PROGRESSIVE GARDEN STATE INSURANCE COMPANY, DRIVE NJ INSURANCE COMPANY AND PROGRESSIVE SPECIALTY INSURANCE COMPANY, **Respondent/Plaintiff(s),** v. ALLSTATE NJ INSURANCE COMPANY **Appellant/Defendant(s).**	: : : : : : : : : : :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1037-23 Team 2 **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY Law Division: Morris County Docket No.: MRS-L-328-23 **SAT BELOW:** Hon. Noah Franzblau, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT ALLSTATE NJ INSURANCE COMPANY

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THE PROVISION OF N.J.S.A. 2A:23B-6.b DOES NOT APPLY TO THE FACTS OF THIS CASE AS THERE WAS AN AGREEMENT TO ARBITRATE AND THE ARBITRATIONS WERE DECIDED PURSUANT TO THE CONTRACTUAL TERMS OF THE ARBITRATION AGREEMENT. (Da 1– Da27)

Progressive argues that the arbitration awards obtained in this matter were outside the contractual scope of the inter-company Arbitration Agreement. Progressive does not dispute that both Allstate and the Progressive Companies involved in this matter were signatories to the Arbitration Forums Medical Payments Subrogation Arbitration Agreement, which is a nationwide agreement. This is a voluntary agreement under which the parties agree to forego litigation and resolve Medpay subrogation claims in the forum. Progressive admits it is a signatory to the agreement and raises jurisdictional arguments surrounding the Article Second Exclusion which states that no company shall be required to arbitrate a claim for reimbursement of medical payments in a jurisdiction where medical payment subrogation claims are prohibited by statute or judicial decision. Progressive's Brief cites to a number of cases discussing the arbitrator's powers and states "the powers of the arbitrator are limited by the agreement of the parties and the arbitrator may not exceed the scope of the powers granted to him/her by the agreement". (PB-19). As set forth in Point I of Appellant's Brief (DB 8-13),

the contractual obligations of the intercompany arbitration agreement provide specific actions which must be taken within the contractual framework to remove the matter from the jurisdiction of Arbitration. The procedure followed in this matter is exactly that set forth in the inter-company Arbitration Agreement. Allstate filed an arbitration and briefed their position providing supporting evidence. Progressive likewise briefed their position and raised a jurisdictional exclusion alleging that the matter was outside of the jurisdiction of Arbitration Forums. The rules and regulations created by the Arbitration Forums require the arbitrator to conduct a hearing to decide the objection to jurisdiction. Counsel for Allstate and Progressive appeared at the hearing and presented their arguments and evidence. The arbitrator thereafter entered a ruling indicating that Progressive did not prove that medical payments subrogation claims were prohibited by statute or judicial decision. At no point did Progressive file an action in the Superior Court seeking to bar the inter-company arbitrations but allowed the matter to proceed before the arbitrator. Progressive voluntarily allowed the arbitrator to rule in accordance with the agreement. Progressive has offered no argument which would support a ruling that any grounds exist in law or equity to revoke the terms on the inter-company Arbitration Contract.

POINT II

MEDPAY BENEFITS RESULTING FROM A MOTOR VEHICLE ACCIDENT ARE NOT BARRED IN A PLAINTIFF'S CIVIL ACTION FOR PERSONAL INJURY OR DEATH. (Da1 – Da27).

N.J.S.A. 2A:15-97 addresses the recovery of collateral source payments in "any civil action brought for personal injury or death, except actions brought pursuant to the provisions of P.L.1972, c. 70 (C. 39:6A-1 et seq.)…". Civil action brought for personal injury or death include causes of action such as medical malpractice, slip and falls, products liability actions, civil rights violations, liable/slander, assault, and claims arising from motor vehicle accidents. The broader definition of a claim includes the entire cause of action both for personal injury, loss of consortium, death, and economic damage, including lost wages and medical expense whether compensated or uncompensated. A civil action brought for personal injury or death as a result of a motor vehicle accident is governed by the provisions of N.J.S.A. 39:6A-1 as set forth in Point IV of our Brief (DB 41-44). A civil action for personal injury or death which is governed by N.J.S.A. 39:6A-1 et seq. resulting from a motor vehicle accident encompasses all of the aspects of the injured party's claim and is not simply limited to the claim for reimbursement of Medpay benefits.

If hypothetically, the first sentence of N.J.S.A. 2A:15-97 stated "In any civil action brought for personal injury or death, except actions brought pursuant to the

provisions of P.L. 1972, c.70 (C. 39:6A-1 et. seq.) or N.J.S.A. 2A:53A-27…", then medical bills paid as a result of a medical malpractice claim would be recoverable, even though N.J.S.A. 2A:53A-27 does not specifically address the recovery of medical bills.

At the time of the enactment of the PIP statute in New Jersey in 1973 and in the years following that enactment Medpay payments were subrogable as a common law right of recovery which was supported by the subrogation provision contained in every automobile policy of insurance. See Da 236-254.

Clearly the New Jersey Department of Banking and Insurance was aware of the ability to recover Medpay payments as of their 1973 opinion. As set forth above and in our prior brief nothing in the enactment of the collateral source rule or Perreira v. Rediger, 169 N.J. 399 (2001) impacted the recoverability of Medpay payments. The consistency of this position is highlighted by the NJDOBI bulletin number 1-11 dated July 5, 2001 (Pa 19). That bulletin was issued in response to Perreira v. Rediger, 169 N.J. 399 (2001), and directed health insurance companies, health maintenance organizations, health service corporations, hospital service corporations, and medical services corporations to cease all subrogation and recovery efforts pursuant to the subrogation provisions of group or individual health insurance contracts or policies. Clearly that bulletin was not directed at automobile or motor vehicle insurance companies. It can be presumed that the

New Jersey Department of Banking and Insurance was aware of their prior position on the recovery of Medpay benefits and did not take the position the Medpay benefits authorized by various New Jersey motor vehicle policies were prohibited by the Supreme Court's ruling in Perreira v. Rediger, 169 N.J. 399 (2001).

POINT III

THE UNPUBLISHED OPINIONS CITED BY PLAINTIFF/RESPONDENT ARE NOT BINDING ON THE ARBITRATOR NOR ARE THEY PERSUASIVE IN LIGHT OF THE ARGUMENTS CURRENTLY PENDING BEFORE THE COURT. (Da1 – Da27).

At the time of the hearings with regard to arbitrations in this matter, Progressive argued both that there was no jurisdiction to hear the matter in arbitration forums and that there was no right of recovery for Medpay benefits in New Jersey. Progressive provided a number of arguments placed before the arbitrator which are currently argued in their Brief and the arbitrator clearly addressed each of the issues as raised by Progressive at the time of the hearing.

