

IN THE FOURTH DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

BEACHES MRI a/a/o
Eileen Thibodeaux,

Appellant,

CASE NO.: 4D23-0800

L.T. CASE NO: CONO-21-015301

v.

SAFECO INSURANCE COMPANY OF
ILLINOIS,

Appellee.

ANSWER BRIEF
OF SAFECO INSURANCE COMPANY OF ILLINOIS

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INTRODUCTION

Appellant, Beaches MRI, did not argue below that Appellee, Safeco Insurance Company of Illinois (Safeco), did not timely serve its summary judgment motion and evidence. Because Beaches MRI did not make this specific argument, Safeco was not given the opportunity to address the issue and the trial court did not consider or rule on the issue. As to Beaches MRI's substantive issue, there were no remaining questions of fact as to whether Safeco's insured had exhausted her available PIP benefits under her contract with Safeco, leaving Beaches MRI with no cause of action.

STATEMENT OF THE FACTS AND THE CASE

On May 6, 2021, Plaintiff, Beaches MRI, filed a breach of contract claim against Defendant, Safeco Insurance Company of Illinois ("Safeco"), seeking no more than \$100.00 in additional personal injury protection (PIP) benefits for services provided to Safeco's insured on July 17, 2019. R. 13, 508. Beaches MRI's only theory of recovery was that Safeco should have reimbursed Beaches MRI using "the 2007 limiting charge" rather than the participating physician fee schedule, a purely legal argument based upon statutory

interpretation. R. 16. In response to Beaches MRI's lawsuit, Safeco asserted that benefits were exhausted and, thus, Safeco could not be liable for any additional payments – regardless of whether Safeco did or did not properly adjust Beaches MRI's bill. R. 28.

On November 4, 2022, the trial court entered a Case Management Order, directing the parties to file their summary judgment motions and scheduling their motions to be heard on February 22, 2023. R. 103. The trial court's Case Management Order did not specify a deadline for filing the parties' summary judgment motions. R. 103.

In compliance with the Case Management Order, Safeco moved for summary judgment based upon exhaustion of benefits. R. 112-23. In support of its motion, Safeco filed the affidavit of its adjuster, authenticating Safeco's business records. R. 131-510. Safeco's business records showed when, how much, and to whom Safeco had paid all the insured's available PIP benefits. R. 112-23, 131-510.

On February 21, 2022, Beaches MRI filed "Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment." R. 124-30. In its motion, Beaches MRI asserted that there were "no disputed issues of fact relevant to the

disposition of the question at issue in this motion.” R. 126-27. The “question at issue” in Beaches MRI’s motion was whether Safeco had proven that benefits were exhausted. R. 128-29.

Beaches MRI offered no evidence to rebut Safeco’s sworn evidence. Beaches MRI simply argued that Safeco’s explanations of review (EORs) did not add up to \$10,000.00. R. 124-30. Beaches MRI did not argue that Safeco had underpaid Beaches MRI. Beaches MRI did not argue that Safeco should have reimbursed Beaches MRI using any statutory fee schedule other than the participating physicians fee schedule allowed by the PIP statute. R. 124-30. Beaches MRI did not argue that Safeco had waived its exhaustion of benefits defense, which Beaches MRI had asserted in its reply to Safeco’s affirmative defense. R. 124-30, 31-33.

At the hearing held on February 22, 2023, Beaches MRI’s counsel affirmed that both parties’ summary judgment motions were to be heard that day, even though Beaches MRI had filed and served its motion the previous day. R. 519. At hearing, Beaches MRI argued that Safeco’s summary judgment motion should be denied because it was not filed within the 40-day period required under Rule 1.510. R. 521. Beaches MRI did not make any argument or representation

to the trial court that Beaches MRI had not been timely served with Safeco's summary judgment motion or summary judgment evidence. R. 129, 521. Because Beaches MRI did not argue that it had not been timely served, neither Safeco nor the trial court addressed any issue related to service. R. 523-24. Beaches MRI also argued that Safeco's documentation was conflicting and that there were missing EORs. R. 521-22.

Safeco's legal counsel responded that it had filed its summary judgment motion and supporting affidavit timely. R. 528. Safeco's counsel assured the court that she could provide the court with the e-filing confirmation number but that, for some unknown reason, neither Safeco's summary judgment motion nor its evidence had been docketed when initially filed. R. 523. The trial court, in its abundant discretion, took defense counsel at her word. R. 523-24.

Safeco's legal counsel also explained that there were no missing business records and pointed out that the EORs did not reflect the payments made through a settlement negotiation with a particular provider, but that those documents were provided to Beaches MRI's counsel, reflecting \$10,000.00 paid. R. 524-25; *see also* R. 424-45.

Beaches MRI's counsel acknowledged that he had received settlement documentation from Safeco, but argued he didn't "know what any of these negotiated payments are...if it's for PIP, for penalty, for postage, for interest." R. 526.

