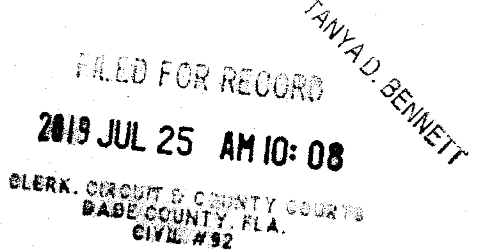

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO. 16-453 AP

LOWER COURT CASE NO.
12-18070 SP 23

UNITED AUTOMOBILE INSURANCE CO.,

Appellant,

v.

MIAMI DADE COUNTY MRI, CORP. a/a/o JAVIER RODRIGUEZ,

Appellee.

_______________________________/

ALBERTO MILIAN
CIRCUIT COURT JUDG

Miguel M. de la O
CIRCUIT COURT JUDGE

PEDRO ECHARTE, JR.
CIRCUIT COURT JUDGE

OPINION

Opinion filed:

On Appeal from the County Court in and for Miami-Dade County, Florida, Judge Myriam Lehr.

Michael J. Neimand, Esq., for Appellant.

Virginia M. Best, Esq. and Johanna M. Menendez, Esq., for Appellee.

Before: PEDRO P. ECHARTE, JR., ALBERTO MILIAN, and MIGUEL DE LA O, JJ.

DE LA O, J.[1]

ON MOTION FOR REHEARING

Upon consideration of Appellee's Motion for Rehearing, we grant rehearing, withdraw the panel opinion of May 8, 2019, and substitute the following opinion in its place.

When considering motions for summary judgment, trial and appellate courts must interpret affidavits and other evidence in the light most favorable to the non-moving party, and may only grant summary judgment if no genuine issue of material fact exists. *See del Pino Allen v. Santelises*, 271 So. 3d 1112, 1113 (Fla. 3d DCA 2019); *Rakusin Law Firm v. Estate of Dennis*, 27 So. 3d 166, 166–67 (Fla. 3d DCA 2010). A mere "iota" or "scintilla" of evidence in the non-moving party's favor is sufficient to preclude the entry of summary judgment. *See Ortega v. Citizens Prop. Ins. Corp.*, 257 So. 3d 1171, 1172 (Fla. 3d DCA 2018) (citing *Carnes v. Fender*, 936 So. 2d 11, 14 (Fla. 4th DCA 2006)). The trial court determined that the affidavit of Appellant's expert, Dr. Edward Dauer, M.D. ("Dr. Dauer"), failed to satisfy the *Daubert* standard and, therefore, disregarded it. Because Dr. Dauer's affidavit was the only evidence Appellant submitted in opposition to summary judgment, the trial court granted summary judgment in favor of Appellee.

[1] Judge de la O did not participate in oral argument.

This Court reviews a trial court's ruling on a motion for summary judgment *de novo*. *See Shands v. City of Marathon*, 261 So. 3d 750, 752 (Fla. 3d DCA 2019). However, we review the trial court's decision to disregard (*i.e.*, strike) Dr. Dauer's affidavit under an abuse of discretion standard. *See Baan v. Columbia Cty*, 180 So. 3d 1127, 1131 (Fla. 1st DCA 2015), *citing Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 194 n.2 (Fla. 1st DCA 2015) *(citing Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). Because the trial court abused its discretion by disregarding Dr. Dauer's affidavit, and because the affidavit constituted sufficient evidence to create a genuine issue of material fact, we reverse.

Javier Rodriguez sustained injuries as a result of a motor vehicle accident, and sought treatment with the Appellee, Miami Dade County MRI, Corp. ("Provider"). The Provider billed Mr. Rodriguez's PIP insurer, United Automobile Insurance Company ("United"). United paid less than the billed amount, and the Provider sued for the difference between what was billed and what was paid. United stipulated to the relatedness and necessity of the medical services provided, but disputed that the charges were reasonable. The Provider moved for summary judgment, and the parties submitted competing affidavits as to the reasonableness of the charges. The trial court found that the Provider's affidavit was sufficient, but that United's was not. It granted summary judgment and final judgment in favor of the Provider. We

agree that the Provider's affidavit was sufficient, but determine that United's affidavit was sufficient as well.

