

IN THE FOURTH DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

CASE NO. 4D23-1107  
LT CASE NO. COINX22057024

PRECISION DIAGNOSTIC, INC.,  
a/a/o NECOKIA LAING,

Appellant,

vs.

MERCURY INDEMNITY COMPANY  
OF AMERICA,

Appellee.

\_\_\_\_\_ /

APPELLANT'S INITIAL BRIEF

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## **INTRODUCTION**

Plaintiff/Appellant, PRECISION DIAGNOSTIC, INC., a/a/o NECOKIA LAING (“Precision Diagnostic”), seeks appellate review of the trial court’s Order Granting Appellee, MERCURY INDEMNITY COMPANY OF AMERICA (“Mercury”)’s motion for summary judgment and Final Judgment in favor of Mercury. In this brief, “(R. \_\_)” refers to the record on appeal.

Precision Diagnostic filed this declaratory judgment action seeking a declaration that Mercury unlawfully applied the insurance policy’s PIP deductible, a declaration that Mercury must readjust this claim based on a lawful application of the insurance policy’s PIP deductible, and a declaration that an exhaustion of benefits defense is not available to Mercury in this action. The trial court entered summary judgment for Mercury concluding that Precision Diagnostic’s claim for declaratory relief was moot and concluding that Precision Diagnostic failed to disprove Mercury’s exhaustion affirmative defense. Whether Precision Diagnostic’s claim was moot, however, was not plead by Mercury and was not raised by Mercury its motion for summary judgment. Moreover, Mercury failed to demonstrate that it was entitled to summary judgment as to its

exhaustion affirmative defense. Instead, the trial court should have granted summary judgment for Precision Diagnostic and entered a declaration that Mercury unlawfully applied the insurance policy's PIP deductible based on Mercury's concession that it did, and the trial court should have entered summary judgment for Precision Diagnostic on Mercury's exhaustion affirmative defense based on this Court's decision in *Northwoods Sports Med. & Physical Rehab., Inc. v. Daniel N.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) ("*Northwoods*") and the English rule of priority.

Based on the arguments that follow, the Final Summary and the trial court's summary judgment rulings should be reversed with instructions on remand to enter the declarations requested in Precision Diagnostic's petition and to enter summary judgment in favor of Precision Diagnostic on Mercury's exhaustion affirmative defense.

### **STATEMENT OF THE CASE AND OF THE FACTS**

Mercury issued an automobile insurance policy with a policy period of October 2, 2014 through April 2, 2015 ("insurance policy") to Necokia Laing ("the insured") that included \$10,000 in PIP benefits with a \$1,000 PIP deductible. (R. 271/25-272/1, 363, 367-422)

Precision Diagnostic agrees, for purposes of this appeal only, that the insurance policy allows Mercury to limit reimbursement of PIP expenses pursuant to the permissive fee schedules set forth in section 627.736(5)(a)1., Fla. Stat. (for purposes of this case, the relevant fee schedule is 200% of Medicare Part B). (R. 28 at ¶¶12-13)

On February 19, 2015, the insured was injured in a motor vehicle accident. (R. 271/16-22, 363) On March 12, 2015, Precision Diagnostic provided diagnostic services to the insured and submitted its medical expenses to Mercury for payment under the insured's PIP coverage in the amount of \$1,600. (R. 363, 452)

Because Precision Diagnostic's expenses were the first expenses received, Mercury reduced those expenses to 200% of Medicare Part B (\$1,140.92), applied that reduced amount to the insurance policy's \$1,000 PIP deductible, and paid the remaining \$140.92 at 80% (\$112.74). (R. 363, 452) However, it is undisputed that section 627.739(2), Fla. Stat., required Mercury to apply 100% of Precision Diagnostic's expenses to the insurance policy's PIP deductible and pay the remaining amount pursuant to the insurance policy and section 627.736, Fla. Stat.

In 2018, the Florida Supreme Court confirmed in *Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr.*, 260 So. 3d 219 (Fla. 2018) (“*Florida Hospital*”) that it was unlawful for insurance companies to reduce medical expenses for emergency medical services submitted by a hospital pursuant to section 627.736(5)(a), Fla. Stat. until *after* the PIP deductible is satisfied. And in 2022, the Florida Supreme Court in *Gogan v. USAA Gen. Indem. Co.*, 47 Fla. L. Weekly S98 (Fla. Jan. 21, 2022) (“*Gogan*”) confirmed once and for all that insurance companies cannot reduce *any* medical expenses pursuant to section 627.736(5)(a), Fla. Stat., regardless of who the medical provider is, until *after* the PIP deductible is satisfied.

It is important to note that with respect to this claim, Mercury would continue to stand by its unlawful method of applying the insurance policy’s PIP deductible until first announcing its change of position at the summary judgment hearing in 2023.

After unlawfully applying the insurance policy’s PIP deductible, Mercury would go on to issue payments to the insured’s other medical providers, Dixie Chiropractic and Vinsant Orthopedics, for a total of \$10,000. (R. 363-64, 424) As will be explained below,

Precision Diagnostic takes issue with several CPT codes that Vinsant Orthopedics submitted, and that Mercury paid.

