

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner,

Case No.: 2007-CA-17336-O
WRIT NO.: 07-72

vs.

DAVID W, DARROW, D.C., P.A., d/b/a/
DARROW FAMILY CHIROPRACTIC,
(Jose McLellan),

Respondent.

_____ /

Petition for Writ of Certiorari
from the Orange County Court

Robert A. Kingsford, Esq.,
for Petitioner.

Joseph Littman, Esq.,
for Respondent.

Before Lubet, Evans, Rodriguez, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI and
GRANTING RESPONDENT'S MOTION FOR A CONDITIONAL
AWARD OF ATTORNEY'S FEES

I. INTRODUCTION

Petitioner, State Farm Mutual Automobile Insurance Company (“Petitioner” or “State Farm”), filed this petition for a writ of certiorari (“Petition”) seeking review of an order of the Orange County Court denying State Farm’s Motion to Dismiss or Abate. This Court has

jurisdiction. Florida Rule of Appellate Procedure 9.030(c)(1). We dispense with oral argument, Fla. R. App. P. 9.320, and deny the Petition.

II. FACTS

Respondent, David W. Darrow, D.C., P.A., d/b/a/ Darrow Family Chiropractic (“Respondent” or “Darrow”), filed the complaint in the underlying case in the Orange County Court seeking payment of PIP benefits from State Farm in connection with his treatment of Jose McLellan.¹ The parties have an extensive litigation history.

In March of 2004, Darrow filed a declaratory judgment action against State Farm in the Eighteenth Judicial Circuit in Seminole County concerning his responsibility to submit to an examination under oath with respect to claims against State Farm. This case was removed to federal court by State Farm which filed a counterclaim setting forth claims against Darrow for fraud, unjust enrichment, deceptive and unfair trade practices and civil theft. State Farm and Darrow stipulated to the return of the matter to the Eighteenth Judicial Circuit Court.

In June and July of 2004, Darrow filed fifteen suits in Seminole County Court seeking to collect PIP benefits from State Farm in connection with treatment of individuals allegedly covered under State Farm PIP endorsements. These fifteen PIP suits were, upon State Farm’s motion, transferred to the Eighteenth Circuit Court and consolidated with the declaratory judgment case already pending there.²

¹ “PIP” is an acronym for “personal injury protection.” With limited exception, “each motor vehicle owner or registrant required to be licensed in Florida is required to carry a minimum amount of personal injury protection, or PIP insurance, for the benefit of the owner and other designees.” *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005). This coverage includes benefits for accident-related medical expenses, disability (lost wages) and death. § 627.736(1)(a),(b),(c), Fla. Stat. (2005).

² In addition to transferring the PIP actions to circuit court, State Farm also sought to stay them. That motion was denied.

In March of 2006, Darrow instituted the underlying suit in the Orange County Court. Service was effectuated shortly thereafter but in any event after service of State Farm's Amended Counterclaim in the consolidated matter pending in the Eighteenth Circuit.

III. STANDARD OF REVIEW

“To obtain certiorari relief, a petitioner must demonstrate that the order departs from the essential requirements of law, that it causes material injury and that the petitioner lacks an adequate remedy on appeal.” *Dees v. Kidney Group, LLC*, 16 So. 3d 277, 279 (Fla. 2d DCA 2009). “A ruling constitutes ‘a departure from the essential requirements of the law’ when it amounts to ‘a violation of clearly established principles of law resulting in a miscarriage of justice.’” *Byrd v. So. Prestressed Concrete, Inc.*, 928 So. 2d 455, 457 (Fla. 1st DCA 2006)(quoting *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983)).

IV. DISCUSSION

We conclude that State Farm did not meet its burden of showing that the County Court's order departed from the essential requirements of the law.