Affidavits in support of, or in opposition to, summary judgment must meet the requirements of Florida Rule of Civil Procedure 1.510(e), and they must not be conclusory. "However, the evidence offered 'need not be in the exact form, or cover all the preliminaries, predicates, and details which would be required of a witness, particularly an expert witness, if he were on the stand at trial.'" *State Farm Mut. Auto. Ins. Co. v. Roberto Rivera-Morales, M.D. a/a/o Joseph*, 26 Fla. L. Weekly Supp. 454a (Fla. 11th Cir. Ct. July 17, 2018) (quoting *OneWest Bank, FSB v. Jasinski*, 173 So. 3d 1009, 1013-14 (Fla. 2d DCA 2015)).

United relied on an affidavit of Dr. Dauer. The Provider argues that Dr. Dauer's affidavit "is conclusory as it simply states that the Plaintiff's charges are excessive and unreasonable, and solely relies upon his charges to support said proposition." But, to the contrary, rather than relying solely on his own charges, Dr. Dauer states in his affidavit that he has "discussed reimbursement rates with [his] peers and colleagues, which include but are not limited to physicians who work in diagnostic centers in Miami-Dade and Broward Counties as well as physicians who have owned and operated their own diagnostic centers in both counties." He further states that these physicians' "experience of charges and reimbursement rates in the community is consistent with the experience I have detailed" in the affidavit. He

also describes his own experience. He states that "[i]n my professional practice as a medical doctor over the last 38 years, I have treated patients injured in automobile accidents and reviewed and evaluated medical records and bills for patients who were injured in automobile accidents and received medical treatments and diagnostic tests." He asserts that he has "over 30 contracts with both private, managed care, and government insurance companies and am familiar with reasonable reimbursement rates for both professional and technical fees based on my experience of providing and paying for these services for 32 years." Based on his knowledge and experience, he concludes that the charges are not reasonable. Dr. Dauer's affidavit is not conclusory. It explains how his knowledge and experience, including decades of practicing as a medical doctor and reviewing bills for patients who were injured in automobile accidents, backed up by discussions with his peers and colleagues, provides him with knowledge regarding the reasonableness of fees for services like the ones at issue in this case.

The Provider argues that even if Dr. Dauer's affidavit were sufficient to raise an issue of disputed fact, the trial court did not abuse its discretion by disregarding the affidavit under a *Daubert* analysis. Absent Dr. Dauer's affidavit, of course, the Provider is entitled to summary judgment. However, we find the trial court did abuse its discretion by disregarding Dr. Dauer's affidavit.

The Provider incorrectly argues the trial court had a "superior vantage point" to this Court in determining whether Dr. Dauer's affidavit was conclusory or otherwise met the requirements of *Daubert*. The trial court relied on Dauer's Affidavit as written. There is no indication in the record that the trial court held an evidentiary hearing, that Dr. Dauer testified at any such hearing, or that the trial court made any credibility findings following such a hearing. The trial court read Dr. Dauer's affidavit, heard arguments, and made a ruling. This Court can review the affidavit as well as the trial court and draw its own legal conclusions about whether the affidavit violated *Daubert*, and whether the trial court abused its discretion in disregarding Dr. Dauer's affidavit.

The Provider further claims that the trial court could not have abused its discretion because other circuit appellate panels have affirmed other trial courts that struck Dr. Dauer's affidavit. For a number of reasons, we reject the notion that a trial court cannot abuse its discretion when other circuit court appellate panels affirm its actions in similar cases.

First, the specifics of a particular expert's testimony are the key to determining if that expert should be allowed to testify under *Daubert*. *See Meyerson v. Walgreen Co.*, 2006 WL 8431622, at *1 (S.D. Fla. Apr. 19, 2006) ("*Daubert* motions require[] the Court to engage in fact-intensive inquiries"); *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 77-78 (E.D.N.Y. 2000) ("The *Daubert* gate-keeping

function applies even in the case of a non-scientific expert. *See Kumho Tire,* 119 S. Ct. at 1175. In such cases, the *Daubert* factors may or may not be applicable; 'the gatekeeping inquiry must be tied to the facts of a particular case.' *Id.* . . . the admissibility inquiry under *Daubert* and *Kumho Tire* must be adapted to the facts of the case at hand"). Absent identical affidavits, and identical competing arguments regarding a motion to strike, reliance on what other judges or Circuit appellate panels have done is a weak foundation upon which to build an argument in such a fact-intensive area of the law.