Precision Diagnostic sent a section 627.736(10), Fla. Stat. presuit demand letter giving Mercury the opportunity to readjust this claim pursuant to a correct application of section 627.739(2), Fla. Stat. (R. 364) Mercury refused to readjust this claim. (R. 428) Mercury did not contest the reasonableness of Precision Diagnostic's expenses. (R. 428)

On April 18, 2019, Precision Diagnostic filed a petition for declaratory relief alleging that Mercury unlawfully applied the insurance policy's PIP deductible when it reduced Precision Diagnostic's expenses to 200% of Medicare and then applied those reduced expenses to the insurance policy's PIP deductible (the "petition"). (R. 27-34) Precision Diagnostic requested the trial court declare that Mercury unlawfully applied the insurance policy's PIP deductible, that Mercury wrongfully refused to readjust this PIP claim, that Mercury must readjust this PIP claim, and that

exhaustion of PIP benefits is not a defense to a petition for declaratory relief.<sup>1</sup> (R. 27-34)

On June 5, 2019, Mercury filed its answer to the petition with affirmative defenses. (R. 49-52) Mercury “*denied*” the petition’s allegation that section 627.739(2), Fla. Stat. “mandates that [t]he deductible amount must be applied to 100 percent of the expenses and losses described in §627.736.” (*compare* R. 29 at ¶22 *with* R. 50 at ¶22) For its first affirmative defense, Mercury denied that its method of applying the insurance policy’s PIP deductible was unlawful when it stated “[Mercury] ... made payment in accordance with the fee schedules delineated withing Fla. Stat. s.627.736(5) and the policy of insurance...” (R. 51) Mercury also alleged as an affirmative defense that all PIP benefits were exhausted.<sup>2</sup> (R. 51-52) No mention was made by Mercury that it was challenging the reasonableness of Precision Diagnostic’s expenses. (R. 49-52)

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<sup>1</sup> This lawsuit was originally filed in Orange County and was subsequently transferred to Broward County. (R. 76)

<sup>2</sup> Mercury would also allege as an affirmative defense that venue was improper. (R. 52) The parties would eventually stipulate to a transfer of this action from Orange County to Broward County. (R. 88)

On May 8, 2020, Mercury filed its motion for summary judgment. (R. 146-53) Mercury argued that it was entitled to a final judgment simply because it paid out \$10,000 in PIP benefits. (R. 146-53) Mercury, however, did not attach any summary judgment evidence to its motion for summary judgment, referenced an affidavit that it did not file with the motion for summary judgment, made no effort to justify its payments, did not explain who it made payment of PIP benefits to, and made no effort whatsoever to demonstrate that there is no question of fact that all payments it issued were for valid or proper claims. (R. 146-53)

Ten (10) months later, Mercury filed the affidavit of Jodi DeMint, a claims adjuster for Mercury. (R. 362-511) Ms. DeMint stated that Mercury paid out \$10,000 in PIP benefits. (R. 363-65) Attached to Ms. DeMint's affidavit were various documents including a copy of the insurance policy, a PIP log, and explanations of benefits which detail what CPT codes all the insured's medical providers submitted and what payments Mercury made to those medical providers. (R. 366-511) Ms. DeMint made no effort to demonstrate that there is no question of fact that all payments made were for valid or proper claims. (R. 362-511)

On February 20, 2023, Precision Diagnostic filed its response to Mercury's motion for summary judgment. (R. 569-74) Precision Diagnostic explained that Mercury failed to demonstrate that all payments it made were made for valid or proper claims (R. 569-70), that Mercury did in fact issue payment for improper services when it issued payment to another medical provider for conflicting CPT codes billed on the same date (R. 570-71), and that because the claims adjusting in this case was not free from bad faith, claims manipulation, improper acts or wrongdoing Mercury was not entitled to summary judgment (R. 571-74).

Specifically, Precision Diagnostic took issue with a payment that Mercury made to Vinsant Orthopedics for expenses submitted for date of service August 18, 2015. On that date of service, Vinsant Orthopedics submitted a \$734 charge for CPT code 99215 and a \$201 charge for CPT code 99358. (R. 442) These CPT codes, however, are incompatible. According to Mercury's explanation of benefits, CPT code 99215 is for "OFFICE/OUTPAIENT VISIT EST." (R. 511) And, according to Mercury's explanation of benefits, CPT code 99358 is for "PROLONG SERVICE W/O CONTACT." (R. 511) (emph. added) Precision Diagnostic's issue was that these CPT codes billed on the

same day are incompatible because one CPT code indicates that the insured was present in the office and the other CPT codes indicates that the insured was not present in the office. (R. 511) Mercury issued payment to Vinsant Orthopedic for both CPT codes at 80% of 200% of Medicare Part B. (R. 511)

Ms. DeMint was deposed in this case and was asked about these conflicting CPT codes. She testified that despite Mercury's description of those CPT codes on its explanation of benefits, Mercury issued payment because it "*assumed*" that the doctor "spent an extended amount of time with the patient." (R. 283/11-15) Ms. DeMint conceded, however, that *Vinsant Orthopedics' medical records do not indicate how long the doctor spent with the insured* (R. 284/2-4), *do not indicate why the doctor spent extended time with the insured* (R. 284/5-12), and she *could not explain when it would be appropriate for CPT code 99215 and 99358 to be billed on the same date of service* (R. 284/19-24). Ms. DeMint conceded that there is *nothing in Vinsant Orthopedics' medical record supporting the submission of CPT code 99358*, which according to their own explanation of benefits, represents a non-contact service. (R. 286/22-287/7)

On February 17, 2023, Precision Diagnostic filed its first motion for summary judgment asking the trial court to enter a declaration that Mercury failed to apply the insurance policy's PIP deductible to 100% of Precision Diagnostic's expenses as required by the Florida Supreme Court's interpretation of section 627.739(2), Fla. Stat., which resulted in an underpayment to Precision Diagnostic. (R. 532-50)

On February 17, 2023, Precision Diagnostic filed its second motion for summary judgment directed to Mercury's exhaustion of benefits affirmative defense. (R. 551-68) Precision Diagnostic argued that a defense of exhaustion of benefits is not available in a claim for declaratory relief (R. 558-60), that this Court's decision in *Allstate Fire & Cas. Ins. Co. v. Sports*, 335 So. 3d 725 (Fla. 4th DCA 2022) requires Mercury to readjust this PIP claim to correct its unlawful application of the insurance policy's PIP deductible to determine what should be paid and to whom (R. 560-61), and that according to the English rule of priority Precision Diagnostic has been denied PIP benefits that it is entitled to because the reasonableness of Precision Diagnostic's expenses is not at issue in this case based on the parties' agreement that the insurance policy allows Mercury to limit

reimbursement to 80% of 200% of Medicare Part B and because Mercury has not challenged the reasonableness of Precision Diagnostic's expenses. (R. 562-67)