Contrary to Beaches MRI's contention at the hearing, Safeco's record evidence demonstrated that one of the insured's medical providers, Simpson Chiropractic Pain & Wellness Center (Simpson Chiropractic), negotiated a settlement with Safeco for certain dates of service. R. 424-31, 433-40, 442-45, 524-25. 419-22 (EOP notes 14, 16, 17, 28). Safeco's payments made to Simpson Chiropractic as part of the negotiated settlement were reflected in the EORs and in the payment ledger (PIP Log) - provided to Beaches MRI during discovery and again prior to the hearing. R. 66, 68-69, 424-31, 433-40, 442-45, 524-25, 419-22 (EOP Notes 14, 16, 17, 38).

Safeco's EORs and Safeco's PIP Log demonstrated that Safeco had paid \$10,000.00 in PIP benefits. Safeco's EORs expressly stated the amounts paid and how those amounts were determined. R. 424-506. Safeco's EORs that indicated that "0.00" was paid expressly stated that, "THIS BILL IS INCLUDED IN A NEGOTIATED SETTLEMENT THAT HAS BEEN PREVIOUSLY PAID TO THE

PROVIDER.” R. 424-45. Safeco’s PIP Log showed the amounts included in the negotiated settlement, along with a notation that read, “Payment Made in Conjunction with completed Bill Settlement and Negotiation Form.” R. 419-21.

Also contrary to Beaches MRI’s argument to the county court, Safeco’s PIP Log noted when and to whom any interest, penalty, or postage was paid that was not a PIP benefit. R. 417, 421(EOP Note 24), 526. Safeco’s EORs and PIP Log showed that benefits had exhausted with a final payment made on October 2, 2019. R. 479-505, 416-20.

In calculating the amount of PIP benefits paid to Eileen Thibodeaux’s providers by Safeco, Beaches MRI ignored the payments made to Simpson Chiropractic as part of the negotiated settlement. R. 525-26. Beaches MRI also miscalculated or misrepresented the total amount paid to all other providers that were not part of Simpson Chiropractic’s negotiated settlement. Safeco’s EORs demonstrated that Safeco paid an additional \$6,338.42 in PIP benefits to providers other than those negotiated, not \$6,105.08 as Beaches MRI contends. R. 522. It appears that Beaches MRI skipped a payment of \$233.34 made to Simpson Chiropractic (that was not

part of the negotiated settlement), since \$6,338.42 minus \$6,105.08 equals exactly \$233.34 ($\$6,338.42 - \$6,105.08 = \233.34). R. 457, 419.

The record evidence also demonstrated that Safeco informed Beaches MRI that benefits were exhausted and provided Beaches MRI with a copy of its PIP Log more than a year before Beaches MRI filed suit. R. 508. Between January 20, 2020, when Safeco informed Beaches MRI that benefits were exhausted, and February 22, 2023, when the summary judgment hearing was held, Beaches MRI uncovered no evidence to suggest (let alone prove) that there were additional benefits available under Safeco's contract with its insured. R. 517-27. The trial court was correct in finding that this is "a straightforward benefits exhausted case" without any evidence of gratuitous payments or bad faith. R. 527.

Contrary to Beaches MRI's assertion in its Initial Brief, Safeco's counsel did not admit that its EORs totaled \$6,105.08. Initial Brief (IB) at 7. Safeco's counsel did not ask the county court to disregard any alleged discrepancy between the EORs and the PIP Log, since there was none. IB. 7. Similarly, Beaches MRI's assertion that Safeco's attorney made no attempt "to demonstrate that Safeco's

alleged payments were made in accordance with Florida law and the subject insurance policy” is false. IB. 7.

Safeco filed a certified and authenticated copy of its insurance contract with Plaintiff’s assignor, Eileen Thibodeaux, along with the entire non-privileged claims file which demonstrated how, when, and what was paid to Eileen Thibodeaux’s medical providers. R. 131-510. Everything filed with the county court had been produced to Beaches MRI two (2) years prior to the hearing. R. 64-69. Despite Beaches MRI’s possessing all evidence, Beaches MRI pointed to nothing that demonstrated or even hinted at bad faith claims handling or gratuitous payments.

Beaches MRI made no argument prior to the hearing that Safeco had paid any untimely or non-compensable bills. Beaches MRI attempted to interject it as an issue at the last minute - *after* Safeco pointed out that Beaches MRI had ignored the settlement payment amounts - as reflected by both the PIP Log and the EORs. R. 524, 526.

With all relevant evidence before the trial court, including all the non-privileged contents of Safeco’s claims file, the trial court

found that there was no genuine issue of material fact and that this was “a straightforward benefit exhausted case.” R. 527.

On March 3, 2023, the trial court granted Safeco’s summary judgment motion and denied Beaches MRI’s cross summary judgment motion. R. 527. Beaches MRI did not move for rehearing. On March 29, 2023, Beaches MRI filed a Notice of Appeal of the trial court’s summary judgment order. R. 534-39. On May 2, 2023, the trial court entered final judgment for Safeco. R. 546-47.