At the time of the hearing on docket number D061-00142-20 (Da 130 – 138) the arbitrator was presented with Progressive's objection to jurisdiction and denied their jurisdiction objection and stated:

> Denied for Respondent 1 - Affirmative Defense denied. Allstate and Progressive Garden State are members of Arb Forums for med pay subrogation dispute resolution. Membership is voluntary. Both have voluntary agreed to

> forgo litigation and have these disputes resolved in Arb Forums. As for the cause of action, there is no statute or reported court decision in New Jersey that has been provided in this matter that states med pay subrogation is barred in New Jersey. Common law causes of action remain viable unless and until the New Jersey legislature or Courts rule otherwise. (Da130 – Da138).

Progressive further objected to jurisdiction raising a number of Trial Court level opinions which were provided to the arbitrator and which are currently being argued before the Court. In response to a review of those unpublished Trial Court decisions the arbitrator stated:

> Affirmative Defense denied. Progressive relies on Orders from two OTSC brought against them to vacate med pay arb decisions obtained BY Progressive, in 2015 and 2019. The decisions in the OTSC is binding upon those parties, in those cases alone, with those facts and arguments raised. While both have been read and considered here, neither is binding and are not a bar to Arb Forums hearing this matter. As already stated in the prior AD raised, and acknowledged in this AD by Respondent itself, there is no reported court decision barring med pay subrogation in New Jersey. (Da130 – Da138).

Progressive cites to Warnig v. Atlantic County Special Services, 363 N.J. Super. 563 (App. Div. 2003) which was addressed by the arbitrator who stated:

> Respondent relies upon Warnig v. Atlantic County Special Services, which is inapplicable to this matter. In Warnig, the carrier paid med expense benefits to its insured who was operating a school bus and who was eligible for workers comp benefits. The Court found that the Collateral Source Rule, N.J.S.A. 39:6A-6, did not

> apply to that claim as the payments were not made pursuant to N.J.S.A. 39:6A-4 or 10. (Da130 – Da138).

Progressive further cites to Mid-Century Insurance Co. v. Freeman, 2016 N.J. Super. Unpub. LEXIS 1127 (Law Div. May 16, 2016) which was also addressed by the arbitrator who stated:

> Respondent also relies upon Mid-Century Insurance v. Freeman which is an unpublished trial court opinion and unpersuasive. The Court in Mid-Century didn't address the applicability of N.J.S.A. 39:6A-1, et seq. by way of the application of the verbal threshold nor did it address the fact that the calculation of medical benefits pursuant to the med pay benefits coverage portion of the policy was required to be accomplished by using the calculations in N.J.S.A. 39:6A-1, et seq. (Da130 – Da138).

With regard to Walsh v. Starr Transit, 2008 WL 199740 (N.J. Super. A.D.) the arbitrator stated:

> Walsh v Starr Transit is also unpublished and more importantly, does not involve a med pay subrogation claim. The issue in Walsh was whether the trial court erred in not allowing the medical benefit payments of $10,000 to be introduced at the trial under the collateral source rule, and if the issue was preserved on appeal. (Da130 – Da138).

Clearly the arbitrator addressed Progressive's contentions and objections to jurisdiction as placed before the arbitrator, which addressed all of the issues currently raised by Progressive in this Appeal and found those arguments not to be persuasive. The arbitrator's decision with regard to the arbitration docket number

D061-00142-20 was the most specific in addressing the arguments of the parties. (Da 130 – 138). In each of the other eight arbitration awards the same exact arguments were raised, virtually identically, with the arbitrator reaching the same result, entering an award in favor of Allstate. The unpublished opinions provided by Progressive are not persuasive based on the arguments placed before the arbitrator and currently before the Court. Those unpublished opinions were not binding on the arbitrator.

POINT IV

THE JUNE 27, 2023 ODER DENYING PROGRESSIVE'S ORDER TO SHOW CAUSE WAS NOT A RULING ON THE MERITS BUT AN EXPRESSION OF THE COURT'S STATEMENTS AT ORAL ARGUMENT. (Da1 – Da27).

On June 19, 2023, the Honorable Louis A. Sceusi, J.S.C. addressed pending motions between Allstate and Arbitration Forums regarding the production of documents. See Point VI of Appellant's Brief DB 45-48. At the time of the oral argument Judge Sceusi indicated that he was entering an Order compelling the discovery but was not ruling on the merits of the case and indicated that the Order to Show Cause would be adjourned until such time as the discovery was received and the judicial/equitable estoppel arguments placed before the Court. Subsequently on of June 27, 2023 Judge Sceusi entered the attached Order denying the Order to Show Cause which was not a ruling on the merits but a simple

ratification of his ruling from the bench that the matter would not proceed until a later date. (Pa 15-17). It appears that the oral argument conducted June 19, 2023 was not placed on the record as a transcript request revealed same. Had Judge Sceusi's ruling of June 27, 2023 actually been a ruling on the merits then pursuant to N.J.S.A. 2A:23B-23.d. the Court was obligated to issue an Order confirming the awards if it had actually denied the application to vacate the awards on the merits.

In Mid-Century Insurance Co. v. Freeman, 2016 N.J. Super. Unpub. LEXIS 1127 (Law Div. May 16, 2016) the Court addressed the extraordinary remedy of judicial estoppel. In the context of that matter the evidence of prior arbitration filings submitted by counsel was apparently limited to a Certification of Counsel without any evidence to support the claim. In the present instance Allstate has sought to obtain copies of the arbitrations filed by Progressive during the pendency of the arbitrations in dispute. Based on the Affidavit of Karen Torres-Acevedo (Da 255) at the pace of 46 arbitrations filed per year from 2018 to 2020; from the time the collateral source rule was enacted in 1987 Progressive would have filed well over 1,000 Medpay arbitrations prior to their 2021 unilateral decision that Medpay was not recoverable.

CONCLUSION

As Medpay benefits paid pursuant to motor vehicle policy of insurance in New Jersey are not PIP benefits or health insurance benefits and are not barred by the collateral source rule, the Trial Court's ruling in this matter should be vacated and the matter remanded for an Order entering the arbitration awards as judgments.

Respectfully submitted,

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Dated: June 13, 2024

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-1037-23T2

PROGRESSIVE GARDEN STATE INSURANCE COMPANY, DRIVE NJ INSURANCE COMPANY AND PROGRESSIVE SPECIALTY INSURANCE COMPANY Plaintiff-Respondents, v. ALLSTATE NJ INSURANCE COMPANY Defendant-Appellant,	ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MORRIS COUNTY Docket No. MRS-L-1762-22 SAT BELOW HON. NOAH FRANZBLAU,J.S.C.

APPELLATE BRIEF AND APPENDIX SUBMITTED ON BEHALF OF PLAINTIFF-RESPONDENTS, PROGRESSIVE GARDEN STATE INSURANCE COMPANY, DRIVE NJ INSURANCE COMPANY AND PROGRESSIVE SPECIALTY INSURANCE COMPANY

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PROCEDURAL HISTORY

Plaintiffs Progressive Garden State Insurance Company, Drive NJ Insurance Company, and Progressive Specialty Insurance Company (hereinafter "Progressive") filed an Order to Show Cause and Verified Complaint pursuant to Rule 4:67-1 on October 7, 2022. The action was filed against Allstate NJ Insurance Company (hereinafter "Allstate") and sought to vacate seven inter-company arbitration awards pursuant to N.J.S.A. 2A:23B-23. It was assigned docket number MRS-L-1762-22. (Da28-Da37). The Honorable Louis S. Sceusi, J.S.C. entered the Order to Show Cause on November 18, 2022 setting forth a return date of December 9, 2023. (Da38-Da41). On November 29, 2022, Allstate filed an Answer a with counterclaim seeking to enforce the inter-company arbitration awards. (Da42-Da61).

