority.

It is clear from the pleadings that the Plan is not a contract between Florida Blue and Harrison, a holding this Court affirmed in the first appeal. Plaintiff did not allege the existence of any other contract with Florida Blue and continued to assert that the "contract" breached in Counts I and II was

the Plan. The trial court did not improperly resolve a factual dispute when it correctly held that law of case applied and Plaintiff did not plead a viable claim for breach of contract in Count I or II.

ii. Harrison did not state a claim for negligence in Counts III and IV.

This Court has already affirmed the trial court's holding in the first appeal that "[t]here is no duty under any contract, tort, theory, or statute, that gives rise to *any duty* as between Florida Blue and the Plaintiff." (R. 737). That holding is law of the case.

Ignoring that law of the case, Harrison cites this Court's Opinion in the first appeal and *Kohl v. Blue Cross & Blue Shield of Florida*, 988 So. 2d 654, 659 (Fla. 4th DCA 2008), to support his sole asserted error: that the existence of a legal duty cannot be decided at the motion to dismiss stage. (Op. Br. p. 38–39). But the existence of a legal duty is an issue of law for the Court to decide, not an issue of fact. *Keene*, 596 So. 2d at 704 ("whether a duty exists between the defendant and the plaintiff is a question of law for the court."). To the extent *Kohl* conflicts with *Keene*, this Court's decision in *Keene* controls. The instant case also differs substantially from *Kohl*, in which the plaintiff did not pursue any administrative remedies and thus there were no records of any administrative proceedings for the Court to consider. The *Kohl* Court held that "not enough information has been developed about the

nature of [Florida Blue]'s relationship to the State of Florida and its role in interpreting the plan." 988 So. 2d at 659. Here, on the other hand, in addition to the SAC and the attached Plan documents, the trial court also considered the judicially noticed administrative record containing several references to Florida Blue's role in administering the Plan and its relationship with DMS. *See, e.g.*, (R. 1191, 1195, 1200–03, 1214, 1216, 1221–23, 1227). The trial court also examined § 110.123, Florida Statutes, which establish the Plan and DMS/DSGI's authority over it.

Accordingly, the trial court here had enough information about Florida Blue's role to determine the legal issue that Florida Blue did not owe a duty to Harrison via the Plan, even if that holding were not already law of the case (which it is). The trial court did not err in holding that Harrison failed to state claims for negligence.

iii. Harrison did not state a claim for negligent misrepresentation in Count V.

The trial court found that Harrison failed to state a claim for negligent misrepresentation because the plain language of the Plan negated his claim and because he does not have damages. (R. 1495).

Harrison only disputes the trial court's holding that the non-waiver clause bars his claim in Count V. (Op. Br. p. 40). He does not address the trial court's alternative holding that he did not adequately plead damages.

(R. 1495). Harrison thus abandoned any alleged error in dismissing Count V. *See Baptist Primary Care, Inc.*, 177 So. 3d at 673 (quoting *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (on motion for rehearing) ("When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy."); *Anheuser-Busch Co. v. Staples*, 125 So. 3d 309, 312 (Fla. 1st DCA 2013) (appellate court is "not at liberty to address issues that were not raised by the parties"); *State v. Town of Sweetwater*, 112 So. 2d 852, 854 (Fla. 1959) (if appellant fails to raise an issue, he is presumed to have abandoned it). Dismissal of the negligence claim should be affirmed on this basis alone.

The ALJ concluded that Harrison was not impacted by the lack of pre-certification because Florida Blue reviewed the claim on the merits anyway. R. 280–81 ("His failure to obtain pre-certification notwithstanding, Petitioner was afforded the opportunity to have Florida Blue review the claim for medical necessity on a post-service basis."). In other words, Harrison already litigated the pre-certification issue. Harrison's claim was ultimately determined to not be covered because it was not medically necessary, regardless of a pre-certification requirement. Denial of coverage based on medical necessity is wholly independent of the pre-certification issue, as the

ALJ found, and as DSGI agreed with. Because the claim did not meet MNC, as a matter of law it is irrelevant whether he was properly informed about the pre-certification requirement or reasonably relied on it under the Plan's terms. Indeed, precertification is not a guarantee of coverage in any event. The pre-certification requirement was not tied to the medical necessity determination. The dismissal should be affirmed.

iv. Harrison did not state a claim for mandatory injunctive relief.