STANDARD OF REVIEW

An appellate court will give great deference to a trial court’s interpretation of its local rules and review a trial court’s application of local rules for an abuse of discretion. *State Farm Mut. Ins. Co. v. Muse*, 2022 U.S. App. LEXIS 3745, 2022 WL 413417 (11th Cir. 2022), citing *Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1302 (11th Cir. 2009).

An appellate court reviews the trial court’s summary disposition of a small claims action *de novo*. *Mech v. Brazilian Waxing by Sisters, Inc.*, 349 So. 3d 453, 454 (Fla. 4th DCA 2022)(citation omitted).

As this Court is aware, the summary judgment standard had changed to reflect the federal standard. R. 124-27. Under the federal

standard, summary judgment is required “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 322-23. A movant need not set forth any evidence when the nonmovant bears the burden of persuasion at trial. R. 125 (citing *Wease v. Ocwen Loan Servicing, LLC*, 915 F.3d 987, 997 (5th Cir. 2019)).

In this case, Beaches MRI, both as the moving and nonmoving party, bore the burden of proving its breach of contract claim. In this case, Beaches MRI failed to prove two essential elements of its breach of contract claim: breach of contract and damages.

SUMMARY OF THE ARGUMENT

Beaches MRI did not argue below that Safeco’s summary judgment motion and evidence was not timely served. Thus, this aspect of Beaches MRI’s argument was not preserved for appellate

review. Fla. R. Civ. P. 1.510 does not dictate when summary judgment motions must be filed, only when they must be served.

The trial court did not abuse its discretion in granting summary disposition in this small claims matter. Florida Small Claim Rule 7.135 required the court to summarily enter judgment at the pretrial conference “or at any subsequent hearing” if there were “no triable issue.” Rule 7.135 does not include the procedural rules found in Rule 1.510 so that matters involving a small amount of money, such as this matter, can be resolved as simply, speedily, and inexpensively as possible.

Beaches MRI failed to submit any evidence, or to point to any evidence, that demonstrated that Safeco had breached its contract with its insured. Beaches MRI failed to submit any evidence, or to point to any evidence, that disproved Safeco’s exhaustion of benefits defense. Safeco, on the other hand, produced its entire non-privileged claims file, which proved that Safeco’s insured had exhausted the maximum amount of PIP benefits available to her under her personal automobile insurance contract with Safeco.

Because this matter was resolved on the merits, the county court's order summary disposition of this claim should be affirmed. There was and is no triable issue to be submitted to a jury.

ARGUMENT

I. THE FINAL JUDGMENT SHOULD BE AFFIRMED.

A. The County Court Did Not Abuse Its Discretion by Entering Summary Disposition in this Case.

1. Beaches MRI Did Not Preserve Any Argument Related to Service.

Beaches MRI argued in its summary judgment motion and at hearing that Safeco did not file its summary judgment motion and evidence timely. R. 129, 521. Beaches MRI did not argue or make any representation to the court that it had not been timely served. R. 129, 521. Since Beaches MRI did not argue that it had not been timely served, the trial court did not rule upon any issue related to service. Because Beaches MRI did not argue that it had not been timely served, Safeco's counsel did not address any issue related to untimely service. R. 523.

To preserve an error for appellate review, the "issue must be presented to the lower court and the *specific* legal argument or ground to be argued on appeal or review must be part of that

presentation if it is to be considered preserved.” *Aills v. Boemi*, 29 So. 3d 1105, 1108-09 (Fla. 2010)(emphasis added)(citation omitted). “While no magic words are required to make a proper objection... the objection must be sufficiently specific to inform the court of the perceived error.” *Id.* at 1109 (citation omitted). “A specific objection provides the trial judge with a clear-cut issue upon which to rule and the adverse party with an opportunity to meet the objection[.]” *Nat Harrison Ass’ns, Inc.*, 256 So. 2d 50 (Fla. 4th DCA 1971), *citing Caldwell v. People's Bank of Sanford*, 73 Fla. 1165, 1175, 75 So. 848, 852 (1917)(“It is the declared policy of this court to confine the parties litigant to the points raised and determined in the court below and not to permit the presentation of points, grounds or objections for the first time in this court, when the same might have been cured or obviated by amendment, if attention had been called to them in the trial court.”).

Here, Beaches MRI did not give either the trial court or opposing counsel the opportunity to address any argument related to service of Safeco’s summary judgment motion or evidence. Therefore, it was not preserved for review. It is entirely possible that Safeco may have been able to produce evidence that it had timely served Beaches MRI

if the issue had been raised. It is also possible that Beaches MRI did not raise the issue below because Safeco had served Beaches MRI in compliance with Rule 1.510.