On December 6, 2023, Allstate requested an adjournment of the December 9, 2023 hearing. In the letter requesting the adjournment, it was stated that the adjournment was needed to pursue records subpoenaed from Arbitration Forums, Inc. (hereinafter "AFI"). Attached to the letter was a copy of the subpoena which did not indicate it was copied and/or served upon counsel for Progressive. (Pa6-Pa12).

On December 20, 2022, counsel for Allstate filed a motion to issue a commission for the service of a subpoena in Florida. (Pa1-Pa5) Counsel for Progressive opposed the motion, noting

that it was not served upon counsel and the first notice of the same was the December 6, 2023 adjournment request. (Pa13-Pa14). An Order issuing the commission was entered by the Judge Sceusi on January 13, 2023. (Da69-Da75). As a result of Allstate's pursuit of AFI documents, return dates on the Order to Show Cause and Verified Complaint were adjourned (February 27, 2023, March 27, 2023, April 21, 2023 and May 12, 2023).

On December 23, 2022, Progressive filed an answer to Allstate's counterclaim in docket number MRS-L-1762-22. (Da62-Da68).

Progressive filed a second summary proceeding by way of Order to Show Cause and Verified Complaint against Allstate seeking to vacate two additional arbitration awards on February 23, 2023. The matter was assigned docket number MRS-L-328-23. (Da76-Da84). On February 24, 2023, the Honorable Marcy M. McMann, J.S.C. entered the Order to Show Cause setting forth a return date of April 21, 2023 (Da85-Da88). On April 11, 2023 Allstate filed an Answer with a counterclaim seeking to enforce the inter-company arbitration awards. (Da89-Da97).

On March 24, 2023 counsel for Allstate filed a motion to enforce litigant's rights; an Order was entered on April 19, 2023 enforcing litigant's rights. On April 18, 2023, Progressive filed an answer to Allstate's counterclaim in docket number MRS-L-328-23. (Da98-Da101). On May 2, 2023, counsel for Allstate

filed a motion to consolidate which was granted on May 12, 2023 by Judge Sceusi (Da102-Da103).

On May 11, 2023 counsel for Allstate filed a motion to hold AFI in contempt for failure to comply with the terms of the April 19, 2023 Order. Counsel for AFI filed opposition to the motion and filed a cross motion seeking to vacate the prior Order and quash the subpoena. Oral argument was conducted before Judge Sceusi on June 19, 2023, and was limited to the Allstate and AFI motions. Following oral argument, the Judge Sceusi issued two (2) orders on June 26, 2023 with a written statement of reasons, vacating the prior Order enforcing litigant's rights but denying AFI's request to quash the subpoena. (Da104-Da117). Judge Sceusi entered an order on June 27, 2023 denying Progressive's Order to Show Cause without explanation other than referencing the other orders issued. (Pa15-Pa17).

Allstate's Subpoena was served on AFI by personal service on July 21, 2023. (Da259).

On July 21, 2023, notice was issued scheduling these matters for trial on November 29, 2023 (Pa18)

On September 21, 2023, counsel for Progressive filed two motions for summary judgment seeking to vacate the inter-company arbitration awards in this matter. (Da269-Da278 and Da489-Da494). On October 3, 2023, counsel for Allstate filed a motion to enforce litigant's rights against AFI as they had failed to

comply with the properly served subpoena to produce records. All of the aforementioned motions were returnable on October 20, 2023.

On October 4, 2023, counsel for AFI filed a motion seeking to quash the Allstate subpoena. On October 11, 2023, Allstate filed opposition to Progressive's summary judgment motions.

On October 17, 2023, Allstate filed a supplemental brief regarding prior arbitration awards entered in favor of Allstate. Allstate's October 17, 2023 brief was rejected by the Court as an impermissible sur-reply as part of its decision denying Allstate's request to adjourn the October 20, 2023 return date on the motions.

Oral argument on Progressive's motions was conducted on October 20, 2023. The Court entered two Orders on October 23, 2023 vacating the nine inter-company arbitration awards obtained in favor of Allstate. (Da1 – Da5). Each Order was supported by a statement of reasons. (Da10-Da27).

The Court subsequently denied the motion to enforce litigant's rights returnable November 3, 2023 indicating that as the underlying matter had been decided the relief sought was moot. (Da6-Da9). Defendant filed the present appeal, seeking relief from the three Orders entered by Judge Franzblau. (Da262-Da267).

COUNTER STATEMENT OF FACTS

1. Between July 9, 2020 and September 20, 2022, Allstate New Jersey Company (hereinafter "Allstate") filed nine (9) claims for med-pay subrogation with AFI, Inc. (hereinafter "AFI") (Da123-Da209). In each case, Allstate paid New Jersey New Jersey Medical Expense Payment ("Med-Pay") benefits on behalf of its insureds in accordance with N.J.S.A. 39:5H-10(c)(2) (Da123-Da209). These claims were submitted under a limited agreement to arbitrate (the Medical Payment Subrogation Arbitration Agreement, hereinafter "the Agreement"), to the Med-Pay Arbitration Forum of AFI (Da118-Da119). Progressive Garden State Insurance Company, Drive NJ Insurance Company and/or Progressive Specialty Insurance Company (hereinafter "Progressive") responded to each claim and timely asserted the affirmative defense med-pay subrogation was prohibited in New Jersey and therefore, the dispute was outside of the scope of the Agreement. In each case, the arbitrator denied this affirmative defense based on the fact that Progressive was a signatory to the Agreement (Da123-Da209).

2. On or about July 20, 2020, a demand for med-pay arbitration was filed by Allstate seeking recovery of $3,096.65 on behalf of Aytekin Sirin as a result of an automobile collision that reportedly occurred in New Jersey on October 25, 2019. The demand was subsequently amended to increase the

amount sought to $8,115.84. This arbitration was as assigned AFI Docket No. D061-00171-20-00 (Da123-Da129).

3. On December 22, 2021 the assigned arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement . A full arbitration hearing was held on July 19, 2022, and by decision published July 23, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $8.115.84 demanded (Da123-Da129).

4. On or about July 9, 2020, a demand for med-pay arbitration was filed by Allstate seeking recovery of $10,000.00 on behalf of Mario Liberato Fernandez as a result of an automobile collision that reportedly occurred in New Jersey on July 24, 2018. The arbitration was assigned AFI Docket No. D061-00142-20-00 (Da130-Da138).

5. On August 1, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on August 1, 2022, and by decision published August 1, 2022, the arbitrator found in favor of Allstate. The arbitrator

simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $10,000 demanded (Da130-Da138).

