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

XXXXXXXXXXXXXXXXXDC, PA,
Plaintiff,

CASE NO. 200X-SC-XXXXX

v.

Division 73

XXXXXXXXXXXXXXXXXXXXXXXXXXXXX
INSURANCE COMPANY,
Defendant.
_______________________________________/

ORDER DENYING ALL THREE PENDING MOTIONS FOR ATTORNEY FEES AND COSTS

In this PIP case three motions for 57.105 sanctions have been filed. Defendant insurance company has filed two motions and Plaintiff has filed one motion, for attorney fees and costs pursuant to *Florida Statutes,* Sec. 57.105. This statute has been said to impose a duty, or at least a penalty for failing to voluntarily dismiss a claim or a defense when it becomes clear that the claim or defense is untenable, *Deborah Mullins v. John and Patricia Kennelly,* 847 So. 2d 1151 (Fla. 5th DCA, 2003). An award of fees under 57.105 must be supported by substantial, competent evidence, and the trial court must make specific findings that the claim or defense was not supported by material facts, or by the application of then-existing law to the material facts, *Shortes v. Hill,* 860 So. 2d 1 (Fla. 5th DCA, 2003); *Vincent Preziosi, DC v. Progressive Express Insurance Company,* 2006-CA-277 (Fla. 9th Cir. App., 2009).

What follows is a fairly long story. The detail should be helpful to the attorneys or any reviewing court. The circumstances surrounding this type of PIP litigation at the time, for example, play in to the determination of whether or not an attorney acted in good faith in filing a claim which arguably had no basis because the original benefits had already been paid. Once filed, the suit was arguably maintained past a reasonable point after the District Court of Appeal clarified that these type suits were not tenable, however, this Court found that there was no sufficient safe harbor notice in regard to that issue and that the 57.105 motion directed to that issue was not only vague, but it was filed after the Plaintiff had already voluntarily dismissed the suit. The fact that the 57.105 motions flew back and forth is significant, because this case seems to demonstrate that Section 57.105 can be used too often. There is a risk that it can become another layer of litigation on top of the substantive litigation.

Although Plaintiff's 57.105 motion was not called up for hearing, the Court addresses and answers that motion along with all the others. The fact that these motions went back-and-forth is integral to the way this Court reviews the entire context.

Storyline:

This case was filed in February 2007 as a declaratory judgment action to obtain a PIP log and insurance policy. The medical treatment provided by Plaintiff had been paid for by Defendant before suit was filed. Nevertheless, Plaintiff alleged in its February 2007 Complaint that Plaintiff believes it is entitled to benefits for medical treatment under the policy of insurance issued by Defendant. This is the first asserted error which Defendant argues would justify the imposition of 57.105 sanctions, that Plaintiff knew it had been paid by the insurance company for the medical treatment, and there was no basis to assert that Plaintiff was still Aentitled to benefits for medical treatment.

As an additional basis for relief, Defendant argued (unsworn) that even though it was not required to provide a PIP log in a case in which the benefits had been paid, that it complied with Plaintiff's demand and sent a PIP long and insurance policy to Plaintiff's counsel prior to this lawsuit being filed. Defendant produced a copy of correspondence dated December 18, 2006 which was addressed to Plaintiff's attorney. Defense counsel argued (unsworn) that this correspondence was a PIP log and had been sent on the date on the correspondence. Plaintiff's counsel argued in rebuttal (unsworn), that he never received the 2006 correspondence containing the PIP log and policy, or that if he did, the correspondence was misdirected because it listed the name of a different insured first instead of the insured who is the subject of this case. Defense counsel argued (unsworn) that Plaintiff's counsel represented the other insured party also, and that Plaintiff's counsel created four lawsuits out of one accident, and that Plaintiff's counsel should be held to have known about the correspondence even if it was put in the other insured client's file. The only *record* evidence on these factual allegations is the copy of the correspondence which was filed without objection. However, the exhibit standing alone, is insufficient to sustain a factual finding that Plaintiff's counsel either did, or did not receive the alleged PIP log and insurance policy prior to suit being filed. (This type issue is generally called a mailbox rule issue, resolved by evidentiary hearing before the court).

As strange as it may seem in hindsight that a medical provider would make a claim for a PIP log when the underlying claim for benefits had already been paid, this Court would observe that there was a heyday on PIP log actions during the time period surrounding the *New Hampshire Indemnity Ins. Co. v. Rural Metro Ambulance,* 13 Fla. L. Weekly Supp. 573a (Fla. 18th Cir.App. 2005) case. During that time, some courts including the 9th Circuit, held that a medical provider may be entitled to a PIP log and insurance policy copy in order to determine if PIP benefits were properly exhausted, (see *American Vehicle Insurance Company v. Florida Emergency Physicians Kang & Assoc. a/a/o Carrico,* CVA1-05-17 (9th Cir.App.,2007).