2. Beaches MRI Has Made No Argument that It Was Surprised, Ambushed, or Unable to Adequately Prepare for the Hearing.

Beaches MRI did not argue and has not argued that it “was deprived of the opportunity to avail itself, as the nonmoving party, of the procedural safeguards provided under [Rule 1.510].” *Nationwide Ins. Co. of Am. v. Integrity Med. Grp.*, 355 So. 3d 542, 543 (Fla. 5th DCA 2023). The summary judgment hearing on both parties’ motions was set on November 4, 2022 for February 22, 2023. R. 103. Discovery had been closed since May 11, 2022. R. 103. Safeco had provided Beaches MRI with its evidence on September 30, 2021. R. 66. Safeco had pled no other defense to Beaches MRI’s breach of contract claim - other than exhaustion of benefits - since July 28, 2021. R. 28.

In this case, there was no gamesmanship or ambush or surprise that could have prevented the deliberate consideration of Beaches MRI’s and Safeco’s motions in this matter – and Beaches MRI has not asserted that there was. Beaches MRI has made no argument that it

was deprived of the ability to adequately respond or to prepare for the hearing on the motions. To the contrary, Beaches MRI agreed that its motion was to be heard at the hearing on February 22, 2023 - despite its having filed and served its motion on February 21, 2023. See Fla. R. Civ. P. 1.510(c)(5)(requiring a non-movant to serve its response at least 20 days before the hearing).

3. The County Court Properly Entered Summary Disposition Where There Was No Triable Issue.

Plaintiff filed its breach of contract claim in the County Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. R. 13. Because Plaintiff's claim was for damages of no more than \$100, Plaintiff's lawsuit was subject to the Florida Small Claims Rules. See Fla. Sm. Cl. R. 7.010 ("The rules are applicable to actions for money or property, the value of which does not exceed \$8,000.00 exclusive of costs, interest, and attorneys' fees."); see also *LaSalla v. Polls by George of Pinellas Cty., Inc.*, 125 so. 3d 1015, 1017 (Fla. 2d DCA 2013)("Florida's small claims rules are rules of procedure for use in county court when the amount in controversy is small."); *Davis v. Clark*, 326 So. 3d 781, 784 (Fla. 2d DCA 2021)(noting that small claims cases involve small amounts of money).

The purpose of the small claims rules is “to provide the simple, speedy, and inexpensive trial of actions at law in county courts.” *Davis*, 326 So. 3d at 784; *see also Morburger v. J. Reporting, Inc.*, 318 So. 3d 619, 621 (Fla. 3d DCA 2021)(“Historically, the purpose of small claims courts is to provide greater access to justice...by allowing claims for small amounts of money to be litigated inexpensively and efficiently.”).

The Seventeenth Circuit Court’s Administrative Order 2020-85-CO (Amendment 1)(effective June 15, 2021), entitled “Invocation of the Florida Rules of Civil Procedure In Certain Small Claims Cases” provides that, in small claims cases in which an insurance company is the sole defendant, Florida’s Rules of Civil Procedure are automatically invoked “except that Rule 1.440 shall not be invoked, and Rules 7.135 and 7.150 are reserved and prevail over Rule 1.430.”

Florida Small Claims Rule 7.135, which was expressly “reserved,” is entitled “Summary Disposition” and provides:

At pretrial conference or at any subsequent hearing, if there is no triable issue, the court shall summarily enter an appropriate order or judgment.

Rule 7.135 requires a trial court to enter summary disposition at a pretrial conference or at any subsequent hearing if it determines that

there is no triable issue. *Save A Lot Car Rental, Inc.*, 325 So. 3d 285, 286-87 (Fla. 2d DCA 2021). No pending motion is necessary or required.

Rule 7.135 is similar, although not identical to Fla. R. Civ. P. 1.510. *Id.* at 286. Both rules require that a trial court find there is no triable issue as a matter of law. *Id.*

In reviewing the trial court's summary disposition order, the appellate court must examine the record to determine if there is "any genuine issue of material fact or the possibility of any issue." *Id.* at 287, citing *Nard, Inc. v. DeVito Contracting & Supply, Inc.*, 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000). However, a court need not follow the same procedural requirements under the small claims rule for summary disposition as under Fla. R. Civ. P. 1.510. *Bond v. Soar Merging Market, LLC*, 31 Fla. L. Weekly 139a (Fla. Duval Cty. Ct. 2022), citing *The Kidwell Group, LLC v. Omega Ins. Co.*, 29 Fla. L. Weekly Supp. 356b (Fla. Bay Cty. Ct. 2021).

In practice, the focus for determining whether a genuine dispute exists is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Shazam Auto Glass, LLC a/a/o Cindy Andrew v. GEICO Gen. Ins. Co.*, 31 Fla. L. Weekly Supp.

322b (Fla. Hillsborough Cty. Ct. 2023), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “Like the standard for directed verdict, the inquiry is ‘whether the 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.’” *Id.*, *citing Anderson*, 477 U.S. at 251-52.