Precision Diagnostic relied on Ms. DeMint's deposition in support of both of its motions for summary judgment and in support of its response to Mercury's motion for summary judgment. (R. 265-92) Ms. DeMint testified that the only reason for non-payment of Precision Diagnostic's demand is that PIP benefits are exhausted. (R. 273/24-274/4) Ms. DeMint *did not state* that the reasonableness of Precision Diagnostic's expenses was a reason for non-payment of Precision Diagnostic's demand. (R. 273/24-274/4)

On March 8, 2023, Mercury filed an untimely response to Precision Diagnostic's motions for summary judgment (was filed less than 20 days before the March 27, 2023 summary judgment hearing). (R. 737-43) First, Mercury argued that there is no bona fide dispute in this case because the Florida Supreme Court's *Florida Hospital* decision explained how a PIP deductible should be applied and that rendered Precision Diagnostic's claim for declaratory judgment moot. (R. 738-39) This issue, however, was not raised in Mercury's response to the petition as required by Florida Rule of Civil

Procedure 1.110, was not raised by Mercury by motion before filing its response to the petition as required by Florida Rule of Civil Procedure 1.140(b) and was not raised in Mercury's motion for summary judgment as required by Florida Rule of Civil Procedure 1.510. Next, while expressly conceding that "it did not apply the deductible to [Precision Diagnostic]'s bill in the manner required by the Florida Supreme Court, Mercury argued that "the reasonableness of the Plaintiff's charges [] was in dispute at the time the Defendant paid the Plaintiff's bill and still at the time benefits exhausted on 11/28/2016." (R. 739-40) Of course, there is no summary judgment evidence to support Mercury's claim that the reasonableness of Precision Diagnostic's expenses was a disputed issue in this case.

On March 27, 2023, the trial court conducted a hearing on the parties' motions for summary judgment. (R. 875-907) Mercury's counsel first argued that Mercury was entitled to a final judgment because Precision Diagnostic's claim for declaratory relief was rendered moot by the Florida Supreme Court's *Florida Hospital* decision. (R. 878-79) Next, Mercury's counsel argued that it was entitled to a final judgment because all available PIP benefits had been exhausted. (R. 879-83) For its part, Precision Diagnostic's

counsel explained that Mercury's argument that Precision Diagnostic's claim for declaratory relief was moot was not raised as an affirmative defense nor raised in its motion for summary judgment. (R. 884) Addressing Mercury's exhaustion argument, Precision Diagnostic's counsel explained that an exhaustion defense does not preclude the trial court from ruling on the requested declaration, that Mercury was required to readjust this claim once it agreed that it unlawfully applied the insurance policy's PIP deductible, that the manner in which Mercury adjusted this claim bring this case within the narrow exception set forth in *Northwoods*, and that Mercury failed to conclusively prove its exhaustion defense in light of its improper payment of CPT codes submitted by Vinsant Orthopedics. (R. 885-92) At the conclusion of arguments, the trial court took the parties' motions for summary judgment under advisement. (R. 896)

On April 5, 2023, the trial court entered an order granting Mercury's motion for summary judgment and denying Precision Diagnostic's motions for summary judgment. (R. 765-70) First, even though it noted that Mercury conceded that it did not lawfully apply the insurance policy's PIP deductible, the trial court concluded that

the issue raised in Precision Diagnostic's petition for declaratory relief – whether Mercury lawfully applied the insurance policy's PIP deductible – was moot because of the Florida Supreme Court's decision in *Florida Hospital*. (R. 768) Next, the trial court concluded that Precision Diagnostic failed to defeat Mercury's exhaustion affirmative defense by failing to present any evidence of bad faith claims handling. (R. 769)

On April 20, 2023, Precision Diagnostic filed a motion for rehearing. (R. 779-848) First, Precision Diagnostic explained that the Florida Supreme Court's *Florida Hospital* decision did not render its claim for declaratory judgment moot because the issue in this case was Mercury's adjustment of the claim not an interpretation of section 627.739(2), Fla. Stat. (R. 781-83) Next, Precision Diagnostic explained that if an appellate decision had any effect on the propriety of Precision Diagnostic's claim for declaratory relief, the relevant decision should be the Florida Supreme Court's 2022 *Gogan* decision which finally resolved Progressive, State Farm, USAA and Mercury's argument that the Florida Supreme Court's decision in *Florida Hospital* did not extend to non-hospital services. (R. 783-86) Next, Precision Diagnostic explained that Mercury's concession that it did

not lawfully apply the insurance policy's PIP deductible four (4) years into litigation is a confession of judgment as to the issue raised in Precision Diagnostic's petition for declaratory relief. (R. 786-87) Next, Precision Diagnostic explained that the trial court erred in entering Final Judgment for Mercury based on Mercury's argument that Precision Diagnostic's claim for declaratory relief was moot because that argument was not raised by Mercury as required by Florida Rules of Civil Procedure 1.110 and 1.140(b) nor in its motion for summary judgment as required by Florida Rule of Civil Procedure 1.510, but, instead was raised for the first time in Mercury's untimely response to Precision Diagnostic's motions for summary judgment. (R. 787-88) Next, Precision Diagnostic explained the trial court employed the incorrect summary judgment burden with respect to Mercury's exhaustion defense when it concluded that "Plaintiff failed to meet its burden of proof" on the exhaustion issue. (R. 789) Last, Precision Diagnostic explained that the trial court failed to address the exception to exhaustion set forth in *Northwoods* and thus the summary judgment order does not contain sufficient findings as required by amended Florida Rule of Civil Procedure 1.510. (R. 789)

Mercury did not file a response to Precision Diagnostic’s motion for rehearing. (R. *generally*)

On May 30, 2023, the trial court entered its order denying Precision Diagnostic’s motion for rehearing with no written analysis. (R. 873)

Precision Diagnostic timely appealed. (R. 856-64)

### **STANDARD OF REVIEW**

The standard of review when reviewing a motion for summary judgment is *de novo*. See *Progressive Auto Pro Ins. Co. v. One Stop Med., Inc.*, 985 So. 2d 10 (Fla. 4th DCA 2008).