6. On or about August 20, 2020, a demand was filed by Allstate seeking recovery of $1,972.84 on behalf of Cristina Santo as a result of an automobile collision that reportedly occurred in New Jersey on November 19, 2018. This arbitration was assigned AFI Docket No. D061-00244-20-00 (Da139-Da146).

7. On August 22, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on August 22, 2022, and by decision published August 23, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $1,972.84 demanded (Da139-Da146).

8. On or about July 9, 2020, a demand was filed by Allstate seeking recovery of $10,000.00 on behalf of Rolando Genao as a result of an automobile collision that reportedly occurred in New Jersey on July 10, 2019. This arbitration was assigned AFI Docket No. D061-00252-20-00 (Da147-Da155).

9. On August 22, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on August 22, 2022, and by decision published August 23, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $10,000.00 demanded (Da147-Da155).

10. On or about August 10, 2020, a demand was filed by Allstate seeking recovery of $10,000.00 on behalf of Galo Ricaurte Arrieta as a result of an automobile collision that reportedly occurred in New Jersey on November 29, 2019. This arbitration was assigned AFI Docket No. D061-00223-20-00 (Da156-Da164).

11. On August 22, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on August 22, 2022, and by decision published August 23, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator

directed Progressive to reimburse Allstate the $10,000.00 demanded (Da156-Da164).

12. On or about August 19, 2020, a demand was filed by Allstate seeking recovery of $4,877.24 on behalf of Luis-Amada Martinez as a result of an automobile collision that reportedly occurred in New Jersey on November 29, 2019. This arbitration was assigned AFI Docket No. D061-00237-20-00 (Da165-Da171).

13. On September 19, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on September 19, 2022, and by decision published September 20, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $4,877.24 demanded (Da165-Da171).

14. On or about December 7, 2021, a demand was filed by Allstate seeking recovery of $5,000.00 on behalf of Joel A. Ramos as a result of an automobile collision that reportedly occurred in New Jersey on May 7, 2021. This arbitration was assigned AFI Docket No. D061-00212-21-00 (Da178-Da186).

15. On September 20, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits

Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on September 20, 2022, and by decision published September 23, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $5,000.00 demanded (Da178-Da186).

16. On or about October 13, 2020, a demand was filed by Allstate seeking recovery of $5,000.00 on behalf of Zarinah N. Yasin as a result of an automobile collision that reportedly occurred in New Jersey on October 18, 2018. This arbitration was assigned AFI Docket No. D061-00391-20-00 (Da172-Da177).

15. On October 27, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on October 27, 2022, and by decision published October 27, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $5,000.00 demanded (Da172-Da177).

16. On or about August 29, 2022, a demand was filed by Allstate seeking recovery of $10,000.00 on behalf of Hazel Quesada as a result of an automobile collision that reportedly occurred in New Jersey on September 1, 2020. This arbitration was assigned AFI Docket No. D22018718B8-C1 (Da187-Da209).

19. On October 28, 2022 the arbitrator denied Progressive's affirmative defense that New Jersey law prohibits Allstate's Med-Pay subrogation claim and as a result, the dispute was outside the scope of the Agreement. A full arbitration hearing was held on October 28, 2022, and by decision published October 28, 2022, the arbitrator found in favor of Allstate. The arbitrator simply found that the Progressive insured was fully responsible for the underlying loss. As a result, the arbitrator directed Progressive to reimburse Allstate the $10,000.00 demanded. The award was amended to $500.00 (Da187-Da209).

LEGAL ARGUMENT

POINT I

INTERCOMPANY ARBITRATION AWARDS ARE SUBJECT TO REVIEW IN ACCORDANCE WITH N.J.S.A. 2A:23B-1 ET SEQ.

There can be no question that New Jersey allows for the review of intercompany arbitration awards, subject to the specific limitations of the statutory language. N.J.S.A. 2A:23A-1 et seq. and N.J.S.A. 2A:23B-1 et seq. clearly manifest the legislative intent to allow for judicial review of alternate dispute resolution awards, including awards rendered based upon an agreement to proceed to alternate dispute resolution. N.J.S.A. 2A:23A-1 et seq. specifically applies to alternate dispute resolution agreed upon in a contract. N.J.S.A. 2A:23B-1 et seq., adopted in 2003, repealed N.J.S.A. 2A:24-1 through 2A:24-11 and applies to alternate dispute resolution resulting from arbitration agreements.

Arbitration, while a favored remedy, remains the result of contract and the question of whether a contract properly reflects the intentions of the parties and specifically, whether a particular dispute falls within the scope of an arbitration agreement requires application of juris prudence and court intervention. "In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only

those issues may be arbitrated which the parties have agreed shall be." Fawzy v. Fawzy, 199 N.J. 456, 469 (2009) citing In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228-29 (1979). In the same vein, a "court may not rewrite a contract to broaden the scope of arbitration[.]" Fawzy, supra., citing Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J.Super. 370, 374 (App.Div.1990).

There are many provisions N.J.S.A. 2A:23B-1 et seq. which firmly establish that judicial intervention was an intended component of the legislation and as a result, judicial review of the intercompany arbitration awards at issue in this matter cannot be foreclosed[1]. The present matters were filed specifically in accordance with N.J.S.A. 2A:23B-23, which provides:

> 2A:23B-23. Vacating award
>
> a. Upon the filing of a summary action with the court by a party to an arbitration proceeding, the

[1] A review of the various sections within N.J.S.A. 2A:23B-1, et seq. finds multiple sections which provide for judicial intervention and/or review in connection with an arbitration. These include:

2A:23B-5. Application for judicial relief
2A:23B-6. Agreement to arbitrate; validity
2A:23B-18. Judicial enforcement of preaward ruling
2A:23B-22. Confirmation of award
2A:23B-23. Vacating award
2A:23B-24. Grounds for modification or correction of award
2A:23B-25. Judgment on award; reasonable fees and costs
2A:23B-26. Jurisdiction
2A:23B-27. Venue
2A:23B-28. Appeal.

court shall vacate an award made in the arbitration proceeding if:

(1) the award was procured by corruption, fraud, or other undue means;

(2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

b. A summary action pursuant to this section shall be filed within 120 days after the aggrieved party receives notice of the award pursuant to section 19 of this act [FN3] or within 120 days after the aggrieved party receives notice of a modified or corrected award pursuant to section 20 of this act, [FN4] unless the aggrieved party alleges that the award was procured by corruption, fraud, or other undue means, in which case the summary action shall be commenced within 120 days after the ground is known or by the exercise of reasonable care would have been known by the aggrieved party.

> c. If the court vacates an award on a ground other than that set forth in paragraph (5) of subsection a. of this section, it may order a rehearing. If the award is vacated on a ground stated in paragraph (1) or (2) of subsection a. of this section, the rehearing shall be before a new arbitrator. If the award is vacated on a ground stated in paragraph (3), (4), or (6) of subsection a. of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the decision in the rehearing within the same time as that provided in subsection b. of section 19 of this act for an award.
>
> d. If the court denies an application to vacate an award, it shall confirm the award unless an application to modify or correct the award is pending.