“When the moving party has carried its burden...its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Shazam Auto Glass, LLC a/a/o Cindy Andrew v. GEICO Gen. Ins. Co.*, 31 Fla. L. Weekly Supp. 322b (Fla. Hillsborough Cty. Ct. 2023), *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *see also Quality Performance Rehab., Inc. a/a/o Adele King v. GEICO Gen. Ins. Co.*, 27 Fla. L. Weekly Supp. 751a (Fla. St. Lucie Cty. 2019)(granting summary disposition where insurer exhausted benefits and the plaintiff’s allegations of invalid or untimely claims was not supported by the record).

In this case, Safeco’s claims file was before the county court and had been in Beaches MRI’s possession for two (2) years. The

uncontroverted evidence demonstrated that Safeco had paid out all available benefits.

Contrary to Beaches MRI's arguments, Safeco provided to Beaches MRI and to the trial court: (1) the bills submitted to Safeco from all providers; (2) the envelopes in which those bills arrived; (3) the medical records provided to Safeco with those bills; (4) the explanations of review (EORs) issued by Safeco with payment; and (5) Safeco's PIP payment ledger. R. 235-506.

The bills, envelopes, and EORs showed when the bills were postmarked (mailed to Safeco) and when Safeco received the bills. R. 235, 241, 248, 254-56, 262-63, etc. Safeco's PIP log showed when each bill was paid for what date(s) of service. R. 415-20. These documents demonstrated that Safeco paid compensable and timely claims for a total of \$10,000.00 in PIP benefits. Beaches MRI provided no evidence (nor pointed to any evidence) to the contrary.

For example, Beaches MRI mailed its bills and medical records to Safeco on July 24, 2019. R. 234-46. Safeco received Beaches MRI's bills and medical records on July 29, 2019. R. 235, 241, Safeco paid \$860.30 to Beaches MRI on August 5, 2019 and \$912.74 to Beaches MRI on August 6, 2019. R. 419, 446-49. Safeco issued two

Explanations of Review (EORs) to Beaches MRI that explained how Safeco arrived at its reimbursement amounts. R. 446-49.

If there were any untimely or non-compensable bills paid by Safeco, Beaches MRI failed to point them out - even though Beaches MRI had been provided all the documentation in discovery on September 30, 2021. R. 64, 66-69.

The county court was within its broad discretion to enter summary disposition/judgment in this case. Beaches MRI failed to demonstrate that there was a genuine issue of material fact. Beaches MRI failed “to do more than show that there was some metaphysical doubt as to the material facts.” Beaches MRI submitted no evidence that required the matter to be submitted to a jury.

B. There Remained No Question of Fact as to Whether Safeco Paid \$10,000 in PIP Benefits.

In this case, both parties moved for summary judgment. R. 112, 124. Thus, both parties were moving and non-moving parties. In its motion, Beaches MRI expressly asserted that there were “no disputed issue of fact relevant to the disposition of the question at issue in this motion.” R. 126-27. The “question at issue” in Beaches MRI’s

motion was whether Safeco had proven that benefits were exhausted. R. 128-29.

Discovery had closed on May 11, 2022. R. 43, 103. The hearing on the parties' competing summary judgment motions had been set for February 22, 2023 since November 4, 2022. R. 103. Beaches MRI filed its summary judgment motion on February 21, 2023, the day before the hearing. R. 124. On February 21, 2023, Safeco submitted the same supporting evidence that it had previously provided to Beaches MRI on September 30, 2021. R. 66-69.

As Beaches MRI explained in its summary judgment motion:

Effective May 1, 2021, Fla. R. Civ. P. 1.510 has been drastically changed to more closely reflect the federal standard regarding motions for summary judgment. In its recent...opinion, the Supreme Court of Florida noted that “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of rules aimed at ‘the just, speedy and inexpensive determination of every action.’”

R. 125 (emphasis added). “[T]he correct test,” Beaches MRI wrote, “is whether ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” R. 126. The focus is on “whether the evidence presents a sufficient disagreement to require submission to a jury.” R. 126.

In this case, Beaches MRI submitted no evidence either to prove its entitlement to summary judgment or to disprove Safeco's entitlement. In this case, there was no evidence "such that a reasonable jury could return a verdict" for Beaches MRI. There was no evidence that required submission to a jury.

Contrary to Beaches MRI's arguments, Safeco's evidence was not conflicting. Also contrary to Beaches MRI's arguments, there were no additional EORs that need to be produced. Safeco's EORs and Safeco's PIP Log showed that Safeco paid \$10,000.00 in PIP benefits. Safeco's EORs expressly stated the amounts paid and how those amounts were determined. R. 424-506. Safeco's EORs which indicated that "0.00" was paid to Simpson Chiropractic expressly stated that, "THIS BILL IS INCLUDED IN A NEGOTIATED SETTLEMENT THAT HAS BEEN PREVIOUSLY PAID TO THE PROVIDER." R. 424-45 (EOP Notes 14, 16, 27, 38). Safeco's PIP Log showed the amounts included in Safeco's negotiated settlement with Simpson Chiropractic, along with a notation that read, "Payment Made in Conjunction with completed Bill Settlement and Negotiation Form." R. 419-21 (EOP Notes 14, 16, 17, 38). Contrary to Beaches MRI's argument to the county court, Safeco's PIP Log also noted any

interest, penalty, or postage paid that was not a PIP benefit. R. 421, 417 (EOP Note 24), 526.

