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

KEON ROUSE,

Appellant

CASE NO.: CVA1 08-06
LOWER COURT CASE NO.:
2006-SC-8752

v.

UNITED AUTOMOBILE INSURANCE COMPANY**,**

Appellee.
_____/

Appeal from the Small Claims Court,
in and for Orange County, Florida,
Judge Jeffrey Arnold.

Charles Rand, Esq., for Appellant

Paul S. Jones. Esq. & Katherine N. Kmiec, Esq.
for Appellee.

Before RODRIGUEZ, KOMANSKI, LEBLANC

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant, Keon Rouse (Rouse), timely appeals the trial court's final judgment denying his verified motion for summary judgment and granting summary judgment in favor of the Appellee, United Automobile Insurance Company (United). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

I. FACTUAL AND PROCEDURAL BACKGROUND

Rouse filed suit against United seeking payment for dental work performed by Dr. James Outlaw, DDS, necessitated after Rouse was involved in a motor vehicle accident on July 5, 2005. Prior to the accident, United had issued Rouse an insurance contract that provided Personal Injury Protection (PIP) coverage with a $1,000 deductible.

Following Dr. Outlaw's treatments, Rouse tendered invoices totaling $2,835.00 to United for payment. Numerous correspondences occurred between Rouse's attorney and United's representatives. On September 30, 2005, Rouse sent a formal demand letter to United's designated demand letter representative. When United failed to respond to the demand letter and did not pay the invoices, Rouse filed a PIP suit on August 16, 2006.

Rouse filed his verified motion for summary judgment on December 21, 2006, requesting a decision in his favor on the disputed dental bills. United filed their own motion for summary judgment on January 25, 2007, claiming Rouse failed to comply with the requirements of Florida Statute §627.736(5)(d) by not submitting the bills on the approved standardized forms and, in turn, failing to furnish United with notice of a covered loss for purposes of Florida Statute §627.736(4)(b). Both parties agreed that there were no disputed issues of material fact presented before the trial judge.

A hearing on both parties' motions for summary judgment was held on March 30, 2007. Following the hearing, the trial court judge issued a ruling denying Rouse's motion and granting United's motion on December 5, 2007. On December 28, 2007, the trial judge issued his "Final Judgment as to United Automobile Insurance Company." It is from this order that Rouse appeals.

II. STANDARD OF REVIEW

The applicable standard of review for orders granting summary judgment is de novo. *5th Avenue Real Estate Dev., Inc. v. Aeacus Real Estate Ltd.*, 876 So.2d 1220 (Fla. 4th DCA 2004). Summary judgment is appropriate only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000).

III. CONCLUSIONS OF LAW

In his Initial Brief, Rouse presents four arguments why the trial court erred in awarding summary judgment in favor of the defendants, United. First he argues that, "the defendant was timely billed for medical services provided to the plaintiff and the bills were in substantial compliance with Florida Statute §627.736(5)[(d)] (2005)". Second he argues that the "defendant

never provided the required Explanation of Benefits (EOB) and therefore waived its defense that the medical bills were not submitted on the appropriate standardized forms." Third he argues that the "defendant's failure to comply with the requirements of Florida Rule of Civil Procedure 1.120(c) resulted in [the defendant's] waiver of its defense to nonpayment of the plaintiff's medical bills." Finally he argues that "the defendant is estopped to prevent a forfeiture of PIP coverage by the doctrine of promissory estoppel." United filed their Answer Brief and responded with four arguments opposing each of Rouse's arguments.

This Court recognizes that the language of the Florida Statutes §627.736(5)(b)(1)(d) (2005), creates what both parties have termed a "substantial compliance" exception to the requirements for submitting insurance claims for reimbursement. This statutory provision permits both insurers and insured persons to withhold payments for claims and/or charges, "with respect to a bill or statement that does not substantially meet the applicable requirements of paragraph (d)." Fla. Stat. §627.736(5)(b)(1)(d) (2005). Following this language, Rouse argues that any bill or statement that does substantially meet the requirements of §627.736(5)(d) must be paid by the insurer.

Notwithstanding the language in §627.736(5)(b)(1)(d), the portion of §627.736(5)(d) that relates to this argument states:

> All statements and bills for medical services rendered by any physician, hospital, clinic, or other person or institution shall be submitted on a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the office or adopted by the commission for purposes of this paragraph. Fla. Stat. §627.736(5)(d) (2005)

The word "shall" in this paragraph indicates a mandatory provision of the PIP statute, one that dictates acceptable versions of PIP claim forms. While Rouse argues that invoking the substantial compliance clause in §627.736 means one of these forms need not be used, this Court disagrees.

The substantial compliance paragraph should be invoked once the insured has passed the threshold of submitting their claim on a CMS 1500, UB 92, or other approved standard form. If such a claim is submitted (on a proper form), and it is later discovered that a deficiency exists, the "substantially meet the applicable requirements" section should be invoked to keep an otherwise proper claim from being denied. While numerous courts have ruled that this is the

proper application of §627.736(5)(b)(1)(d), Rouse did not present this Court with any case law to support their opposing interpretation of this section.