The gravamen of the Plaintiffs' Order to Show Cause and Verified Complaint is that the nine med-pay subrogation demands filed by Allstate with AFI were not within the terms of the Agreement. Rather, they are specifically excluded by the Agreement as med-pay subrogation is prohibited in New Jersey. Thus, the arbitrators exceeded their powers by acting upon disputes that were not subject to the Agreement. Progressive's institution of these summary actions to vacate the nine med-pay arbitration awards was based on the premise that the arbitrators exceeded their powers by acting upon disputes that were not subject to intercompany arbitration as provided by N.J.S.A. 2A:23B-23(a)(4) was procedurally proper and as will be discussed, infra, was substantively correct as well.

To the extent that Allstate maintains that the intercompany arbitration awards are final and not subject to review, it wholly ignores not only the case law concluding med-pay subrogation is prohibited in New Jersey but also the legislative intent behind N.J.S.A. 2A:23B-1 et seq. which prescribes the role of the judiciary with respect to arbitration awards.

POINT II

THE QUESTION OF WHETHER A DISPUTE IS SUBJECT TO AN ARBITRATION AGREEMENT IS TO BE RESOLVED BY A COURT, NOT AN ARBITRATOR, PER N.J.S.A. 2A:23B-6(b).

Allstate argues that the question of whether the disputes at issue are subject to the med-pay intercompany arbitration agreement is a "condition precedent" and therefore, within the scope of authority granted to the arbitrator per N.J.S.A. 2A:23B-6. This argument fails based on the statutory authority cited along with the common sense factual considerations.

The underlying premise of the Progressive's arguments to vacate the nine (9) med-pay arbitration awards is that they each represented a dispute that was not within the terms of the med-pay intercompany arbitration agreement. Specifically, the agreement includes exclusions:

> **Article Second**
> **Exclusions**
>
> No company shall be required, without its written consent, to arbitrate any claim or suit if:
>
> (a) it is not a signatory company nor has given written consent; or
> (b) it creates any cause of action or liabilities that do not currently exist in law or equity; or
> (c) its policy is written on a retrospective or experience-rated basis; or
> (d) any payment which such signatory company may be required to make under this Agreement is or may be in excess of its policy limits. However, an Applicant may agree to accept an award not to exceed policy limits and waive their right to pursue the balance directly against the Respondent's insured; or
> (e) it has asserted a denial of coverage; or

> (f) any claim for the enforcement of which a lawsuit was instituted prior to, and is pending at, the time this Agreement is signed; or
> (g) under the insurance policy, settlement can be made only with the insured's consent; or
> (h) medical payment subrogation claims are prohibited by statute or judicial decision.

(Emphasis added). There is no question that the agreement excludes any dispute arising out of jurisdictions where med-pay subrogation is prohibited based on statute or judicial decision. Progressive raised this exclusion as an affirmative defense as required by the Arbitration Forums rules. Each arbitrator rejected this affirmative defense, generally finding that Progressive was a signatory to the agreement and not considering the specific legal authorities cited by Progressive.

Whether med-pay subrogation is prohibited in New Jersey is not a condition precedent. Rather, it is a question of whether a dispute (or in this case, nine disputes) fall within the scope of the med-pay intercompany arbitration agreement. In this regard, N.J.S.A. 2A:23B-6 provides that the resolution of such a question is for the court and not for the arbitrator.

> 2A:23B-6. Agreement to arbitrate; validity
>
> a. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
> b. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

> c. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
>
> d. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

Because an agreement to arbitrate is a contract, only those issues may be arbitrated which the parties have agreed shall be. Waskevich v. Herold Law, P.A., 431 N.J.Super. 293, 298 (App.Div. 2013). The authority of the arbitrators arises solely out of the med-pay subrogation arbitration agreement and can only be limited to those cases which fall within the agreement. If a dispute is excluded from the scope of the agreement, then the arbitrator is without authority to act upon it.

It is generally held that the duty to arbitrate and the scope of the arbitration are dependent upon the terms of the agreement. Singer v. Commodities Corp., 292 N.J.Super. 391, 402 (App.Div.1996)(quoting Cohen v. Allstate Ins. Co., 231 N.J.Super. 97, 100-01, (App.Div.), certif. denied, 117 N.J. 87 (1989)). The powers of the arbitrator are limited by the agreement of the parties and the arbitrator may not exceed the scope of the powers granted to him/her by the agreement. Kimm v. Blisset, LLC, 388 N.J.Super. 14, 25 (App.Div. 2006), cert. denied 189 N.J. 478, citing High Voltage Engineering Corp. v. Pride Solvents & Chem. Co. of N.J., Inc., 326 N.J.Super. 356,

361-62, (App.Div.1999). In the present matter, it is clear that the Med-Pay Subrogation Arbitration Agreement did not apply to matter arising in jurisdictions where med-pay subrogation is prohibited. Such is not an issue of condition precedent, as suggested by Allstate. Rather, it requires the determination of whether the dispute falls within the clear language of the agreement and as such, is a judicial interpretation rather than one for the arbitrator. See Muhammad v. County Bank of Rehoboth Beach Delaware, 189 N.J. 1 (2006), cert. denied 127 S.Ct. 2032, 549 U.S. 1338, on remand 2007 WL 6449326.

Here, the Med-Pay Subrogation Arbitration Agreement included specific exclusions to the agreement to arbitrate, one of which was whether med-pay subrogation was prohibited in the jurisdiction in question. Thus, by its express language, the Agreement did not extend to disputes over med-pay which arose in jurisdictions where med-pay subrogation was prohibited. Contrary to the arguments advanced on behalf of Allstate, this is not a question of a condition precedent but rather, a question of whether a dispute (or in this case, multiple disputes) are excluded based on the clear language of the Agreement.

Moreover, because med-pay subrogation is prohibited in New Jersey, the balance of Allstate's arguments must fail. Since med-pay subrogation is prohibited in New Jersey, then the

subject disputes were not within the scope of the Med-Pay Subrogation Arbitration Agreement. The various arbitrators acted outside of the scope of their authority because they have no authority to decide matters outside of the scope of the Agreement.

POINT III

THERE IS NO AUTHORITY TO ESTABLISH THAT MED-PAY SUBROGATION IS PERMITTED IN NEW JERSEY.

Unlike PIP benefits, there is no statutory authority authorizing med-pay subrogation in New Jersey. N.J.S.A. 39:6A-9.1 created a specific remedy for PIP insurers to recover PIP benefits from responsible tortfeasors that were not required to maintain PIP coverage or were required but failed to maintain PIP coverage. Moreover, the statutory scheme for PIP benefits in N.J.S.A. 39:6A-1 et seq. is without any reference to med-pay benefits. Although N.J.S.A. 39:6A-9.1 has been amended as recently as 2011, it continues to apply only to recovery of PIP benefits and has not been amended to include med-pay subrogation.