On December 31, 2020, the Florida Supreme Court issued a decision that amended Florida Rule of Civil Procedure 1.510 *sua sponte*. *In re: Amends. to Fla. R. Civ. P. 1.510*, 309 So. 3d 192 (Fla. 2020). The Court held that effective May 1, 2021, Florida Rule of Civil Procedure 1.510 would be amended to adopt the federal summary judgment standard and added a sentence to previous version of subsection (c) which said, “The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard...” *Id.* at 194-195 (citations omitted).

Under this standard, the trial court was required to view all evidence and draw all reasonable factual inferences in favor of the nonmoving party. Summary judgment should only be granted, “[i]f the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” See Fla. R. Civ. P. 1.510(a) (2021).

“An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Reina-Leon v. Home Depot U.S.A. Inc.*, 2019 WL 1745378 (M.D. Fla 2019) (citing *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996)). A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden to show the lack of a genuinely disputed material fact. *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008).

“If there is a conflict between the parties’ allegations or evidence, the non-moving party’s evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party’s favor.” *Reina-Leon*, 2019 WL 1745378 at \*3 (citing *Shotz v. City of Plantation*, 344 F.3d 1161, 1164 (11th Cir. 2003)). If a reasonable

jury evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine dispute of material fact, a court should not grant summary judgment. *Id.*; *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988).

This is because summary judgment is authorized “only where moving party is entitled to judgment as a matter of law, where it is clear what the truth is, ... (and where) no general issue remains for trial ... (for) the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.” *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)) (emph. added).

In *Anderson*, the United States Supreme Court stated that,

[o]ur holding...does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...

*Anderson*, 477 U.S. at 255. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), the United States Supreme Court again made sure to note that Federal Rule of Civil Procedure 56 “must be construed with due regard...for the rights of persons asserting claims and defenses

that are adequately based in fact to have those claims and defenses tried before a jury...” Thus, summary judgment is not and should not be used as a substitute for the trial of disputed fact issues. *In re Amends.*, 309 So. 3d at 194.

### **SUMMARY OF THE ARGUMENT**

The Record in this case clearly demonstrates that Mercury was not entitled to a Final Judgment. Instead, the trial court should have entered a declaration that Mercury unlawfully applied the PIP deductible, that Mercury must readjust the insured’s PIP claim, and the trial court should have granted Precision Diagnostic’s motion for summary judgment as to Mercury’s exhaustion affirmative defense.

First, the trial court erred when it concluded that the Florida Supreme Court’s *Florida Hospital* decision rendered Precision Diagnostic’s claim for declaratory relief moot. Procedurally this issue was not properly before the trial court. This issue was not pled pursuant to Florida Rules of Civil Procedure 1.110 and 1.140 nor raised by Mercury in its motion for summary judgment pursuant to Florida Rule of Civil Procedure 1.510. Substantively, the Florida Supreme Court’s *Florida Hospital* decision did not address each of the declarations sought in Precision Diagnostic’s petition, and

Mercury admitted that it unlawfully applied the insurance policy's PIP deductible. As such, the trial court should have granted Precision Diagnostic's first motion for summary judgment and entered a declaration that Mercury unlawfully applied the insurance policy's PIP deductible.

Second, the trial court erred when it considered Mercury's exhaustion affirmative defense and held that Precision Diagnostic failed to meet its summary judgment burden. Procedurally, exhaustion of benefits is not a defense to a declaratory judgment action that seeks a declaration regarding coverage and is not "an action for benefits." Moreover, the trial court employed the incorrect summary judgment burden when it required Precision Diagnostic to disprove Mercury's exhaustion defense. Substantively, Mercury failed to conclusively demonstrate that it exhausted benefits on the payment of valid and proper claim. Moreover, the trial court failed to properly consider and apply this Court's decision in *Northwoods* which confirmed that the English rule of priority applies in a case like this where the necessity and reasonableness of a PIP claim is accepted by the insurer.

Because the trial court's summary judgment order violates Florida procedural and substantive law, it should be reversed. On remand, the trial court should be instructed to enter a declaration that Mercury unlawfully applied the insurance policy's PIP deductible and a summary judgment in favor of Precision Diagnostic as to Mercury's exhaustion affirmative defense.

## **ARGUMENT**

### **I. THE FINAL JUDGMENT SHOULD BE REVERSED.**

#### **A. Whether Precision Diagnostic's Claim For Declaratory Relief Was Moot Was Not Before The Trial Court.**

The trial court's summary judgment order contains just three (3) paragraphs of reasoning. (R. 768-69) The first two (2) paragraphs are dedicated to the trial court's conclusion that Precision Diagnostic's claim for declaratory relief was rendered moot by the Florida Supreme Court's *Florida Hospital* decision. (R. 768) Not only was this ruling procedurally inappropriate but it was substantively incorrect.

**1. Mercury did not allege that Precision Diagnostic's claim for declaratory relief was moot in either its responsive pleading or in a motion filed before filing its responsive pleading.**

First, Mercury never raised that Precision Diagnostic's claim for declaratory relief was rendered moot as required by Florida Rules of Civil Procedure 1.110 and 1.140(b).

"An affirmative defense is an assertion of facts or law by the defendant that, if true, would avoid the action and the plaintiff is not bound to prove that the affirmative defense does not exist." *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010). "An affirmative defense is waived unless it is pleaded." *Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010).

Florida's pleading rules regarding affirmative defenses are readily ascertainable. Florida Rule of Civil Procedure 1.110(d) provides in relevant part:

In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, *and any other matter constituting an avoidance or affirmative defense.*

Fla. R. Civ. P. 1.110(d) (emph. added).