The trial court did not “inappropriately disregard the patent discrepancy between Safeco’s PIP log and Safeco’s EORs,” since there was none. This matter was resolved on the merits. The trial court properly entered summary disposition. There was no triable issue. Moreover, there is nothing to gain by sending this matter back to the small claims court - other than to waste judicial resources and to add undue expense for the parties involved.

C. Safeco Cannot Be Held Liable for Extra-Contractual Damages.

1. The County Court’s Order Was Supported by Competent Substantial Evidence.

Beaches MRI argues that exhaustion of benefits was an affirmative defense and, therefore, Safeco bore the burden of proof. Florida’s courts have held that exhaustion of benefits is not an affirmative defense which must be affirmatively pled. *See e.g., Millennium Radiology, LLC a/a/o Yesenia Arango, v. State Farm Mut. Auto. Ins. Co.*, 20 Fla. L. Weekly Supp. 174a (Fla. Miami-Dade Cty. 2012)(ruling that exhaustion of benefits was not an affirmative defense that is waived if not affirmatively pled), *citing Digital Med.*

Diagnostics v. United Auto. Ins. Co., 958 So. 2d 505, 507 (Fla. 3d DCA 2007).

Even if Safeco bore the burden of proof, Safeco demonstrated, by competent substantive evidence, that it had exhausted all available contractual benefits by paying \$10,000.00 in PIP benefits to the insured's medical providers. Safeco's evidence also demonstrated that Safeco paid compensable and timely claims. Even if some (or all) the claims had been paid incorrectly, Safeco could not be held liable for extra-contractual payments to Beaches MRI, who had already been properly compensated. Beaches MRI made no attempt to plead or to prove either of the two exceptions to the general rule applicable to exhaustion of benefits.

The general rule is that, once an insurance company has paid PIP benefits up to the limits of the insurance contract, the insurance company has fulfilled its obligation to its insured and is not liable to pay any additional PIP benefits, even those that are in dispute. *Simon v. Progressive Express Ins. Co.* ("Simon"), 904 So. 2d 449 (Fla. 4th DCA 2005); see also *Progressive Am. Ins. Co. v. Stand-Up MRI* ("Stand-Up MRI"), 990 So. 2d 3 (Fla. 5th DCA 2008); *Sheldon v. United Services Automobile Ins. Co.* ("Sheldon"), 55 So. 3d 593 (Fla. 1st DCA

2011); *Northwoods Sports Med. & Physical Rehab., Inc. v. Daniel N. ("Northwoods")*, 137 So. 3d 1049 (Fla. 4th DCA 2014); *GEICO Indem. Co. v. Gables Ins. Recovery ("Gables Ins. Recovery")*, 159 So. 3d 151 (Fla. 3d DCA 2014); *Millennium Radiology, LLC v. State Farm Mut. Auto. ("Millennium")*, 152 So. 3d 797 (Fla. 3d DCA 2014).

An exhaustion of benefits “extinguishes the provider’s right to further payments” where the “reasonableness of the provider’s claim is still in dispute.” *Northwoods*, 137 So. 3d at 1056. “In all of these cases...the insurer had first either rejected or reduced payment on a claim after submission of the provider’s bills.” *Id.* This general rule applies regardless of whether benefits were exhausted *prior to* the medical provider’s filing suit on the amount it claimed to be due (*Simon and Gables Ins. Recovery*), or *prior to service of the complaint* on the insurance company (*Stand-UP MRI and Sheldon*), or *after service of the complaint* (*Northwoods*), so long as “exhaustion is prior to the establishment of the amount to which the medical provider is entitled under PIP.” *Id.*; see also *United Servs. Auto. Ass'n v. Less Inst. Physicians b/d/a Lesspine Institute a/a/o Amelia F. Stringer-Gowdy*, 344 So. 3d 557 (Fla. 3d DCA 2022)(reversing trial court and remanding to enter summary judgment in insurer’s favor due to

exhaustion of benefits “[b]ecause PIP benefits were exhausted through payment of valid claims and because [the plaintiff] neither pled bad faith, nor did the trial court make a bad faith determination” and therefore insurer “ha[d] no further liability on pending claims.”); *Progressive Select Ins. Co. v. Faderani*, 330 So. 3d 928, 931 (Fla. 4th DCA 2021)(reaffirming *Northwoods* and *Gables Ins. Recovery* that “[o]nce the PIP benefits are exhausted through the payment of valid claims, an insurer has no further liability on unresolved, pending claims, absent bad faith in the handling of the claim by the insurance company”)(original emphasis).

