

NOT FINAL UNTIL TIME
EXPIRES TO FILE RE-HEARING
MOTION, AND IF FILED, DISPOSED OF

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

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

APPELLATE DIVISION
CASE NO. 17-441-AP-01

Appellant,

vs.

LOWER CASE #139625-SP-23

PAN AM DIAGNOSTIC SERVICES
INC., DBA WIDE OPEN MRI, A/A/O
YVON DUGAZON,

Appellee.

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Opinion filed this 7th day of October, 2019.

An appeal from the County Court in and for Miami Dade County, Florida, Judge Caryn Schwartz.

Nancy Gregoire, Esq., for the Appellant, State Farm Mutual Automobile Insurance Company.
Virginia M. Best, Esq. for the Appellee, Pan Am Diagnostic Services, Inc.

Before FRANCIS, WARD AND JOHNSON, JJ.

JOHNSON, J.

Francis Ward

Solely concerning reasonableness, we reverse. The trial court below focused primarily on the scientific method, holding that Dr. Dauer's testimony must be genuinely scientific to meet the dictates of *Daubert*.

It must first be noted that the reasonableness of pricing does not involve essentially scientific testimony or even a scientific issue. While not on point factually, *Messick v. Novartis*

Pharmaceuticals Corp., 747 F.3d 1193, 1198 (9th Cir. 2014), gives some guidance as to the flexible nature of a *Daubert* analysis concerning medical testimony: “But Dr. Jackson repeatedly referred to his own extensive clinical experience as the basis for his differential diagnosis, as well as his examination of Messick’s records, treatment, and history. Medicine partakes of art as well as science, and there is nothing wrong with a doctor relying on extensive clinical experience when making a differential diagnosis...”

The case at hand is even more clear and less scientific. Dr. Dauer is being offered as an expert on pricing. This can be established through experience. Roberta Kahana, who authored the affidavit in support of reasonableness, based her opinion on far less information than Dr. Dauer. Dr. Dauer has been licensed as a doctor since 1976. He is Board Certified in Diagnostic Radiology. He is a managing member of a Broward Imaging Center. He is a Research Associate Professor of Biomedical Engineering, Radiology, and Family Medicine at the University of Miami. He has reviewed and evaluated medical records and bills for patients injured in auto accidents for 40 years. Dr. Dauer additionally conducts peer reviews of medical records of other physicians and their patients, and routinely reviews both charges and reimbursements for medical services of hundreds of persons who were not his patients. His Broward P.E.T. Imaging Center has approximately 45 contracts with insurance companies, including governmental, worker’s compensation, HMO/PPO, and other third party payors.

Dr. Dauer also stated that he is familiar with reimbursement levels in Orange County (Orlando). He is knowledgeable that both charges and reimbursements are slightly lower in Orange County than Broward County. He clearly has sufficient knowledge and experience to support his testimony.

Section 627.736(5)(a)(1), Florida Statutes states that reimbursement levels in the community and payments accepted by the provider may be considered in determining whether a charge is reasonable.

In Dr. Dauer's affidavit, he indicates that Pan Am Diagnostics provides services to Medicare patients, Worker's Comp patients, and other insurance companies including HMO plans, all of which reimburse Pan Am Diagnostics at much less than 200% of Medicare, showing that Pan Am accepts far less than the \$2,150 charged for each of the two MRIs in this case. This was not refuted by the Plaintiff below at summary judgment.

Were the Appellant to show at trial, for instance, that Pan Am Diagnostics accepts \$350 for Medicare patients and \$500 for HMO patients for payment for an MRI, it could potentially cause a jury to believe that \$2,150 is an unreasonable price.

As such, the Plaintiff below did not establish *irrefutably* that the nonmoving party *cannot* prevail were a trial to be held. *Redland Ins. Co. v. Cem Site Constructors, Inc.*, 86 So.3d 1259, 1261 (emphasis in original) (Fla. 2d DCA 2012) (*quoting Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC*, 75 So.3d 864, 868 (Fla. 2d DCA 2011)).

If the slightest doubt exists as to a genuine issue of material fact, the summary judgment must be reversed. *Alvarez-Mejia v. Bellissimo Props., LLC*, 208 So.3d 797,799 (Fla. 3d DCA 2016).

(WARD AND FRANCIS, JJ. CONCUR)

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