New Jersey personal automobile policies are required to include PIP coverage. They are also required to provide "extended medical benefits", also referred to as med-pay benefits. These benefits specifically apply only when PIP benefits are not available to an injured insured. The authority requiring insurers to offer such benefits is regulatory (N.J.A.C. 11:3-7.3(b)). Nothing within the regulatory scheme obligating personal automobile insurers to provide extended medical benefits includes any right of the insurer paying such

benefits to seek recovery by way of subrogation against the responsible party.

Allstate relied upon a Dept. of Ins. in Circular Letter New Jersey Automobile 9, dated 2/22/73, indicating that extended medical benefits "will be subrogable." However, the Circular predates the adoption of the Collateral Source Rule, N.J.S.A. 2A:15-97 (1987). It also predates various cases involving extended medical benefits, the relation to PIP benefits and whether the benefits could be recovered via subrogation.

In Ingersoll v. Aetna Casualty & Surety Company, 138 N.J. 236 (1994), the New Jersey Supreme Court addressed whether or not extended medical expense benefits coverage was included within traditional PIP benefits. The Court held that extended medical benefits "are a creature…of regulation promulgated under the legislative authority by the Commissioner of Insurance." Id. at 239. Med-pay benefits represented a very narrow window of coverage to a limited class of persons who are ineligible for PIP Benefits. In Ingersoll, the plaintiff was riding a motorcycle and sustained significant injuries that were not covered under his motorcycle policy but had coverage available under two personal lines automobile policies. The Supreme Court held that extended medical expense benefits were outside of PIP, not included within the subrogation provisions applicable for

PIP benefits but, unlike PIP benefits, were stackable. Id. at 241.

In 2001, the New Jersey Supreme Court decided Perreira v. Rediger, 169 N.J. 399 (2001), where it concluded that the collateral source rule barred health carriers that expend funds on behalf of covered persons from recouping such payments through subrogation or contract reimbursement. "Health carriers" included health insurance companies, health maintenance organizations, health service corporations, hospital service corporations and medical service corporations. The Court ruled that health carriers have no common law right to subrogation; the enactment of N.J.S.A. 2A:15-97 continued to leave health carriers with no right to recover paid benefits; and the rules adopted by the Department of Banking and Insurance (DOBI) allowing reimbursement and subrogation provisions in contract forms (N.J.A.C. 11:4-42.10), must be narrowly interpreted to apply only in cases that do not involve the collateral source rule (for example, those in which New Jersey law is not applicable). Id. at 418.

In response to the Court's decision in Perreira, on July 5, 2001, DOBI issued Bulletin No. 01-11 (Pa29) to all New Jersey licensed health carriers directing them immediately to cease all subrogation and recovery efforts against persons covered by group or individual contracts or policies issued in New Jersey,

except to the extent permitted by N.J.S.A. 2A:15-97, regardless of whether these contracts include subrogation or reimbursement provisions.

In Warnig v. Atlantic County Special Servs., 363 N.J.Super. 563 (App.Div. 2003), the Appellate Division considered whether N.J.S.A. 39:6A-6 allowed recovery of med-pay benefits in a worker's compensation proceeding. The Court relied heavily upon the findings in Ingersoll, supra., that the anti-stacking provision of N.J.S.A. 39:6A-4.2 did not apply to med-pay, since med-pay benefits are not PIP benefits and did not fall within the purview of N.J.S.A. 39:6A-4 or N.J.S.A. 39:6A-10. The Court further noted that N.J.S.A. 39:6-6 did not mention med-pay benefits. Warnig, supra. at 568-569. The Court, in addressing the legislative intent behind N.J.S.A. 39:6A-6, noted that it had been amended in 2003 but the amendments did not add any provision for recovery of med-pay benefits. The Court was compelled to strictly construe the statute, which did not include med-pay benefits. Warnig, supra. at 571.

The Appellate Division revisited the application of N.J.S.A. 2A:15-97 in County of Bergen Employee Benefit Plan v. Horizon Blue Cross Blue Shield of New Jersey, 412 N.J.Super. 126 (App.Div. 2010) and once again, demonstrated not only the purpose behind the Collateral Source Rule but also the practical interpretation of the same. County of Bergen attempted to

pursue subrogation rights for health benefits from its Plan Administrator, Horizon, which contractually had the right to pursue subrogation for benefits paid but chose not to do so. The trial court granted summary judgment to Horizon to dismiss the complaint. On appeal, the Court examined the purpose of N.J.S.A. 2A:15-97 to eliminate the double recovery to plaintiffs that flowed from the common-law collateral source rule and to allocate the benefit of that change to liability carriers. Id. at 133, citing Perreira, supra. at 403. The Court focused upon the statutory language which, clear on its face, was evidence of its legislative intent. Id. at 139, citing Perreira, supra. at 418.

> "As noted, it is well established that " 'the best indicator of [Legislative] intent is the statutory language.' " …When a statute is plain on its face, we do not "interpret [it] to achieve a different end." …"Our judgment is not on the wisdom of the legislative enactment, but only on its meaning."

County of Bergen, supra., at 138-139 (citations omitted). Ultimately, the Court affirmed the trial court decision, finding that the plain language N.J.S.A. 2A:15-97 supported the interpretation that it barred County of Bergen's subrogation claim and as a result, there was no cause of action against Horizon.

What is clear from the foregoing is that there is no statutory or regulatory authority allowing for subrogation of

med-pay benefits in New Jersey. Further, the cases cited herein illustrate that when presented with question of how subrogation claims interact with the Collateral Source Rule, the Courts have consistently concluded that the purpose of N.J.S.A. 2A:15-97 to prevent double recovery of health benefits and further, as med-pay benefits are specifically not PIP benefits, that they med-pay benefits are subject to the Collateral Source Rule and as a result, med-pay subrogation is prohibited in New Jersey

Put another way, if med-pay expenses are not PIP for purposes of N.J.S.A. 39:6A-4.2 or N.J.S.A. 39:6A-6, they are not PIP for purposes of N.J.S.A. 39:6A-9.1. Case law is clear that med-pay expenses are no different than health benefits and are subject to the language of N.J.S.A. 2A:15-97.

POINT IV

N.J.S.A. 2A:15-97, OTHERWISE KNOWN AS THE COLLATERAL SOURCE RULE, HAS BEEN INTERPRETED TO PROHIBIT MED-PAY SUBROGATION IN NEW JERSEY.

Med-Pay subrogation claims are barred by the **statutory** collateral source rule (N.J.S.A. 2A:15-97), and this has been affirmed by multiple **judicial decisions**. There are unpublished decisions written that are particularly relevant as they are directly on point and provide a succinct but well-reasoned analysis. These unpublished decisions are included herein based on R. 1:36-3 and the Comments relating to Unpublished Opinions. PRESSLER & VERNIERO, Current N.J. COURT RULES, Comment R. 1:36-3 (GANN).