Florida Rule of Civil Procedure 1.140(b) requires every defense in law or fact be presented in a responsive pleading, the rule, with regard to seven specific defenses, gives a defendant the option to raise such defenses by motion, rather than by responsive pleading. Fla. R. Civ. P. 1.140(b). Failure to state a cause of action is one such defense. Fla. R. Civ. P. 1.140(b)(6). Subsection (g) requires a defendant opting to raise any of these defenses in a motion to include in the motion all other defenses or objections that may be raised by motion and are “then available to that party.” Subsection (g) reads, in relevant part, as follows:

If a party makes a motion under this rule but omits from it any defenses or objections then available to that party that this rule permits to be raised by motion, *that party shall not thereafter make a motion based on any of the defenses or objections omitted*, except as provided in subdivision (h)(2) of this rule.

Fla. R. Civ. P. 1.140(g) (emph. added). Subsection (h)(2), specifically referenced in subsection (g), and directly relevant to the failure to state a cause of action defense, reads, in its entirety, as follows:

The defenses of failure to state a cause of action or a legal defense or to join an indispensable party *may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised either in a motion under subdivision (b) or in the answer or reply.* The defense of lack of jurisdiction of the subject matter may be raised at any time.

Fla. R. Civ. P. 1.140(h)(2) (emph. added). Further, subsection (h)(1) provides that a defendant's failure to raise defenses or objections either by motion or in a responsive pleading results in a party's waiver of the defense or objection, except under the circumstances provided in rule 1.140(h)(2). Fla. R. Civ. P. 1.140(h)(1).

“Failure to raise an affirmative defense prior to a plaintiff's motion for summary judgment constitutes a waiver of that defense.” *Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46, 48 (Fla. 1988) (quoting *Wyman v. Robbins*, 513 So. 2d 230, 231 (Fla. 1st DCA 1987)). In other words, a defendant may not “raise an unpled affirmative defense as a basis for resisting a motion for summary judgment.” *Capotosto v. Fifth Third Bank*, 230 So. 3d 891, 892 (Fla. 4th DCA 2017). As the First District explained in *Meigs v. Lear*, 191 So. 2d 286, 289 (Fla. 1st DCA 1966), the summary judgment proceeding “was certainly not designed to be used as a substitute for the parties' pleadings.” See also, *Mark Leach Health Furniture Co. v.*

*Thal*, 143 So. 2d 64, 66 (Fla. 2d DCA 1962) (“The efforts of the defendant to raise the affirmative defense of failure of consideration to prevent the entry of the summary judgment was ineffective. This affirmative defense was not pleaded in the answer and there was no request to amend.”). Likewise here, this Court cannot affirm a summary judgment entered on an as-yet unpled affirmative defense.

Under Florida Rule of Civil Procedure 1.510(c) (as amended and effective May 1, 2021), summary judgment is to be granted only “if the pleadings and summary judgment evidence on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In this case, the Record is more than clear that Mercury did not raise as an affirmative defense pursuant to Florida Rule of Civil Procedure 1.110(d) and did not raise in a motion pursuant to Florida Rule of Civil Procedure 1.140(b) that Precision Diagnostic had failed to state a claim for relief.

**2. Mercury did not argue in its motion for summary judgment that Precision Diagnostic's claim for declaratory relief was moot.**

And, if this pleading deficiency was not enough to warrant a reversal of the Final Judgment, the argument that Precision Diagnostic's claim for declaratory relief was rendered moot by the Florida Supreme Court's decision in *Florida Hospital* was not raised by Mercury in its motion for summary judgment as required by Florida Rule of Civil Procedure 1.510 and thus the Final Judgment could not be predicated on this argument.

It is reversible error to enter summary judgment on a ground not raised with particularity in the motion for summary judgment. *Williams v. Bank of Am. Corp.*, 927 So. 2d 1091, 1093 (Fla. 4th DCA 2006) (citing, *inter alia*, *Cheshire v. Magnacard, Inc.*, 510 So. 2d 1231, 1234 (Fla. 2d DCA 1987)). The purpose of this rule "is to eliminate surprise and to provide parties a full and fair opportunity to argue the issues." *H.B. Adams Distribs., Inc. v. Admiral Air of Sarasota Cty., Inc.*, 805 So. 2d 852, 854 (Fla. 2d DCA 2001) (citing *Lee v. Treasure Island Marina, Inc.*, 620 So. 2d 1295, 1297 (Fla. 1st DCA 1993)). See also *Cheshire*, 510 So. 2d at 1234 ("The purpose of the rule is to put

the opposing party on notice as to the grounds which will be asserted against him.” (*quoting Burns v. Consol. Am. Ins. Co.*, 359 So. 2d 1203, 1206 (Fla. 3d DCA 1978)); *City of Cooper City v. Sunshine Wireless Co.*, 654 So. 2d 283, 284 (Fla. 4th DCA 1995) (“This rule is designed to prevent ‘ambush’ by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing.” (*quoting Swift Indep. Packing Co. v. Basic Food Int’l, Inc.*, 461 So. 2d 1017, 1018 (Fla. 4th DCA 1984))).

Here, the trial court entered summary judgment in favor of Mercury based on its conclusion that Precision Diagnostic’s claim for declaratory relief. That claim and legal argument, however, was not raised in Mercury’s motion for summary judgment. As such, it was reversible error for the trial court to enter a summary judgment for Mercury based on this argument. *See Deluxe Motel, Inc. v. Patel*, 727 So. 2d 299, 301 (Fla. 5th DCA 1999) (concluding that the trial court erred in granting summary judgment based on arguments made at the summary judgment hearing but not in the written motion for summary judgment).

**3. The Florida Supreme Court's decision in *Florida Hospital* did not render Precision Diagnostic's claim for declaratory relief moot.**

Notwithstanding the foregoing procedural issues, the trial court's ruling that Precision Diagnostic's claim for declaratory relief was moot was substantively incorrect.

"The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192 (Fla. 1995) (citing *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991)). As relevant here, section 86.021, Fla. Stat., provides:

Any person claiming to be interested or who may be in doubt about his or her rights under a . . . contract . . . or whose rights, status, or other equitable or legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under such . . . contract . . . or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

§ 86.021, Fla. Stat. Simply stated, pursuant to Chapter 86 of the Florida Statutes, declaratory relief is appropriate upon the showing of:

1. The existence of a bona fide dispute between the parties.
2. A justiciable question regarding the existence of a power, privilege, right or immunity.
3. The Complainant is in doubt as to the power, privilege, right, or immunity.
4. Bona fide, actual, and present need for the declaration.