In *Faderani*, the Fourth District reiterated that only in extremely limited instances can a plaintiff be entitled to further benefits after exhaustion. *Id.* The court stated that exhaustion of benefits must be given its due weight, and that merely adjusting charges in some contested manner for a plaintiff, or some other third party, could not override the fact that there is nothing left for an insurer to pay.

Florida’s District Courts have recognized only two extremely limited exceptions to the general rule that an insurance company is not liable to pay any additional PIP benefits once it has paid the

insurance contract's benefit limits. The first exception applies when an insurer adjusts a claim in bad faith as defined by §624.155, Fla. Stat. *Faderani*, 330 So. 3d at 928. The second exception applies when an insurer pays an untimely bill. *Coral Imaging Services v. GEICO Indem. Ins. Co.*, 955 So. 2d 11 (Fla. 3d DCA 2006)(“*Coral Imaging*”).

2. Beaches MRI Made No Argument and Presented No Evidence to Support a Bad Faith Claim.

The appellate courts in *Simon*, *Stand-Up MRI*, *Northwoods*, *Gables Ins. Recovery*, and *Millennium* all mentioned “bad faith” as an exception to the general rule. *Simon*, 904 So. 2d at 450; *see also Stand-Up MRI*, 990 So. 2d at 4; *Northwoods*, 137 So. 3d at 1057; *Gables Ins. Recovery*, 159 So. 3d at 155; *Millennium*, 152 So. 3d 797 (Fla. 3d DCA 2014). Bad faith is more than just “improper payments” and must be pled by a provider in an avoidance if exhaustion is pled as an affirmative defense. *Faderani*, 330 So. 3d at 930; *see also Less Inst. Physicians*, 344 So. 3d at 560.

In Florida, first party bad faith claims are only authorized by §624.155 of the Florida Statutes. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1124 (Fla. 2005). “The enactment of section 624.155

‘essentially extended the duty of an insurer to act in good faith in those instances where an insured seeks first-party coverage or benefits under an insurance contract.’” *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1066 (Fla. 2011), *as revised on denial of reh'g* (Nov. 10, 2011); *see also Ruiz*, 899 So. 2d at 1126, *citing State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 59 (Fla.1995). It allows for the recovery of damages more than policy limits when bad faith is proven. §624.155(8), Fla. Stat. (“The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.”)

“Because [§624.155] is in derogation of the common law, it must be strictly construed.” *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1283 (Fla. 2000). Bad faith causes of action are limited to those based on the violations or actions enumerated in §624.155, which provides in pertinent part:

By the commission of any of the following acts by the insurer:

1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have

done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests;

2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

§624.155(1)(b), Fla. Stat.; *see also Auto-Owners Ins. Co. v. Conquest*, 658 So. 2d 928, 929 (Fla. 1995)(discussing that §624.155 allows for civil suit when any person has “been damaged by enumerated acts of the insurer.”). A bad faith claim brought pursuant to §624.155 is “a separate and distinct cause of action” from a breach of contract claim that does “not accrue until completion of the initial action.” *Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163, 165 (Fla. 5th DCA 2010).

In this case, there was no “bad faith” issue. The term “bad faith” implies exactly that—that Safeco somehow adjusted the charges in a malicious manner that was intended to defraud Beaches MRI. *Simon*, 904 So. 2d at 450. Beaches MRI has not pled a bad faith cause of action. *Most importantly, none* of the bad faith actions

enumerated in §627.155 have been asserted or even alluded to in this case.

3. There Was No Evidence of Payment of an Untimely Claim.

In *Coral Imaging*, the Third District created a second exception to the general rule of exhaustion of benefits, by deciding that an insurer may be liable for damages that exceed policy limits if it pays bills submitted beyond the statutorily mandated time periods. *Coral Imaging*, 955 So. 2d at 11. The Third District’s decision in *Coral Imaging* made it clear that untimely bills are exempt from PIP payments, and that it is the sole responsibility of medical providers to comply with the statutory deadlines. A provider is “*prohibited* from including in its statement of charges any services which were rendered more than [35] days ago...Therefore, the provider is not even *permitted to submit* a bill for untimely services.” *Id.* at 14 (original emphasis).

There is only one exception to when a provider may submit a bill beyond 35-days after treatment, but this exception imposes its own strict time requirements: If a “provider submits to the insurer a notice of initiation of treatment within 21 days after its first

examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement.” §627.736(5)(c), Fla. Stat. As with the 35-day statutory time limit, the statutory extension to 75 days is a mandatory deadline.

The exception created by *Coral Imaging* only applies to instances “where the PIP insurer exhausts benefits by improperly paying untimely claims.” *Gables Ins. Recovery, Inc.*, 159 So. 3d at 155. In *Gables Ins.*, the Third District granted second-tier certiorari because the circuit appellate court had improperly applied *Coral Imaging*. *Id.* at 152-56. The disputed issue in *Gables Ins.* was whether the insurer, who had issued \$10,000 in PIP reimbursements, could be ordered to pay damages for the difference between the adjusted amount paid and 80% of the amount billed. *Id.* at 153.