In Palisades Safety and Insurance Association v. Drive New Jersey Insurance Company, et al., No. CAM-L-4446-14 (Law Div. February 13, 2015), a summary action was filed by Palisades seeking to vacate a med-pay subrogation award rendered in favor of Drive NJ. The argument on behalf of Palisades was that the arbitrator exceeded its powers by arbitrating the case and rendering an award as med-pay subrogation was prohibited in New Jersey. Addressing the merits of the Collateral Source Rule, N.J.S.A. 2A:15-97 and as interpreted in case law, Judge Ragonese found the purpose of the rule was to prevent double recovery. Because the rule precluded health plan beneficiaries from recovering medical expenses from the tortfeasor, it followed that

the health care carrier was likewise barred from recovery. Judge Ragonese concluded the med-pay benefits paid by Drive NJ to is insured were benefits under the Collateral Source Rule and there was no statutory exception or conflict to suggest otherwise. As a result, the Court concluded that med-pay subrogation was prohibited in New Jersey and the underlying award was vacated. Palisades Safety and Insurance Association v. Drive New Jersey Insurance Company, et al., supra. (slip op. at 8-11).

Over a year later, Judge Natali in Middlesex County addressed the identical issue in Mid-Century Ins. Co. v. Freeman, 2016 N.J. Super. Unpub. LEXIS 1127 (Law Div. 2016). Judge Natali framed the question as "whether costs and expenses paid pursuant to an insured's Extended Medical Expense Coverage ("Med-Pay") are subject to the collateral source rule expressed in N.J.S.A. 2A:15-97 and therefore not recoverable in a subsequent subrogation action". The decision had two basic premises: first, an insurer's med-pay obligation is not found within N.J.S.A. 39:6A-1, et seq but rather, N.J.A.C. 11:3-7.3(b) and therefore cannot be considered an action brought "pursuant to" N.J.S.A. 39:6A-1, et seq. This is consistent with the general proposition that med-pay benefits are not the same as PIP benefits. They are not subject to the prohibition against stacking in N.J.S.A. 39:6A-4.2, only apply in those circumstances when PIP benefits are not available and med-pay benefits cannot duplicate benefits payable

under workers' compensation or Medicare. See Ingersoll, supra. Second, med-pay expenses were "benefits" as used in N.J.S.A. 2A:15-97 and therefore, were not excluded from the collateral source rule. Relying upon Perreira, Judge Natali concluded med-pay expenses were not recoverable by way of subrogation. Mid-Century Ins. Co. v. Freeman, 2016 N.J. Super. Unpub. LEXIS 1127, supra. (slip op. at 15-18).

Judge Natali's analysis also addressed two arguments similar to arguments raised by Allstate herein. First, Judge Natali addressed the reliance upon a February 22, 1973 "Circular Letter Automobile No. 9" issued by the New Jersey Department of Banking and Insurance. Judge Natali noted that the circular, roughly 40 years old at the time, predated the adoption of N.J.S.A. 2A:15-97 as well as the NJ Supreme Court decision in Perreira and could not be considered as reflective of the current Legislative intent, statutory authority or interpretation. While not referenced by Judge Natali, it is worth noting that NJDOBI responded to the NJ Supreme Court decision in Perreira, issuing Bulletin No. 01-11 to all New Jersey licensed health carriers directing them immediately to cease all subrogation and recovery efforts against persons covered by group or individual contracts or policies issued in New Jersey, except to the extent permitted by N.J.S.A. 2A:15-97, regardless of whether these contracts include subrogation or

reimbursement provisions. Mid-Century Ins. Co. v. Freeman, 2016 N.J. Super. Unpub. LEXIS 1127, supra. (slip op. at 17-18).

The second point addressed by Judge Natali was the argument that New Jersey Indemnity should be estopped from arguing that med-pay subrogation was barred by N.J.S.A. 2A:15-97 because it had filed actions to recover med-pay expenses in the three preceding years from other automobile insurers. Judge Natali discussed the extraordinary remedy of judicial estoppel along with the uncertain facts submitted by Mid-Century. The Court concluded that the proofs submitted did not warrant the application of judicial estoppel. Mid-Century Ins. Co. v. Freeman, 2016 N.J. Super. Unpub. LEXIS 1127, supra. (slip op. at 18-22).

Three years later, Judge Sceusi in Morris County decided St. Paul Protective Insurance Company v. Drive New Jersey Insurance Company, No. MRS-L-85-19 (Law Div. April 12, 2019), a summary action with identical facts to this matter. Drive New Jersey Insurance Company (Drive NJ) had filed a demand for intercompany arbitration in Arb Forums seeking recovery of damages against St. Paul Protective Insurance Company (St. Paul) in the amount of $5,000.00 paid as extended medical benefits. The claim was submitted under the Med-Pay intercompany arbitration agreement adopted by both parties. St. Paul raised several affirmative defenses to the demand of Drive NJ, including the defense that New Jersey law prohibited med-pay subrogation. At a preliminary

hearing, the arbitrator rejected St. Paul's affirmative defense that New Jersey law prohibited med-pay subrogation. At the full arbitration hearing, the arbitrator did not address the merits of the affirmative defense that New Jersey law prohibited med-pay subrogation and awarded damages in favor of Drive NJ. St. Paul appealed this decision in accordance with N.J.S.A. 2A:23B-23.

Finding that the appeal was filed timely and articulated a rationale for the appeal under N.J.S.A 2A:23B-23(c), Judge Sceusi proceeded to address whether med-pay subrogation was prohibited in New Jersey. It was noted that this was a critical finding as the Med-Pay Arbitration Agreement did not require any member company to arbitrate a case if medical payment subrogation claims are prohibited by statute or judicial decision. If the affirmative defense asserted by St. Paul was valid, then there was no agreement to arbitrate the subject dispute and the arbitrator exceeded his/her authority by proceeding with the arbitration hearing. Judge Sceusi addressed the applicability of the Collateral Source Rule, N.J.S.A. 2A:15-97 along with the established cases cited by St. Paul (Ingersoll, supra., t seqe, supra., and the unpublished decision in Mid-Century Ins. Co. v. Freeman, supra. In light of these cases and the express language of the Med-Pay Arbitration Agreement, Judge Sceusi viewed the dispute as whether there was a valid agreement to arbitrate. He noted that while there are no published decisions directly on

point, the unpublished decisions support the conclusion that med-pay subrogation was prohibited in NJ. Moreover, it he noted the statute providing for PIP subrogation, N.J.S.A. 39:6A-9.1 has been amended several times but did not provide for med-pay subrogation in New Jersey. In light of the argument submitted, Judge Sceusi concluded that med-pay subrogation was prohibited in New Jersey and as a result, the arbitration award in favor of Drive NJ was invalid as the arbitrator has exceeded his/her authority. St. Paul Protective Insurance Company v. Drive New Jersey Insurance Company, supra. (slip op. at 6-9).