Rouse next argues that United failed to provide an Explanation of Benefits (EOB) and therefore waived their defense that the bills were not submitted on the appropriate standardized forms. In response, United presents a two-fold argument. First, United claims they were not under any statutory obligation because §627.736(5)(b) had not been properly complied with, and as such the requirement to issue an EOB, found in §627.736(4)(b), had not been triggered. Secondly, United asserts that the language of §627.736(4)(b) permits an insurer to raise a violation of subsection 5 at any time and consequently United's failure to issue an EOB did not serve as a waiver of their affirmative defenses.

The pertinent language of §627.736(5)(d) states that: "[f]or purposes of paragraph (4)(b), an insurer shall not be considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph, and unless the statements or bills are properly completed in their entirety as to all material provisions, with all relevant information provided therein." Fla. Stat. §627.736(5)(d) (2005). Rouse uses this language, coupled with an order on summary judgment from Broward County, to argue that United was obligated to issue an EOB. In Rouse's cited case, *Martinez v. United*, 14 Fla. L. Weekly Supp. 308a (Fla. 17th Cir. Ct. Jan. 16, 2007), the plaintiff chiropractor received partial summary judgment in its favor as to the defendant's examination under oath no-show defense. United contends, and this Court agrees, that *Martinez* is distinguishable from the instant case. In *Martinez*, United's inaction following the receipt of a valid claim resulted in the partial summary judgment order against them and in favor of Martinez. The crucial difference between the Martinez case and the instant one is that Martinez submitted a valid claim to United, while Rouse did not.

As this Court previously discussed, Rouse did not submit a proper claim to United. Therefore United was not furnished with anything that would have triggered the requirement to issue an EOB under subsection (4)(b). If this Court were to have no further arguments to consider on appeal, we would not hesitate to deny this instant appeal. However, another argument remains for our consideration, and this particular argument completely alters the outcome of this appeal.

Rouse's third argument centers on Florida Rule of Civil Procedure 1.120(c). Rouse argues that United was required to specifically deny the performance of a condition precedent pursuant to Fla. R. Civ. P. 1.120(c). By failing to do so, United waived its defense to nonpayment of the bills. The language of rule 1.120(c) states:

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver that all conditions precedent have been performed or have occurred. *A denial of performance or occurrence shall be made specifically and with particularity.* Fla. R. Civ. P. 1.120(c) (emphasis added).

Since Rouse alleged performance with all conditions precedent in his complaint, United should have denied these allegations specifically and with particularity. Meaning, in order to properly deny these allegations, they should have set out which conditions precedent to recovery the Rouse did not satisfy.

Another appellate panel in this Court's circuit has recently dealt with the consequences of improperly denying the performance of conditions precedent. In *Cevallos v. Mercury Ins. Co. of Fla.*, No. CVA1 06-86 (Fla. 9th Cir. Ct. June 25, 2009), the appellate panel reversed a final summary judgment in favor of the defendant insurance carrier. The defendant failed to deny the performance of conditions precedent specifically and with particularity. The appellate panel's analysis is completely in line with the instant appeal. The *Cevallos* court stated:

> Prior case law sets forth the construction of this rule. For example, "[c]ourts have repeatedly reinforced that in order for conditions precedent to be properly raised they must be pled with specificity." *Damadian MRI in Pompano Beach, P.A. v. United Auto. Ins. Co.*, 14 Fla. L. Weekly Supp. 184a (Fla. 17th Cir. Ct. Dec. 22, 2006). Pursuant to Florida Rule of Civil Procedure 1.120(c), in pleading a denial of performance or occurrence of a condition precedent, it shall be made specifically and with particularity. *Id*. When an adverse party is claiming a condition precedent was not complied with, it must do so with detail. *Id*. *See also San Marco Contracting Co. v. State Dept. of Trans.*, 386 So. 2d 615 (Fla. 5th DCA 1980).
>
> By failing to specifically allege that the Appellants did not give proper notice or that they failed to submit proper HCFA forms, the Appellee did not comply with Rule 1.120(c). As such the Appellee waived these defenses under Rule 1.140(h)(1). That rule provides: "A party waives all defenses and objections that the party does not present either by motion….or if the party has made no motion, in a responsive pleading." Fla. R. Civ. P. 1.140(h)(1).

