IN THE SUPREME COURT OF FLORIDA

**Case No. SC-18-1390**
L.T. No. 2D-16-4036

MRI ASSOCIATES OF TAMPA, INC., d/b/a PARK PLACE MRI,
*Petitioner,*

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
*Respondent*.
_____/

# STATE FARM'S RESPONSE TO PETITIONER'S MOTION FOR REHEARING OR CLARIFICATION

Pursuant to Florida Rule of Appellate Procedure 9.330, State Farm Mutual Automobile Insurance Company ("State Farm") submits this Response to the motion of petitioner MRI Associates of Tampa, Inc., d/b/a Park Place MRI ("Park Place"), for rehearing or clarification as to the Court's recent opinion. *See* MRI Assocs. of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co., No. SC-18-1390, 2021 WL 5832298 (Fla. Dec. 9, 2021) (the "Opinion"); Mot. Reh'g Clarification (Dec. 23, 2021) (the "Motion for Rehearing").

## I. INTRODUCTION

The Court should deny the Motion for Rehearing, which largely repeats the arguments set forth in Petitioner's Briefs – the same arguments that were considered and rejected in the Opinion. Park Place focuses on one purportedly new point, concerning principles of textual analysis, which is just another version of its prior arguments. Moreover, to the extent that its textual argument has any new elements, Park Place erred by raising them for the first time on rehearing.

The Opinion carefully analyzes the history of the Florida No-Fault ("PIP") Statute, including the 2012 amendments, as well as this Court's PIP precedent. *See* Fla. Stat. § 627.736 (2013); Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973 (Fla. 2017); GEICO Gen. Ins. Co. v. Virtual Imaging Servs., Inc., 141 So. 3d 147 (Fla. 2013). Park Place claims that the Opinion violates this line of PIP cases. To the contrary, the Court ruled consistently in this case and in Orthopedic Specialists (which arose under the prior version of the PIP Statute) by finding that both insurance policies properly limit PIP reimbursements based on the statutory schedule of maximum charges.

## II. FACTUAL BACKGROUND

1. This case involves 19 PIP claims from State Farm insureds who: (a) were injured in automobile accidents in 2013; (b) subsequently received MRIs from Park Place; and (c) assigned their PIP benefits to Park Place. *See* Opinion, 2021 WL 5832298, at *3; Mot. Reh'g ¶ 2.

2. State Farm paid each bill based on the amounts set forth in the schedule of maximum charges (the "Schedule") in the PIP Statute and its automobile insurance policy (the "Policy"). *See* Fla. Stat. § 627.736(5)(a)1.; Opinion, 2021 WL 5832298, at *2 (quoting Policy provisions). The same (2013) version of the Statute and the same Policy apply to all of the underlying claims.

3. Park Place disputed the amounts paid by State Farm, which then filed this action for declaratory relief. On review of the parties' cross-motions for summary judgment, the circuit court ruled against State Farm on the question of whether its Policy "lawfully invokes the [statutory] schedule of maximum charges." Opinion, 2021 WL 5832298, at *3; *see also* Mot. Reh'g ¶ 2.

4. State Farm appealed the final judgment to the Second District, which reversed and rejected Park Place's "argument that State's Farm's policy contains an unlawful hybrid method of reimbursement calculation and is therefore impermissibly vague." Opinion, 2021 WL 5832298, at *4 (quoting State Farm Mut. Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc., 252 So. 3d 773, 778 (Fla. 2d DCA 2018)). The district court also certified a question of great public importance to this Court. *See* Opinion, 2021 WL 5832298, at *4 (quoting original question).

5. After rephrasing the certified question, this Court unanimously approved "the result reached by the Second District" – namely, reversal of the final judgment in favor of Park Place. Opinion, 2021 WL 5832298, at *6.[1]

## III. DISCUSSION

### A. Park Place Has Not Shown Any Reason for Rehearing.

Park Place seeks rehearing on three grounds, all of which are variations of the single legal issue in this proceeding – namely,

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[1] Justice Grosshans, who joined the Supreme Court after the May 2020 oral argument in this case, did not participate in the decision.

whether State Farm's "policy provisions clearly and unambiguously authorize the use of the statutory schedule of maximum charges in accord with the requirements of the [PIP] statute." Opinion, 2021 WL 5832298, at *1.