The law requires that a later-served case be abated “upon a showing that a prior action involving the same parties and the same or substantially similar causes of action is pending in the same court or another court of comparable jurisdiction.” *Internal Surplus Lines Ins. Co. v. Markham*, 580 So. 2d 251, 253 (Fla. 2d DCA 1991). *See also Britamco Underwriters, Inc. v. Cent. Jersey Invs., Inc.*, 632 So. 2d 138, 141 (Fla. 4th DCA 1994). Petitioner focuses only on the first two requisites for abatement. State Farm addresses whether the causes of action in this case are sufficiently similar to those in the Eighteenth Circuit case and whether or not the presence of parties in the Eighteenth Circuit Court not present here defeats the requirement of identity of

parties.

These are not the only issues which must be addressed in order to demonstrate the propriety of abatement. The case sub judice is obviously not pending in the same court as the consolidated action in the Eighteenth Circuit. That being so, under *Markham*, the courts where the two cases are pending must be “of comparable jurisdiction” in order for one to be abated. See *Internal Surplus Lines Ins. Co. v. Markham*, 580 So. 2d at 253. State Farm, however, does not address this requirement.

In the authorities cited by State Farm, the original case and the subsequent case sought to be abated were pending either in the very same circuit court or in sister Florida circuit courts. We find them inapplicable here on this issue. In the instant matter, one case is pending in the county court while the consolidated case is before the circuit court. In such a circumstance, and with State Farm not addressing the “comparable jurisdiction” requirement for abatement, we must deny its Petition for a Writ of Certiorari. Petitioner has not shown that the Orange County Court, where the case it wants abated is pending, is a court of jurisdiction “comparable” to that of the Eighteenth Judicial Circuit Court.

V. FEES

Darrow has moved for a conditional award of counsel fees “pursuant to Appellate Rule 9.400 and/or Florida Statute 627.428 and/or 627.736(8).” (Resp’t Mot. to Tax Appellate Attorney’s Fees 1.) This motion is unopposed and we grant it.³ Respondent also seeks fees pursuant to section 57.105, Florida Statutes. Inasmuch as we have already granted Darrow’s other counsel fee motion, we deny the one based on section 57.105 as moot.

³ Florida Rule of Appellate Procedure 9.400 is procedural and not a substantive basis for an award of counsel fees. *Dept. of Highway Safety and Motor Vehicles v. Trauth*, 971 So. 2d 906, 908 (Fla. 3d DCA 2007). We cannot award fees pursuant to that rule.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, State Farm Mutual Auto Insurance Company's Petition for Writ of Certiorari be and hereby is **DENIED**; and **IT IS FURTHER ORDERED AND ADJUDGED** that Respondent, David W. Darrow, D.C., P.A., d/b/a/ Darrow Family Chiropractic's motion for counsel fees pursuant to section 627.428, Florida Statutes, be and hereby is **CONDITIONALLY GRANTED** dependent upon Darrow's ultimate success in the underlying case; and

IT IS FURTHER ORDERED AND ADJUDGED that Respondent, David W. Darrow, D.C., P.A., d/b/a/ Darrow Family Chiropractic's motion for counsel fees pursuant to section 57.105, Florida Statutes, be and hereby is **DENIED** as moot.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ____14th____ day of ____May_____, 2010.

_____/S/_____
MARC L. LUBET
Circuit Court Judge

_____/S/_____
ROBERT M. EVANS
Circuit Court Judge

_____/S/_____
JOSE R. RODRIGUEZ
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: 1) Robert A. Kingsford, Esquire, MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, P.A., 315 East Robinson Street, Suite 550, Orlando, Florida 32751; 2) V. Rand Saltgaver, Esquire, 1215 Mount Vernon Street, Orlando, Florida 32853-6096; 3) Joseph Litmann, Esquire and Charles Kane, Esquire, KANE & KANE, 4800 North Federal Highway, Suite 101E, Boca Raton, Florida 33431 on the ___14th___ day of _____May_____, 2010.

_____/S/_____
Judicial Assistant