*May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952). To operate within this sphere of anticipatory and preventative justice, the Declaratory Judgment Act should be liberally construed. See *Rigby v. Liles*, 505 So. 2d 598 (Fla. 1st DCA 1987).

The Declaratory Judgment Act authorizes declaratory judgments as to insurance policy obligations and coverage. See *Legion Ins. Co. v. Moore*, 846 So. 2d 1183 (Fla. 4th DCA 2003).

An *issue* is “moot” only when the controversy has been so fully resolved that a judicial determination can have no actual effect. *Dehoff v. Imeson*, 153 Fla. 553, 15 So. 2d 258 (1943). A *case* is “moot” when it presents no actual controversy or when the issues have ceased to exist. Black’s Law Dictionary 1008 (6th ed. 1990).

In this case, the petition alleges that not only did Mercury unlawfully apply the insurance policy’s PIP deductible, but Mercury refused to readjust this claim in light of the Florida Supreme Court’s

*Florida Hospital* decision, and that Mercury has refused to issue payment to Precision Diagnostic based on its claim that PIP benefits are exhausted. As framed by Precision Diagnostic's petition, the issues in this case are whether Mercury properly applied the insurance policy's PIP deductible, and if not, whether Mercury was required to readjust the subject PIP claim to properly account for the insurance policy's PIP deductible, and whether exhaustion of PIP benefits is a defense to the payment of additional benefits to Precision Diagnostic.

In response to the Petition, Mercury steadfastly maintained that it did not unlawfully the insurance policy's PIP deductible, that it was not required to readjust this claim to properly account for the PIP deductible, and that exhaustion of PIP benefits precludes the payment of additional PIP benefits. It is also worth noting that even after the Florida Supreme Court issued its decision in *Florida Hospital*, Mercury and other insurance companies continued to challenge that ruling by arguing that *Florida Hospital* only applied to hospital expenses. The Florida Supreme Court entertained that argument and did not resolve that issue until 2022 in *Gogan*, which decision was issued after Precision Diagnostic filed its petition.

Because each of the issues raised in the petition collectively were not resolved by the Florida Supreme Court's decisions in *Florida Hospital* or *Gogan*, and because substantive issues of fact exist that significantly affect the rights and obligations of the parties, the trial court erred as a matter of law when it entered summary judgment for Mercury based on the conclusion that Precision Diagnostic's claim for declaratory relief was moot.

**4. Precision Diagnostic was entitled to declaration by the trial court that Mercury unlawfully applied the insurance policy's PIP deductible.**

Precision Diagnostic's petition requested a declaration that Mercury unlawfully applied the insurance policy's PIP deductible. (R. 27-34) Precision Diagnostic's first motion for summary judgment explained that it was entitled to a declaration that Mercury unlawfully applied the insurance policy's PIP deductible. (R. 532-50) The trial court noted in its summary judgment order that Mercury conceded that it unlawfully applied the insurance policy's PIP deductible. Because the Record in this case is clear that Mercury unlawfully applied the insurance policy's PIP deductible, Mercury was entitled to that declaration. On remand, the trial court should

be instructed to enter a declaration in Precision Diagnostic's favor that Mercury unlawfully applied the insurance policy's PIP deductible.

**B. The Trial Court's Summary Judgment Ruling As To Mercury's Exhaustion Affirmative Defense Was Procedurally And Substantively Incorrect.**

The third and final paragraph of the trial court's summary judgment order addressed Mercury's exhaustion affirmative defense. (R. 768-69) According to the trial court, "the Plaintiff failed to meet its burden of proof regarding the issue of exhaustion of benefits." (R. 769) The trial court further concluded that *Northwoods* and the English rule of priority was inapplicable. (R. 768-69) Not only did the trial court apply the incorrect summary judgment burden, but the trial court's failure to apply the *Northwoods* exception and the English rule of priority is fatal.

**1. Exhaustion of benefits is not a valid defense to a declaratory judgment action.**

Precision Diagnostic's petition sought a declaration regarding Mercury's claims adjusting in this case. Because the petition did not seek benefits, it is not an "action for benefits" and an exhaustion of

benefits defense cannot preclude the trial court from issuing the requested declaration.

In *Bristol W. Ins. Co. v. MD Readers, Inc.*, 52 So. 3d 48 (Fla. 4th DCA 2010), this Court held that because a medical provider's petition for declaratory relief concerned an insurer's method for calculating reimbursement of PIP benefits and did not seek the payment of PIP benefits, the medical provider was not required to submit a section 627.736(10), Fla. Stat. presuit demand letter. *Id.* at 51 ("Because the complaint sought a declaratory judgment and no damages, we agree that the statutory notice did not become a condition precedent of MD Readers' right to bring this action, as it sought no benefits."). See also, *Cent. Palm Beach Physicians & Urgent Care, Inc. v. Infinity Auto Ins. Co.*, No. 17-cv-62201-WPD, 2018 U.S. Dist. LEXIS 84100, at \*18 (S.D. Fla. May 16, 2018) ("As to the claims for declaratory and injunctive relief, the Court agrees with the reasoning and conclusion of the Florida Fourth District Court of Appeal that, as these claims do not seek damages, they do not constitute an action for benefits under the section and therefore the statutory notice requirement is not a condition precedent to these claims.").

Precision Diagnostic's petition does not seek the payment of actual benefits. It merely seeks a declaration that Mercury unlawfully applied the insurance policy's PIP deductible, and that Mercury should readjust the claim in accordance with section 627.739(2), Fla. Stat. Even if the insured's benefits are properly exhausted readjustment of the claim and a determination of coverage is, at a minimum, necessary to determine any additional amounts owed by the insured.