First, Park Place raises a disingenuous "whole-text" argument, claiming that State Farm's Policy does not provide "a notice" of its Schedule election. *See* Mot. Reh'g at 16-31. Second, Park Place disputes the Court's finding that the PIP Statute allows insurers to cap PIP reimbursements based on the Schedule. *See* id. at 31-36. Third, despite the Court's contrary statement, Park Place persists in arguing that the two methods of determining PIP reimbursements are mutually exclusive. *See* id. at 36-40.

By repeating or rephrasing its appellate arguments, Park Place essentially "assert[s] that this court overlooked the facts, authorities, and arguments set forth in its brief[s] and the record on appeal." Boardwalk at Daytona Dev., LLC v. Paspalakis, 212 So. 3d 1063, 1063 (Fla. 5th DCA 2017). Such extensive re-argument is improper:

> Because it is the exception to the norm, a motion for rehearing filed under Florida Rule of Appellate Procedure 9.330 should be done under very limited circumstances. The proper function of a motion for rehearing is to present to the court in clear and concise terms some point that it overlooked or failed to consider; only this and nothing more. A motion for rehearing is strictly limited to calling the Court's attention – *without argument* – to something obviously overlooked or misapprehended and is not a vehicle for counsel or the party to continue its attempts at advocacy.

Dabbs v. State, 230 So. 3d 475, 476 (Fla. 4th DCA 2017) (emphasis in original; citations & internal punctuation omitted); *accord* Boardwalk v. Paspalakis, 212 So. 3d at 1063 (rejecting motion for rehearing that "does what [Rule] 9.330(a) proscribes; it re-argues the merits of the case") (citation & internal punctuation omitted).

And to the extent Park Place's textual argument raises new points, that also is improper. *See* Fla. R. App. P. 9.330(a)(2)(A) ("The motion [for rehearing] shall not present issues not previously raised in the proceeding."); Dabbs, 230 So. 3d at 476 ("An issue not raised previously cannot be raised for the first time in a motion for rehearing.").

### 1. In Its "Whole-Text" Discussion, Park Place Misinterprets the PIP Statute and Re-Argues the Notice Question Addressed in the Opinion.

In its primary rehearing argument, Park Place claims that this Court failed "to follow the whole-text canon" in its interpretation of the amended PIP Statute. Mot. Reh'g ¶ 28 (citation omitted). But actually it is Park Place that errs by seeking to add a special notice requirement to the Statute. This argument fails for multiple reasons.

First, Park Place mistakenly reads the phrase "a notice" in sub-section (5)(a)5. as requiring some sort of "Special Notice" or "Important Notice" designation in any policy that elects to limit PIP reimbursements based on the Schedule. *See* Mot. Reh'g ¶¶ 39-40. The PIP Statute contains no such provision. As noted in Orthopedic Specialists, the Statute has a "simple notice requirement" and no "magic words" are needed to cap charges based on the Schedule. 212 So. 3d at 977 (citation & internal punctuation omitted). If the Legislature intended to require more than a simple notice, it would have said so. *Cf.* Fla. Stat. § 627.727(1) (2021) (specifying wording, bold font and type-size for form declining uninsured motorist coverage). This Court

properly applied "the plain meaning of the text of the provisions of the PIP statute" by approving State Farm's "simple notice" electing the Schedule. Opinion, 2021 WL 5832298, at *5.