During the pendency of *Gables Ins.*, Florida’s Supreme Court decided *GEICO General Ins. Co. v. Virtual Imaging Services., Inc.*, 141 So. 3d 147 (Fla. 2013). In *Virtual Imaging*, The Court ruled that GEICO’s policy did not provide sufficient notice to allow for adjustments using the PIP statute’s schedule of maximum charges.

Id. at n.2. The circuit appellate court in *Gables Ins.* applied *Coral Imaging* to find that GEICO had “wrongly exhausted” policy benefits by limiting reimbursement according to the statutory schedule and could, therefore, be liable for benefits above its policy limits. *GEICO Indem. Co. v. Gables Ins. Recovery, Inc. a/a/o Rita M. Lauzan*, 20 Fla. L. Weekly Supp. 862a (Fla. 11th Cir. App. 2013).

On certiorari review, the Third District found that *Coral Imaging* was not controlling. Unlike the exhaustion of benefits that occurred in *Coral Imaging* by paying late bills, “benefits were not improperly exhausted” in *Gables Ins.* by reducing payable charges to the amounts allowed by the statutory schedule. *Id.* at 155. “Rather, every medical provider GEICO paid was entitled to payment and all the claims paid were timely.” *Id.*

The Third District explicitly ruled that *Coral Imaging* only allowed for damages that exceeded policy limits in instances where the insurer exhausted benefits by paying untimely bills not payable under the PIP statute. *Gables Ins.* 159 So. 3d at 155. The *Coral Imaging* exception only applies if a plaintiff demonstrates that the insurer’s payment of untimely bills led to the exhaustion of benefits.

In this case, Beaches MRI was provided all Safeco's documentation showing when each medical provider rendered services to the insured and when each medical provider submitted its bill to Safeco. Nonetheless, Beaches MRI made no attempt to prove that Safeco paid any untimely bills, even though Beaches MRI had all the information available to it.

It has long been held that "a motion for summary judgment cannot be defeated simply by the mere assertion of an illusory and unsupported factual issue." *Hatcher v. Roberts*, 478 So. 2d 1083, 1091 (Fla. 1st DCA 1985), citing *Bared v. Miami Professional Sports Ltd.*, 353 So. 2d 167 (Fla. 3d DCA 1978); *Byrd v. Leach*, 226 So. 2d 866 (Fla. 4th DCA 1969); *Johnson v. Studstill*, 71 So. 2d 251 (Fla. 1954). A party opposing summary judgment may not merely assert that an issue exists, but "must go forward with evidence sufficient to generate an issue on a material fact." *Byrd*, 226 So. 2d at 868.

It is the non-moving party's burden to present evidence to preclude the entry of summary judgment. *Tomasini v. Mount Sinai Med. Ctr. of Fla., Inc.*, 315 F. Supp. 2d 1252, 1260 n.11 (S.D. Fla. 2004). The court is not required to "scour the record to determine

whether there exists a genuine issue of material fact to preclude summary judgment." *Id.* (citations omitted).

Here, Beaches MRI was required to "identify specific evidence in the record, and to articulate the 'precise manner' in which that evidence supported [its] claim." *Id.* (citations omitted). Beaches MRI has not come forward with any evidence sufficient to generate a material issue of fact.

Safeco was entitled to summary disposition of this claim. There was no triable issue for a jury. The simple truth is that all available benefits had been exhausted. Without any evidence of a breach of contract or evidence of damages, Beaches MRI had no breach of contract claim.

CONCLUSION

Appellee, Safeco Insurance Company of Illinois, respectfully requests that this Honorable Court affirm that county court's summary disposition of this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via e-portal service to Chad A. Barr, Esquire, Chad Barr Law, 238 Westmonte Drive, Suite 200, Altamonte Springs, FL

32714 to designated email addresses service@chadbarrlaw.com; linda@chadbarrlaw.com; chad@chadbarrlaw.com (Appellant's appellate counsel); Thomas J. Wenzel, Esquire, Steinger, Greene & Feiner, 2727 NW 62nd St., Fort Lauderdale, FL 33309 to designated email addresses: pleadings@injurylawyers.com (Appellant's trial counsel); Jo-Anna Enriquez, Esquire, Law Office of Ignacio M. Sarmiento, P.O. Box 7217, London, KY 40742 to designated email addresses jo-anna.enriquez@libertymutual.com; flpipmail@libertymutual.com (Appellee's trial counsel) on December 20, 2023.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief has been submitted in Bookman Old Style 14-point font and does not exceed 13,000 words in compliance with Fla. R. App. P. 9.045 and Fla. R. App. 9.210.

/s/ Rebecca Delaney
REBECCA DELANEY, ESQUIRE