As held by the trial court, under Florida law injunctive relief is a remedy, not a cause of action that stands alone. (R. 1496 at ¶ 56 citing 29 Fla. Jur 2d Injunctions § 1 (Nov. 2022 Update)); *Alabau v. Town of Lake Park*, 617 So. 2d 872 (Fla. 4th DCA 1993). Harrison should not have pled injunctive relief as a separate cause of action, but it really does not matter because the trial court examined the merits of Harrison's request for injunctive relief anyway. R. 1496-97 at ¶¶ 57-60.

Ultimately, the trial court held that Harrison failed to plead the elements required for a claim for injunctive relief: irreparable injury, a clear legal right, or the lack of an adequate remedy at law. (R. 1496). Plaintiff thus failed to state facts to meet the required elements for injunctive relief. In addition, the trial court also held that it would not be able to issue the requested injunction because Florida Blue does not have the power to amend the Plan in any

event. (R. 1497 at ¶ 60; Fla. Stat. § 110.123(5)). Indeed, it's the State's Plan, not Florida Blue's.

Taking the last element first, Harrison failed to address the trial court's holding that it cannot grant the requested injunctive relief because neither Florida Blue nor a court has power to amend the Plan. By not addressing this holding, Harrison has abandoned any argument that the trial court erroneously dismissed the injunctive relief claim. *See Baptist Primary Care, Inc.*, 177 So. 3d at 673. This is sufficient reason alone to affirm dismissal. The trial court also correctly held that Harrison's conclusory allegations of irreparable harm were insufficient. "A complainant alleging irreparable injury must state facts which will enable the court to judge whether the injury will in fact be irreparable. Mere general allegations of irreparable injury will not suffice." *Waters v. Sch. Bd. of Broward Cnty., Fla*., 401 So. 2d 837, 838 (Fla. 4th DCA 1981); *see also First Nat. Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 423–24 (Fla. 2d DCA 1963) ("The facts comprising such injury must be presented clearly so that the court may determine the exact nature and extent of the possible injury."). Harrison failed to allege any facts– as to him or a class – that enable the court to determine what the injury even is, let alone that an injury would be irreparable. Harrison also failed to identify a clear legal right that would justify the imposition of injunctive relief.

"[I]njunctive relief, it is an extraordinary remedy that 'requires a clear legal right, free from reasonable doubt.'" *Net First Nat. Bank v. First Telebanc Corp.*, 834 So. 2d 944, 950 (Fla. 4th DCA 2003).

The dismissal of Harrison's claim for injunctive relief should be affirmed.

v. Harrison failed to state a claim for breach of fiduciary duty.

The trial court correctly held that Harrison's claim for breach of fiduciary duty failed to state a claim because there is no duty owed by Florida Blue to Harrison, and because Harrison cannot allege that Florida Blue owes it a duty that conflicts with the duties Florida Blue owes DMS pursuant to the Plan. (R. 1497). As briefed above, whether a legal duty exists is an issue of law for the court to decide, not an issue of fact. Therefore, the trial court did not err in holding that the lack of a legal duty was law of the case and Plaintiff had not alleged anything in the SAC to change that outcome.

Once again, Harrison failed to address another of the trial court's alternative holdings: even assuming for the sake of argument Harrison did have a claim for breach of fiduciary duty, such a claim would be subsumed into a claim for bad faith insurance practices. Because Harrison does not address this holding, he abandoned any argument that the trial court erred

in dismissing the fiduciary duty claim for this reason. *See Baptist Primary Care, Inc.*, 177 So. 3d at 673.