Second, Park Place tries to justify its "new" textual argument by claiming that the Court approved State Farm's Schedule election based on issues "not raised by the parties." Mot. Reh'g ¶ 12. Such a claim is disingenuous in this single-issue case. The question certified to and answered by this Court is whether State Farm's "policy provisions clearly and unambiguously authorize the use of the [Schedule] in accord with the requirements of the [PIP] statute." Opinion, 2021 WL 5832298, at *1; *see also* MRI Associates, 252 So. 3d at 778 ("Because the State Farm policy includes mandatory language expressly limiting reimbursement for reasonable medical expenses to the [Schedule], we conclude that it is sufficient to place insureds and service providers on notice as required by section 627.736(5)(a)5.").

Throughout the proceedings, including in this Court, both parties discussed the 2012 PIP amendments and the effect of new sub-section (5)(a)5. on the notice issue. Indeed, Park Place repeatedly argued that the amended Statute "expressly required

a distinct notice." Initial Br. at 20 (citing "a notice" provision); *see also* id. at 21 & 38; Reply Br. at 8 (claiming Policy "cannot constitute 'a notice' electing the fee schedules under Section 627.736(5)(a)5."); id. at 13. The "whole-text" discussion in the Motion for Rehearing is merely an expanded version of Park Place's prior argument that this Court rejected. Such re-argument does not warrant rehearing. *See* Boardwalk v. Paspalakis, 212 So. 3d at 1063; Dabbs v. State, 230 So. 3d at 476.

Third, to the extent that Park Place revised and expanded its prior argument (for example, by adding pages of new caselaw), such new argument is improper on rehearing. *See* Fla. R. App. P. 9.330(a)(2)(A); Dabbs, 230 So. 3d at 476.

### 2. THE COURT CORRECTLY FOUND THAT THE SCHEDULE OPERATES AS A CAP ON PIP REIMBURSEMENTS.

This Court determined that "reimbursement *limitations* based on the [Schedule] be understood . . . simply as an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates. By its very nature, a limitation based on a schedule of maximum charges establishes a ceiling but not a floor." Opinion, 2021 WL 5832298, at *6

(emphasis in original). In disputing this holding, Park Place again re-argues points that were briefed by the parties and considered by the Court.

Park Place contends that an insurer that "lawfully elects the [Schedule] reimbursement methodology" generally "must pay the amount fixed by the [Schedule]." Mot. Reh'g ¶ 55. In support of its position, Park Place cites inapplicable caselaw interpreting the **prior** version of the PIP Statute and holding that insurers could not apply Medicare policies to reduce payments based on the Schedule. *See* id. (citing Nationwide Mut. Fire Ins. Co. v. AFO Imaging, Inc., 71 So. 3d 134 (Fla. 2d DCA 2011)).

In this appeal, Park Place complained that State Farm: (a) paid more than the Schedule amount for the underlying 19 MRIs (*see* Initial Br. at 39-40 & Reply Br. at 13-14); and (b) less than the Schedule amount in other cases (*see* Initial Br. at 35-39). As State Farm observed, Park Place's complaints concern matters of Schedule **application** rather than Schedule **election**, which is the issue on appeal. *See* Answer Br. at 36.

State Farm went on to explain that it paid the MRIs in this case based on Medicare's 2007 Limited Charge Fee

Schedule. *See* Answer Br. at 36-38. And last year, the Third and Fourth Districts issued decisions supporting State Farm's use of the limiting charge schedule. *See* Allstate Fire & Cas. Ins. Co. v. Jeffrey L. Katzell, M.D., P.A., 323 So. 3d 191 (Fla. 4th DCA 2021); Priority Med. Ctrs., LLC v. Allstate Ins. Co., 319 So. 3d 724 (Fla. 3d DCA 2021).