Second, we must determine whether this particular trial court ruling was an abuse of discretion. Perhaps other rulings regarding Dr. Dauer's affidavit were not an abuse of discretion, but each ruling must be evaluated on its individual merits. After carefully reviewing the trial court's decision here, we conclude it is legally erroneous, which by definition is an abuse of discretion. For example, the trial court held that "Medicare, HMO, and PPO reimbursements are not relevant as to the issue of reasonableness of charges." This conclusion of law is *expressly* contradicted by the PIP statute. Insurers that do not elect to use the fee schedule limitation under section 627.736(5)(a)1.f.I., may nevertheless rely upon such fee schedules to challenge the reasonableness of a medical provider's charges under section 627.736(5)(a), which provides that in determining reasonableness, consideration may be given to "various federal and state medical fee schedules applicable to motor

vehicle and other insurance coverages." Judges are bound to follow legal principles, and their failure to do so is not immunized by the erroneous rulings of others.

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."

B. Cardozo, The Nature of the Judicial Process 141 (1921) (quoted in *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)).

Third, *Daubert's* "gatekeeping function was not intended to supplant the adversary system or the role of the jury: 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Baan*, 180 So. 3d at 1134 (quoting *United States v. Ala. Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013)) (citations omitted). Indeed, "*Daubert* and Rule 702 are not intended to provide an automatic challenge to the testimony of every expert; rather, the rejection of expert testimony is the exception not the rule." *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liab. Litig.*, 2016 WL 9560113, at *3 (N.D. Tex., Oct. 3, 2016) (citing Fed. R. Evid. 702 advisory committee note (2000)).

Fourth, reviewing the decisions upon which the Provider relies[2] reveals their shortcomings and inapplicability to the issues before us. For example, in *Jawanda James*, the panel affirmed a trial court that found Dr. Dauer's affidavit "was based on his own experience operating his own clinic, his opinion of Medicare reimbursements, and his understanding of Florida Statute section 627.736," ignoring Dr. Dauer's reference to the usual, customary, and reasonable charges in the community; his critique of the Provider's affidavit; his basis for opining that Medicare rates establish presumptive reasonable charges for particular medical services; his peer review of other providers' services and charges; and his comparison of the cost of hospital versus outpatient services. The companion decisions in *Julio Reyes* and *Barbara Perez* merely relied on *Jawanda James* for their respective rulings.

Moreover, the trial courts in *Jawanda James* and *Erlin Duran* made the identical error as the trial court here, using the identical language ("Medicare, HMO,

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[2] *United Automobile Insurance Company v. Miami Dade County MRI, a/a/o Jawanda James*, Case No. 2017-000026-AP-01 (11th Jud. Cir., April 26, 2019); *United Automobile Insurance Company v. Miami Dade County MRI, a/a/o Barbara Perez*, Case No. 2017-000027-AP-01 (11th Jud. Cir., April 26, 2019); *United Automobile Insurance Company v. Miami Dade County MRI, a/a/o Julio Reyes*, Case No. 2017-000025-AP-01 (11th Jud. Cir., April 26, 2019); and *United Automobile Insurance Company v. Miami Dade County MRI, [a/a/o Erlin Duran]*, Case No. 2016-000450-AP-01 (11th Jud. Cir., March 22, 2019). It should be noted that *Erlin Duran* did not concern an affidavit by Dr. Dauer.

and PPO reimbursements are not relevant as to the issue of reasonableness of charges."). This is clear legal error. Of course, trial courts do not have the discretion to ignore the law as written by the Legislature. It is, therefore, a clear abuse of discretion to do so, and those rulings should not have been affirmed. The trial court in *Julio Reyes* similarly held that "Medicare is not relevant in PIP cases, and should not be used unless the appropriate policy election has been made."[3] Not only are decisions by other appellate panels of this circuit *not* binding upon us, but we refuse to compound legal error by blindly following erroneous ones.

Interpreting Dr. Dauer's affidavit in the light most favorable to United, the non-moving party, it provides the "iota" or "scintilla" of evidence necessary to survive summary judgment. Therefore, the trial court erred in granting summary judgment as to reasonableness. Accordingly, the summary judgment and final judgment entered below are hereby **REVERSED**, and this cause is **REMANDED** to the trial court.

ECHARTE and MILIAN, JJ., concur.

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NOT REPRESENTED BY COUNSEL.

3 The trial court in *Barbara Perez* expressly disregarded the Medicare rates, effectively making the same legal error.