In any event, Florida law is well established that claims for bad faith against an insurer do not exist unless and until an insured prevails on a claim for breach of the insurance policy and claims of breach of fiduciary duty fall within a claim for bad faith. *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.,* 94 So. 3d 541 (Fla. 2012); *Gov't Empl. Ins. Co. v. Prushansky*, Case No. 12–80556–CIV, 2012 WL 6103220 (S.D. Fla. Dec. 7, 2012) (dismissing count for breach of fiduciary duty); *Milne v. Liberty Ins. Corp.*, 2013 WL 12069033 (S.D. Fla. Jun. 17, 2013) (same); *Torres v. GEICO Gen. Ins. Co., Inc.*, 2013 WL 12084492 (S.D. Fla. Nov. 21, 2013) (same).

Of course, here, Harrison did not prevail on his coverage claims under the State Plan. The trial court also dismissed as premature Harrison's initial count for bad faith in the FAC, which was affirmed on appeal. The trial court correctly ruled on these issues.

C. The Trial Court Did Not Err in Striking Harrison's Class Allegations.

i. The Trial Court Did Not Fail to Exercise Independent Judgment.

Harrison's argument challenging the trial court's independent judgment in ruling on the motion to strike fails for the same reasons as his argument regarding the order on the motion to dismiss.

ii. The Court's Decision to Strike Was Not Premature.

In striking Harrison's class allegations, the trial court correctly reasoned that "[s]triking facially insufficient class allegations prevents litigants from the enormous costs of time and money that result from class discovery." (R. 1469) (citing *Donelson v. Ameriprise Fin. Servs., Inc.* 999 F.3d 1080, 1092 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2675 (2022)).

Florida Rule of Civil Procedure 1.220(d)(1) provides that the trial court may: (A) allow the class action claim or defense to be maintained; (B) disallow the class representation and strike the class representation allegations; or (C) order postponement of the determination pending the completion of discovery concerning whether the claim or defense is maintainable on behalf of a class. Thus, allowing discovery before striking class allegations is one of the options the trial court has, but not the only option. *See, e.g.*, *Tropical Trailer Leasing, LLC*, 308 So. 3d at 248 (granting a motion to strike class allegations from a complaint); *Bay Area Injury Rehab*

Specialists Holdings, Inc. v. United Servs. Auto. Ass'n, 173 So. 3d 1004, 1007 (Fla. 2d DCA 2015) (affirming the striking of class action allegations from a complaint without allowing class discovery).

Harrison cites *Frankel v. Miami Beach*, 340 So. 2d 463, 469 (Fla. 1976), for the proposition that class allegations should never be dismissed before allowing class discovery. But, unlike this case, *Frankel* involved "the average class action," i.e., one in which the plaintiff has stated a viable cause of action and the issue is whether the case can be maintained as a class action. *Id.* Here, Plaintiff has been unable to state any viable claims against Florida Blue; this case is not "the average class action." *See Taran v. Blue Cross Blue Shield of Florida, Inc.*, 685 So. 2d 1004, 1006 (Fla. 3d DCA 1997) (holding that "average class action" is one which adequately alleges injury and has a viable cause of action). A named plaintiff must establish a case or controversy with the defendant, and if they fail to do so, the named plaintiff may not seek relief on behalf of himself or any member of the class. *Ferreiro*, 928 So. 2d at 377. Harrison cannot state any claims against Florida Blue and asserting a putative class does not absolve Plaintiff of his basic pleading requirements. Thus, the trial court did not err in striking Harrison's class claims prior to discovery.

iii. The Court Did Not Fail to Conduct the Proper Analysis Under Rule 1.140(f).

The trial court noted that "unsupportable class allegations bring 'impertinent' material into the pleading." (R. 1469) (quoting *Donelson*, 999 F.3d at 1092). Further, as explained by the trial court, a motion to strike is a proper method to defeat facially insufficient class action allegations. *Id.* (quoting *Tropical Trailer Leasing, LLC*, 308 So. 3d at 248). Thus, Plaintiff's argument that the trial court did not perform a proper analysis under Rule 1.140(f) falls flat.