State Farm also rebutted Park Place's claim that an insurer cannot pay less than the Schedule amount. *See* Answer Br. at 38-41. As State Farm noted, the amended PIP Statute includes a new provision (sub-section (5)(a)3.) allowing insurers to use "Medicare coding policies and payment methodologies." *See* id. at 41. AFO Imaging – which prohibited the use of such policies under the prior version of the PIP Statute – does not apply to this case or to any claims arising under the amended Statute. Indeed, the Fourth DCA recently ruled that, under new sub-section (5)(a)3., insurers can consider Medicare payment policies when calculating PIP payments. *See* State Farm Mut. Auto. Ins. Co. v. Pan Am Diagnostic Servs., Inc., 321 So. 3d 807, 808 (Fla. 4th DCA 2021) ("[W]e agree with State Farm's contention that the trial courts misinterpreted the PIP statute and the insurance policy by finding

that section 627.736(5)(a)2. sets an absolute floor for PIP reimbursements that cannot be modified by authorized Medicare payment methodologies[.]"); State Farm Mut. Auto. Ins. Co. v. Stand Up MRI of Boca Raton, P.A., 322 So. 3d 87, 94 (Fla. 4th DCA 2021) ("We read subparagraph [(5)(a)3.] as permitting insurers to use Medicare coding policies and payment methodologies . . . to reduce the reimbursement amount for PIP benefits below the applicable amount under the 2007 Medicare Part B schedule.").

### 3. THE COURT CORRECTLY RULED THAT INSURERS MAY CONSIDER THE SCHEDULE IN CONJUNCTION WITH OTHER STATUTORY FACTORS TO DETERMINE PIP PAYMENTS.

Park Place may disagree with the Court's conclusions. But there is no valid reason to claim that the Court – which analyzed its PIP precedent in detail in the unanimous Opinion – "overlooked or misapprehended portions of [its] previous decision[s]." Mot. Reh'g ¶ 59. This section of the Motion is merely improper re-argument. *See* Boardwalk v. Paspalakis, 212 So. 3d at 1063 (criticizing motion for rehearing filed "as a last resort to persuade this court to change its mind or to express [counsel's] displeasure with this court's conclusion") (citation & internal punctuation omitted); *accord* Dabbs, 230 So. 3d at 476.

## B. Park Place Has Not Shown Any Need for Clarification.

In the alternative, Park Place seeks clarification of the Opinion on two grounds – neither of which has merit. First, Park Place claims that State Farm's policy language is "extremely unique" and that the Court should limit its ruling to State Farm. Mot. Reh'g ¶ 72. Second, Park Place asks the Court to explain its approval of the "***result*** reached by the Second District." Id. ¶ 73 (emphasis in original).

Contrary to Park Place's claim, State Farm's policy language is not unique. Other Florida insurers also elect to limit reimbursements based on the Schedule and other statutory factors. *See* John S. Virga, D.C., P.A. v. Progressive Am. Ins. Co., 215 F. Supp. 3d 1320, 1324 (S.D. Fla. 2016) ("Plaintiff attempts to paint the policy as 'ambiguous' by arguing that the policy refers to both the fact-based method of calculation and the fee schedule."); Bartow HMA, Inc. v. Sec. Nat'l Ins. Co. 325 So. 3d 46, 50 (Fla. 4th DCA 2021) ("The provider's argument that the policy is required to exclude any reference to the default methodology to give proper notice of the insurer's election to limit reimbursements pursuant

to subsection (5)(a)2. is simply unsupported by [Virtual Imaging] and was rejected in [Orthopedic Specialists].").

Further, this Court did not accept jurisdiction over the certified question because the language of a single insurance policy is of great public importance. The important question posed by the Second District (and rephrased by this Court) is whether the amended PIP Statute allows insurers to limit reimbursements using the schedule of maximum charges or whether the Statute requires them to use the Schedule as a separate, exclusive method. This Court correctly determined that the Schedule is simply an optional method of capping reimbursements under the long-established method for determining the reasonable amount for medical benefits.

Finally, there is no need for the Court to clarify its simple statement approving the "result" of the Second DCA decision, which was to reverse the underlying final summary judgment.

## IV. CONCLUSION

For these reasons, the Court should deny the Motion for Rehearing or Clarification.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this 10th day of January 2022 to all persons on the Service List.

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