> A party who waives an affirmative defense by defective pleading loses the ability to rely on that particular defense at trial. *See Padovano, Florida Civil Practice*, § 7:26 (2009 ed.). The trial courts relied on the improperly pleaded affirmative defenses when they issued the Final Summary Judgments on November 16, 2006, and March 26, 2007. Both orders stated that "Plaintiff's failure to submit a completed HCFA form constituted a violation of [Florida Statute Section 627.736(5)(d)]. Therefore, Defendant did not have proper notice of a covered loss under the statute." As these denials should have been deemed waived due to lack of specificity and particularity, it was reversible error for the trial courts to grant Final Summary Judgments to the Appellee based on that affirmative defense. *Cevallos v. Mercury Ins. Co. of Fla.*, No. CVA1 06-86 (Fla. 9th Cir. Ct. June 25, 2009)

This Court is unconvinced by the argument set forth by United in their Reply Brief that claims that the affirmative defense of failure to comply with conditions precedent can be raised at any time. The 5th District Court of Appeal has recently released an opinion that addresses United's flawed argument that they have unlimited time to raise the claim that PIP claim was in violation of subsection (5). In *Florida Medical & Injury Center v. Progressive*, 35 Fla. L. Weekly D215b (Fla. 5th DCA 2010), the court cited a widely circulated, albeit unpublished, opinion from the 4th Judicial Circuit in Duval County, FL: *Lowery v. Progressive Select Ins. Co.*, 16 Fla. L. Weekly Supp. 755a (Fla. Duval Cty. Ct. July 8, 2008). In the *Lowery* opinion, Duval County Court Judge Arias broke down the language of subsection (5) and "at some length refuted this argument using a grammatical analysis of the language of the statute, applying the rules of statutory construction and reading subsection (4)(b) in pari material with the remainder of the statute." *Florida Medical*, 35 Fla. L. Weekly Supp. D215b. The 5th District Court of Appeal agreed with Judge Arias' interpretation and held that an insurer is not allowed an "unlimited time to assert that the claim was generally in violation of subsection (5); rather, this provision is limited to a claim that 'the amount of the charge was in excess of that permitted' in subsection (5)." *Id*. This Court agrees with the reasoning set forth by both the *Lowery* opinion and the controlling precedent of the *Florida Medical* opinion.

In the instant case, this Court is presented with one error committed by each party at trial level. Rouse failed to comply with Florida Statutes §627.736 by submitting a deficient PIP claim form. United waived their affirmative defense that Rouse failed to comply with all conditions precedent required to put their insurance company on notice of a covered loss. The question remaining for this Court is to determine which of these errors will determine the outcome of this

appeal. We are of the opinion that United's failure to deny the occurrence of compliance with the PIP statute requirements specifically and with particularity, and consequently United's waiver of that affirmative defense, prevents them from prevailing on this appeal. As this analysis has resolved this appeal, we decline to address Rouse's fourth argument concerning estoppel.

Finally, the 5th District Court of Appeal concluded their analysis in the *Florida Medical* case by identifying the legislative intent behind the passage of Florida's No-Fault law. Specifically, "the Legislature expressed that the purpose of the PIP statute is to provide for medical, surgical, funeral and disability insurance benefits without regard to fault." *Id*. This Court believes that the outcome of this appeal is both procedurally proper as well as in-line with the legislative intent behind the PIP statute.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that this Court **GRANTS** the instant appeal, and **REVERSES** the trial court's "Final Judgment as to United Automobile Insurance Company," dated December 12, 2008. This cause is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this ____15____day of ___March_____, 2010.

_____/s/_____
JOSE R. RODRIGUEZ
Circuit Judge

_____/s/_____
WALTER KOMANKSI
Circuit Judge

_____/s/_____
BOB LEBLANC
Circuit 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:

Charles Rand, Esq.; Charles M. Rand, P.A., 407 Wekiva Springs Road, Suite 119, Longwood, FL, 32779, and

Paul S. Jones. Esq. & Katherine N. Kmiec, Esq.; Luks, Santaniello, Perez, Petrillo & Gold, P.A., 255 South Orange Ave., Suite 930, Orlando, FL 32801.

_____/s/_____
JUDICIAL ASSISTANT

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Before RODRIGUEZ, KOMANSKI, LEBLANC

ORDER ON MOTION FOR REHEARING

THIS CAUSE is before the Court upon Appellee's Motion for Rehearing in response to this Court's Opinion filed on March 16, 2010. The Court being duly advised in the premises finds:

This Court issued its opinion in this case on March 16, 2010. Appellee timely filed its Motion for Rehearing on March 30, 2010. Prior to the issuance of our "Final Order and Opinion Reversing Trial Court," this Court treated the instant appeal with careful attention and reviewed applicable precedent, which was expressed in this Court' Order.

The Appellee has failed to present to this Court any new point or issue that the Court failed to consider or misapprehended in rendering its Order on March 16, 2010, which would render the decision erroneous. *Hollywood, Inc. v. Clark*, 15 So. 2d 175 (Fla. 1943); Fla. R. App. P. 9.330. Further, the Appellee attempts to improperly introduce additional authority in its

motion for rehearing, which was not presented or argued in its Answer to the Initial Brief. *Cartee v. Florida Dep't of Health & Rehab. Serv.*, 354 So. 2d 81 (Fla. 1st DCA 1977). Consequently, this Court finds no basis for the motion.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Appellee's "Defendant, United Automobile Insurance Company's, Motion for Rehearing," is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this ____20____day of _____April_____, 2010.

_____/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

_____/S/_____
WALTER KOMANKSI
Circuit Judge

_____/S/_____
BOB LEBLANC
Circuit Judge

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_____/S/_____
JUDICIAL ASSISTANT