Harrison does not argue that the trial court erred *on the merits* of its holding that Harrison failed to meet the pleading requirements provided by Rule 1.220(c). Rather, Plaintiff incorrectly argues that the trial court should not have analyzed at all whether the class allegations were sufficiently pled. (Op. Br. p. 49). However, "[p]arties seeking class certification have the burden of ***pleading*** and proving each and every element required by [R]ule 1.220." *Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261, 265 (Fla. 5th DCA 2002) (emphasis added). Asserting class representation is not a Talisman that absolves Plaintiff from pleading a viable cause of action. If that were not the case, then every plaintiff could avoid dismissal for failure to state a claim by merely alleging a class. That is obviously not the law. The trial court

conducted a proper analysis in striking Harrison's insufficient class allegations and its ruling should be affirmed.

iv. Harrison's Alternative Argument Regarding Mootness Fails.

The trial court entered its Order granting the motion to strike on May 10, 2023 at 11:26 am (R. 1467), before it entered its Order granting the motion to dismiss at 1:11 pm. (R. 1479). Because the order striking class allegations was entered before dismissal, Plaintiff's argument fails on its own logic. Moreover, the trial court entered an Amended Order Granting Defendant Blue Cross and Blue Shield of Florida, Inc.'s Motion to Dismiss Second Amended Complaint, effective as of November 7, 2023. The motion to strike was not moot under these circumstances.

V. CONCLUSION

At this point, Harrison's claims have been reviewed through the administrative appeal process by the State, an Administrative Law Judge, an Independent External Review doctor, and through this action by two trial court judges, and this Court through the first appeal. Everyone who has reviewed the case has concluded that Harrison has not successfully presented a viable claim, whether through the presentation of evidence on the merits in the administrative process, or pled in this action. Nothing has changed since this Court reviewed Harrison's first appeal, except that he has

now been afforded the opportunity to amend. The trial court correctly found that the SAC presented nothing that would support a viable claim. Plaintiff also concedes that if the issues of law are as found by the trial court, then further amendment would be futile. For all the foregoing reasons, the Court should affirm the trial court's orders granting Florida Blue's motion to dismiss with prejudice and to strike class allegations.

/s/ Timothy J. Conner
Timothy J. Conner, Esq.
Florida Bar No. 767580
timothy.conner@hklaw.com
Jennifer A. Mansfield
Florida Bar No. 0186724
jennifer.mansfield@hklaw.com
Laura B. Renstrom, Esq.
Florida Bar No. 108019
laura.renstrom@hklaw.com
HOLLAND & KNIGHT LLP
50 North Laura Street, Suite 3900
(904) 353-2000
Jacksonville, FL 32202

Counsel for Appellee Blue Cross and Blue Shield of Florida, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May, 2024, I electronically filed the foregoing with the Florida Courts E-Filing Portal, which will serve it on the following counsel of record via electronic mail. I further certify that a copy of the foregoing was served via electronic mail on the following:

Michael Fox Orr
morr@orrcook.com
Kevin B. Cook
kcook@orrcook.com
Kathleen H. Crowley
kcrowley@orrcook.com
ORR | COOK
50 N. Laura Street, Suite 1675
Jacksonville, FL 32202
Attorneys for Appellant

Jason Gonzalez
JasonGonzalez@shutts.com
Amber Stoner Nunnally
ANunnally@shutts.com
SHUTTS & BOWEN LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301
Counsel for Appellee Department of Management Services, Division of State Group Insurance

/s/ Timothy J. Conner
Attorney

CERTIFICATE OF COMPLIANCE

Counsel for Appellee Blue Cross and Blue Shield of Florida, Inc. certifies that this Answer Brief is typed in 14 point (proportionately spaced) Arial and does not exceed 13,000 words or 50 pages.

/s/ Timothy J. Conner
Attorney