Some lawyers were so caught up in the rush with these PIP log cases, that they could not believe that the PIP log demands could not stand alone when benefits had already been paid. In one of these cases, the undersigned judge granted an insurance company's motion for summary judgment and entered a defense final judgment, finding that:

> "Since there is no outstanding or unpaid bill in this case, there is not a sufficient case in controversy to constitute grounds for declaratory judgment. This Court is not convinced that it would be a wise or sustainable decision to extend *American Vehicle Insurance Company v. Florida Emergency Physicians Kang & Assoc. a/a/o Carrico,* CVA1-05-17 (9th Cir.App.,2007) to the case at bar," (Order dated November 2, 2007, Case No. 2005-SC-6643).

That case was appealed, (*Hawthorne v. Progressive,* CVA1-08-09), and is still pending.

Four months after the case at bar was filed, the 9th Circuit Court in it's appellate capacity ruled that a PIP log declaratory judgment action could not be made out of a case in which benefits had already been paid. In *Obando v. State Farm Fire and Casualty Co.,* 14 Fla. L. Weekly Supp. 932a (June, 2007)*,* the Court found that;

> "Other than Appellant's claimed need for the PIP log, the record reflects an absence of any dispute over the payment or non-payment of a submitted claim. There is also nothing in the record to suggest that Appellant is disputing that a bill was correctly applied to the deductible or disputing that coverage has been exhausted.... Without a cognizable dispute, it is simply inappropriate to render a declaratory judgment."

Given the fact that at least two local cases were appealed due to the plaintiff's attorneys belief that they could make a declaratory judgment action for a PIP log out of a case in which the underlying benefits had already been paid, the Court is tempted to consider the mileu of PIP litigation at the time, in finding that the lawyer in the case at bar, acted in good faith *when he filed this case.*

The main basis for Defendant's claim for attorney fees, is that Plaintiff's counsel maintained this suit too long after the case law had been clearly decided against Plaintiff's position that PIP logs could be obtained through declaratory judgment lawsuits. Florida's 5th DCA ruled in December 2007 that the declaratory judgment actions to obtain PIP logs and insurance policy copies were not tenable, *Geico General Insurance Co. v. Florida Emergency Physicians,* 972 So.2d 966. The Defense filed a motion for summary judgment based upon *Geico* and the *Progressive v. Rural Metro*, 994 So.2d 1202 (Fla. 5th DCA Nov. 2008). Plaintiff's counsel filed a voluntary dismissal two months later, in February 2009.

It is seems reasonable to infer that Defendant's clear and specific disclosure of binding authority compelled Plaintiff to dismiss this case. It also seems reasonable to infer that disclosing this binding authority earlier in the case would have resulted in the case being concluded sooner. Finally, it seems reasonable to conclude that this is exactly the type of notice which ought to be required by Section 57.105(4). To do otherwise might encourage litigants to delay notifying their opponent or filing a summary judgment motion in hopes of obtaining 57.105 fees if the opposing party doesn't voluntarily dismiss the case within some defined reasonable period of time.

Another way to have resolved this case early, would have been for Defense counsel to have called Plaintiff's counsel and said, "Hey, you need to look at the *Geico* case. All the other plaintiff's lawyers are dropping these PIP log suits." That might have resulted in a voluntary dismissal being filed in early 2008 instead of early 2009. Professional courtesy extended in this manner can solve the type of problems now being sought to be cured by Section 57.105. It is a 'problem solving' approach rather than a litigation approach. It is a far more practical, effective, and professionally rewarding approach than the litigation intensive approach.

Instead we have three motions for 57.105 sanctions filed in this case. In the first 57.105 motion, Defendant requested sanctions against Plaintiff due to Defendant's position that the PIP log had been sent to Plaintiff prior to this suit being filed. In the second 57.105 motion, Plaintiff asserted that Defendant's Motion to Dismiss was legally deficient by attaching and relying on documents which were not in the four corners of the Complaint. As legal authority for his assertion, he stated that; "This principle is a first year, first semester principle of law school," and that both Defense counsel "knew or should have known that this claim/defense was without legal justification and was not supported by the facts or the law." For good measure Plaintiff's counsel added that one of the defense lawyers was "supposedly supervising" the other one, as if to infer that he was not doing a good job supervising due to filing the motion which Plaintiff's counsel deemed "obvious(ly) legally deficient" to the extent that he deemed it worthy of a 57.105 motion in response.