Because this is *not* an "action for benefits," exhaustion of benefits, even if valid, cannot avoid the requested declarations in this case. *See, i.e., Crespo & Assocs., P.A., a/a/o A. Vilchis v. Progressive American Ins. Co.*, 25 Fla. L. Weekly Supp. 1047a (Fla. Hillsborough Cty, April 16, 2018); *Crespo & Assocs., P.A., a/a/o Amirali Bhannadia v. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 233a (Fla. Hillsborough Cty, Feb. 7, 2018); *Tampa Bay Imaging, LLC v. Amica Mut. Ins. Co.*, 19 Fla. L. Weekly Supp. 749a (Fla. Hillsborough Cty, May 11, 2012). As such, the trial court's consideration of Mercury's exhaustion affirmative defense was error and the trial court's order granting Mercury's motion for summary judgment should be reversed.

**2. The trial court employed the incorrect summary judgment standard regarding Mercury's exhaustion affirmative defense.**

Even if exhaustion of benefits was an available defense, the trial court erred when it required Precision Diagnostic to disprove Mercury's exhaustion affirmative defense. Because the trial court relied on the incorrect summary judgment burden, its order granting Mercury's motion for summary judgment should be reversed.

In a summary judgment motion, the movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. To satisfy this burden, the movant must point out to the court that "there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. It is only after the moving party has met its initial burden of production that the summary judgment burden shifts to the nonmoving party to demonstrate that there is a genuine issue of fact for trial. *Celotex*, 477 U.S. at 324.

In this case, Mercury has the burden of proof regarding summary judgment on its affirmative defense that no genuine issues of material fact exist. See Fla. R. Civ. P. 1.510 and *Holl v. Talcott*, 191

So. 2d 40, 43 (Fla. 1966). There is no dispute that exhaustion of PIP benefits can be a defense to claim for PIP benefits. There are, however, recognized exceptions. Because the amount of policy benefits available are not reduced by an insurance company's payment of invalid or improper claims because such payments should not be considered "payment" under the PIP policy, Mercury must prove that the amounts paid were paid for valid services that required compensation of the insured's limited benefits. See *Northwoods*, 137 So. 3d at 1057; *Coral Imaging Services v. Geico Indem. Ins.*, 955 So. 2d 11, 16 (Fla. 3rd DCA 2006).

In this case, the only relevant "fact" that appears in Mercury's motion for summary judgment, with respect to payments, was that "on or about 11/8/2006, Defendant paid out the last of the \$10,000.00 in PIP benefits and benefits became exhausted." (R. 147) (emph. added) Mercury's motion for summary judgment, however, *did not detail* all or any of its PIP payments, *provided no explanation whatsoever* for any of its PIP payments to the insured's various other medical providers that resulted in payment of \$10,000, and generally *made no attempt* to demonstrate that all the payments that it made were for valid or proper claims. (R. 146-53) This was, after all,

Mercury's summary judgment burden. And, Mercury's summary judgment burden is underlined by the fact that, as has been noted, there are legitimate questions of fact as to whether all the claims that Mercury paid were valid or proper claims.

Because the trial court failed to require Mercury to demonstrate the absence of no questions of fact that it paid \$10,000 for valid or proper claims, and instead placed the burden on Precision Diagnostic to disprove Mercury's exhaustion affirmative defense that was based on no evidence, this court should reverse the trial court's summary judgment order.

**3. At a minimum, summary judgment was not available because Mercury failed to demonstrate that there are no questions of fact as to whether Mercury paid \$10,000 for valid or proper claims.**

Additionally, the trial court abandoned its burden to deny summary where there are questions of fact as to whether Mercury paid \$10,000 for valid or proper claims. Because there are questions of fact with respect to this issue, summary judgment was not available to Mercury.

The basic issue before a court on a motion for summary judgment 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.” *Anderson*, 477 U.S. at 251-52. The moving party has the burden of showing the absence of a genuine issue as to any material fact, and in deciding whether the movant has met this burden the court must view the movant’s evidence and all factual inferences arising from it in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir.1993). An issue of fact is “material” if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *Anderson*, 477 U.S. at 248; *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 998 (11th Cir.1992). “It is ‘genuine’ if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.” *Id.* Simply stated, “[i]f reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment.” *Miranda v. B & B Cash Grocery Store, Inc.*, 975

F.2d 1518, 1534 (11th Cir.1992) (*citing Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir.1985)).

With respect to Mercury's exhaustion affirmative defense, the dispute concerns whether Mercury should have paid for the services rendered by Vinsant Orthopedics' expenses on August 18, 2015. On that date of service, Vinsant Orthopedics submitted a \$734 charge for CPT code 99215 and a \$201 charge for CPT code 99358. (R. 442) These CPT codes, however, are incompatible based on Mercury's own explanation of benefits which states that CPT code 99215 is for "OFFICE/OUTPAIENT VISIT EST" and that CPT code 99358 is for "PROLONG SERVICE W/O CONTACT." (R. 511) (emph. added) These CPT codes billed on the same day are incompatible because one CPT code indicates that the insured was present in the office (99215) and another other CPT code indicates that the insured was not present in the office (99358). (R. 511) Mercury issued payment to Vinsant Orthopedic for both CPT codes at 80% of 200% of Medicare Part B. (R. 511)

Ms. DeMint, Mercury's corporate representative, testified that despite Mercury's conflicting description of those CPT codes on its explanation of benefits, Mercury issued payment because *it*

*“assumed” that the doctor “spent an extended amount of time with the patient.”* (R. 283/11-15) (emph. added) Ms. DeMint conceded, however, that *Vinsant Orthopedics’ medical records do not indicate how long the doctor spent with the insured* (R. 284/2-4), do not indicate *why the doctor spent extended time with the insured* (R. 284/5-12), and she *could not explain when it would be appropriate for CPT code 99215 and 99358 to be billed on the same date of service* (R. 284/19-24). Ms. DeMint conceded that *there is nothing in Vinsant Orthopedics’ medical record supporting the submission of CPT code 99358, which according to their own explanation of benefits, represents a non-contact service billed on the same date as an in-office service CPT code.* (R. 286/22-287/7)

In this case, Mercury has failed to carry its summary judgment burden to demonstrate that the absence of a genuine issue of material fact with respect to its exhaustion affirmative defense. Because, when all factual inferences from the record evidence are drawn in favor of Precision Diagnostic, there is a question of fact as to whether all payments made to Vinsant Orthopedics were for valid and proper claims, the trial court’s summary judgment ruling should be reversed.