The third 57.105 motion was filed right *after* Plaintiff dismissed it's Complaint. The Defense responded to the Plaintiff's Voluntary Dismissal by filing it's second 57.105 Motion For Attorney Fees and Costs. This motion asserted that Plaintiff and Plaintiff's counsel:

> "....knew or should have known that Florida law did not require an insurer to provide a certified copy of a declarations page before this lawsuit was filed. As such, the Plaintiff's claim was not supported by the material facts necessary to support the claim and/or by the application of then-existing law to those material facts. This is true, especially considering that the Plaintiff did not contend that Defendant failed to pay or improperly reduced any of the medical bills submitted for payment on behalf of Xxxxx Xxxx."

At the hearing on Defendant's motions for 57.105 sanctions, Defendant argued that Plaintiff and Plaintiff's counsel should pay Defendants fees and costs because Defendant had paid the benefits and sent the PIP log and policy copy prior to suit being filed, and because Plaintiff should have known about case law developments.

<u>Conclusions and Findings:</u>

This case is troubling for a number of reasons. This Court does not intend to shirk from imposing 57.105 sanctions in order to curtail costly, unfocused litigation. However, prior to obtaining 57.105 attorney fees as a sanction, a party should be required to send a 57.105(4) notice which clearly and specifically cites what legal authority might have been overlooked.

"The primary purpose of section 57.105(4) is not to spring a procedural trap upon the unwary.... Rather its function is to give a pleader a last clear chance to withdraw a frivolous claim or defense...," *Maxwell Building Corp. v. Euro Concepts, LLC,* 874 So. 2d 711 (Fla. 4th DCA 2004). In the case at bar, the third 57.105 motion is the one which seeks sanctions for filing a baseless suit or a suit maintained after case law changed. But it was filed *after* this case was dismissed. "A party cannot circumvent the purpose of the safe harbor provision by waiting until after the case is settled or the claims dismissed to move for sanctions, since then there is nothing for the offending party to amend or correct." 61A Am.Jur.2d Pleading Sec. 639, citing *Progress Federal Sav. Bank v. Lenders Assoc., Inc.,* 1996 WL 57942 (E.D. Pa. 1996).

A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11, Temple Law Review, Spring 1994 (Cutler), details the experience the federal courts have had in enforcing Rule 11, the federal version of 57.105. This article exposes some of the possible pitfalls which this Court hopes to avoid. Although the intention of these type sanctions is to curtail litigation by making it cost prohibitive, there is some evidence that these motions can actually fuel another layer of litigation on top of the original substantive litigation. Lawyers may become defensive, or even aggravated or unprofessional and hurl 57.105 motions back and forth at each other. Perhaps the fact that three such motions were filed in this case is a demonstration of the type problems identified in the law review article.[1]

In this case, Defendant first clearly and specifically notified its opponent of controlling legal authority within it's December 2008 Summary Judgment Motion. The opposition filed it's voluntary dismissal two months later. The 57.105 motion alleging that the opponent "knew or should have known" that the case law did not support his position, filed *after* the case was voluntarily dismissed, was too late and had been rendered moot by the voluntary dismissal.

In regard to the first 57.105 motion, no relief is afforded because insufficient record evidence was adduced to support a finding that the PIP log had been received by Plaintiff in light of Plaintiff's denial of receipt. That issue could have been resolved by evidentiary motion at some juncture in this case, but it was rendered moot by the voluntary dismissal.

The second 57.105 motion filed by Plaintiff in response to Defendant's Motion to Dismiss was not at issue for determination, but was detailed in order to show how these motions were filed in a back-and-forth manner.

WHEREFORE, all of the three 57.105 motions pending in this case are Hereby DENIED.

DONE AND ORDERED this xx th day of xxxxxx, 200x in Chambers at Orlando, Orange County, Florida.

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DEB SAMMONS BLECHMAN
Orange County Judge

I HEREBY CERTIFY that a true copy of the foregoing was furnished this ____ day of August, 200x to:
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____
Judy Ball, Judicial Assistant

[1] This article mentions some sanctions which the federal courts can employ instead of ordering the offending litigant and attorney to pay their opponents fees. A potentially practical sanction is to allow the judge to assess a cost to be paid to the Court instead of to the other party/attorney. Payment of these funds into the statewide court trust fund could help alleviate the court congestion caused by meritless litigation, without fueling the likelihood of competing attorney fee motions. Another option which might be considered, would be the publication of sanctions orders in the local bar publications, with or without the attorneys names redacted, as an educational tool, in order to foster the real intent of 57.105 or federal Rule 11, which is to cause attorneys to perform a thorough and honest assessment of any claim or defense *before they put their name on the pleading.* One last point, is that protections need to be in place to inform litigants at the onset of a 57.105 motion being filed, that they could be exposed to sanctions in the form of attorney fee awards to the opposing side. The litigants are entitled to a frank cost/benefit analysis at that point.