**4. Precision Diagnostic was entitled to a summary judgment as to Mercury's exhaustion affirmative defense in accordance with this Court's decision in *Northwoods* and the English rule of priority.**

Last, the trial court erred when it failed to appreciate and apply this Court's holding in *Northwoods* and its discussion of the English rule of priority. In fact, the trial court erred by failing to explain why *Northwoods* did not apply. Because the necessity and reasonableness of Precision Diagnostic's expenses was not in dispute at the time Mercury unlawfully applied the insurance policy's PIP deductible – which was before PIP benefits were allegedly exhausted – the English rule of priority applies, and Precision Diagnostic is entitled to the PIP benefits that it would have been paid had Mercury correctly the insurance policy's PIP deductible in the first place.

In *Northwoods*, this Court explained that the English rule of priority adopted by the Florida Supreme Court in *Boulevard National Bank of Miami v. Air Metal Industries, Inc.*, 176 So. 2d 94 (Fla. 1965) operates in the context of a PIP claim in a limited fashion. *Northwoods*, 137 So. 3d at 1055. This Court would go on to state that English rule of priority applies only where compensability is established; that is where the necessity and reasonableness of a

medical provider's expenses is established. *Id.* at 1057. This Court would go on to explain that this occurs when claims are “*settled either by insurance company acceptance or by resolution of disputed charges through suit.*” *Id.*

In this case, the Record demonstrates that the necessity<sup>3</sup> and reasonableness of Precision Diagnostic's expenses was accepted by Mercury. In fact, because Mercury chose to apply Precision Diagnostic's single charge to the insurance policy's PIP deductible, it had no choice but to *accept* that charge at 100% because as the Florida Supreme Court explained in *Florida Hospital*, “when calculating the PIP benefits due an insured, the deductible must be subtracted from the total medical charges before applying the reimbursement limitation in section 627.736(5)(a)1.b.” *Florida Hospital*, 260 So. 3d at 226.

Because Mercury was required by law to *accept* Precision Diagnostic's single charge at 100% (\$1,600), Mercury was required to reimburse the amount of that charge that exceeded the insurance policy's PIP deductible at 80%. There is nothing in the law that allows

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<sup>3</sup> Ms. DeMint testified that Mercury was not contesting the necessity of Precision Diagnostic's expenses. (R. 272/23-273/2)

an insurer to adjust a single claim submitted in two different ways. Of course, any other medical expenses submitted would then be adjusted in accordance with section 627.736(5)(a)1., Fla. Stat. Under this method, because necessity and reasonableness is not at issue, Precision Diagnostic would be entitled to \$367.26 ( $(\$600 \times .8) - \text{prior payment of } \$112.74$ ).

Of course, some insurers may argue that it should be allowed to apply section 627.736(5)(a)1., Fla. Stat.'s permissive fee schedule limitations *pro rata* to the amount of a single charge that exceeds the PIP deductible. Perhaps that is true,<sup>4</sup> but even if an insurer can make that case, reasonableness is still not at issue and Precision Diagnostic would be entitled to more than what it originally paid based on Mercury's unlawful application of the insurance policy's PIP deductible.

It is more than clear in this case that not only was Mercury required to *accept* Precision Diagnostic's expenses at 100%, but regardless of what reimbursement methodology is applied to the amount of Precision Diagnostic's single charge that exceeds the

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<sup>4</sup> This issue would need to be decided by the trial court before this Court could pass on it.

insurance policy's PIP deductible, reasonableness is not at issue. And it is similarly clear that the down-the-line providers rights did not vest to the exclusion of Precision Diagnostic's priority rights not only because of the English rule, but also because this Court explained that an insurer is obligated to correct unlawful deductible adjustments in order to determine the eligibility for reimbursements. *Allstate Fire & Cas. Ins. Co. v. Sports*, 335 So. 3d 725 (Fla. 4th DCA 2022). As such, the trial court erred in its understanding of and failure to apply this Court's holding in *Northwoods* and the English rule of priority. If there were ever a case where the English rule of priority should apply in the PIP context, it is this case. As such, the trial court erred in denying Precision Diagnostic's motion for summary judgment directed to Mercury's exhaustion affirmative defense. On remand, the trial court should be instructed to enter a summary judgment in Precision Diagnostic's favor as to Mercury's exhaustion affirmative defense.

### **CONCLUSION**

For the foregoing reasons, Precision Diagnostic respectfully requests that this Court reverse the trial court's order granting Mercury's motion for summary judgment and Final Judgment and

remand this case with instructions to enter a declaration that Mercury unlawfully applied the insurance policy's PIP deductible, a declaration that Mercury is required to readjust this claim in light of its concession that it unlawfully applied the insurance policy's PIP deductible, and to enter a summary judgment as to Mercury's exhaustion affirmative defense.

Respectfully Submitted this 4th day of December 2023.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to the Florida Rules of Appellate Procedure 9.210(a)(2), I hereby certify that this brief is proportionally spaced, 14-point Bookman Old Style font. Per Microsoft Word software, this brief contains less than the maximum wordcount for argument, excluding those pages exempted by Florida Rule of Appellate Procedure, 9.210(a)(5).

s/Chad A. Barr  
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*Attorney for the Appellant*

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing document was filed with the clerk of court using the Florida Courts E-Filing Portal, and a copy has been thereby furnished to Nancy W. Gregoire Stamper, Esquire, [gregoirecourt@kblglaw.com](mailto:gregoirecourt@kblglaw.com); [cal@kblglaw.com](mailto:cal@kblglaw.com) on this 4th day of December 2023.

s/Chad A. Barr  
Chad A. Barr, Esquire  
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