Two months later, Judge Sceusi once again was faced with the same basic dispute in The Automobile Insurance Company of Hartford, CT v. New Jersey Manufacturers Insurance Company, No. MRS-L-1027-99 (Law Div. June 24, 2019). New Jersey Manufacturers Insurance Company (NJM) had filed the med-pay subrogation demand seeking $5,031.28 from The Automobile Insurance Company of Hartford, CT (Travelers). Travelers asserted affirmative defenses including that New Jersey law prohibited med-pay subrogation. At the full arbitration hearing, the arbitrator concluded that New Jersey law allowed med-pay subrogation and awarded damages in favor of NJM. Travelers appealed this decision in accordance with N.J.S.A. 2A:23B-23.

Given that the facts and issues were similar to the St. Paul case, it is no surprise that Judge Sceusi's decision here followed

his decision in the St. Paul case. He once again found that med-pay subrogation was prohibited in New Jersey and therefore, the arbitrator exceeded his/her authority by rendering an award in favor of NJM. The Automobile Insurance Company of Hartford, CT v. New Jersey Manufacturers Insurance Company, supra. (slip op at 6-8).

In addition to the decisions discussed above, there is another unpublished decision which demonstrated application of N.J.S.A. 2A:15-97 to med-pay benefits in a bodily injury trial. In Walsh v. Starr Transit, 2008 WL 199740 (N.J.Super. A.D. 2008), the Appellate Division addressed whether medical bills were properly barred from introduction at trial. The Appellate Division found the trial court erred in this regard, and concluded that the bills, which were paid under med-pay benefits, could be introduced subject to deduction from any damages awarded to the injured party. Citing the purpose of N.J.S.A. 2A:15-97 to "eliminate[ ] double recovery" and shift the burden of spiraling insurance costs from the liability carriers to the casualty insurers" and relying upon Perreira, supra., the Court stated:

> "As such, the first party insurer providing the medical benefit is not entitled to subrogate against the tortfeasor."

Walsh v. Starr Transit, supra. (slip op. at 3).

By hearing and deciding the nine arbitrations at issue, the arbitrators imperfectly performed their role, exceeded their

powers and committed prejudicial error. Further, in finding against Progressive, the arbitrators created a cause of action against Progressive, and created a liability to Allstate, which did not exist as a matter of New Jersey law or equity. As a result, the arbitration award is in contradiction of the parties' arbitration agreement and was properly vacated under the provisions of N.J.S.A. 2A:23B-23.

Moreover, since the Court retains exclusive jurisdiction to determine whether "a controversy is subject to an agreement to arbitrate," and since Allstate's subrogation claims are prohibited by both **statute** and **judicial decisions**, it is submitted that this court should not only vacate the arbitration award, but should also find that there was no agreement and/or right for Allstate to arbitrate.

POINT V

THE TRIAL COURT PROPERLY CONSIDERED PLAINTIFFS' MOTIONS UNDER R. 4:46 RATHER THAN A HEARING ON A SUMMARY ACTION UNDER R. 4:67-5.

The subject actions were initially filed as summary proceedings under R. 4:67 as required by N.J.S.A. 2A:23B-1 et seq. Multiple return dates were scheduled for a final hearing. However, each was adjourned due to the efforts of Allstate pursuing records from AFI.

The initial adjournment request came on December 6, 2022 to adjourn a final hearing date of December 9, 2022. It was in that adjournment request that counsel for Allstate disclosed the issuance of a subpoena to AFI in October 2022 that was not copied or served upon counsel for Progressive.

Notwithstanding the objections by counsel for Progressive to the Allstate subpoena and the records requested therein, Judge Sceusi allowed Allstate to seek enforcement of litigant's rights and issuance of a commission to serve process in Florida, where AFI was located. As a result, return dates on the Order to Show Cause and Verified Complaint were adjourned multiple times (February 27, 2023, March 27, 2023, April 21, 2023 and May 12, 2023).

Allstate continued to pursue AFI and filed a motion to hold the same in contempt. AFI retained counsel to respond to and oppose the motion and to cross move to quash the underlying

subpoena. The hearing on Plaintiff's Order to Show Cause and Verified Complaint was now scheduled for June 20, 2023. Allstate's contempt motion against AFI and AFI's cross motions were also scheduled for oral argument on that date. At oral argument, it was determined that the competing motions of Allstate and AFI would be addressed and not the Order to Show Cause and Verified Complaint. Following oral argument, the Judge Sceusi issued two (2) orders on June 26, 2023 which disposed of the Allstate and AFI motions. Judge Sceusi then issued an order on June 27, 2023, denying Progressive's Order to Show Cause without explanation other than referencing the other orders issued.

Shortly after the oral arguments and orders by Judge Sceusi noted above, the Court issued a trial date for November 29, 2023. Allstate continued to pursue AFI and in doing so, failed to provide copies of the various documents as requested by Progressive relating to the pursuit of documents from AFI.

Progressive filed its motions for summary judgment on September 21, 2023 with a return date of October 20, 2023.

Contrary to the suggestion of counsel for Allstate, summary judgment motion were properly filed by plaintiff and disposition by Court was in accordance with R. 4:46 and not R. 4:67. Judge Sceusi's June 27, 2023 Order denying Progressive's Order to Show Cause and the subsequent issuance of a trial date can only be

interpreted that the Court found the action could not proceed as a summary action and was to proceed as a plenary action. Regardless, the standards for consideration of a motion under R. 4:46 are identical to those under R. 4:67-5. See Wolosoff v. CSI Liquidating Trust, 205 N.J.Super. 349 (App.Div. 1985).

Clearly Allstate proffers this argument to overcome its failures in responding to Progressive's motions. Allstate failed to recognize the additional proofs submitted in support of the summary judgment motions and then, attempted to submit a voluminous sur-reply that was untimely and ultimately not considered by the Court. Allstate further failed to respond to the facts that Progressive withdrew ten (10) pending med-pay subrogation arbitrations in September 2021 and further, that its counsel was well aware of Progressive's actions as he was counsel for Allstate on seven of the ten arbitrations that were withdrawn (Da424-Da425; Da428-Da429; Da448-Da450; Da451-Da455; Da458-Da459; Da463-Da464; Da470-Da475; Da476-Da481 & Da481-Da488). Finally, Allstate was in a position to proffer evidence if Progressive had filed any med-pay subrogation arbitrations since September 2021 but was silent in this regard, thus validating Progressive's proofs as to its actions since September 2021.

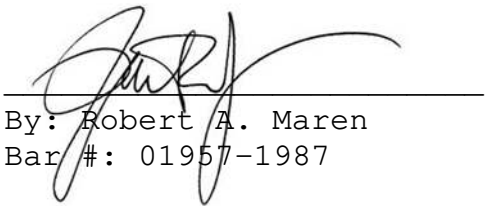
CONCLUSION

Notwithstanding the arguments of counsel, there are clear and undisputed facts relating to this matter. There is no question that the AFI med-pay subrogation agreement does not apply to disputes arising out of a jurisdiction where med-pay subrogation is prohibited. N.J.S.A. 2A:23B-1 et seq. allows a party to see to have an intercompany arbitration award vacated under certain circumstances, one being that the arbitrator acted beyond the scope of his/her authority. The question of whether a dispute is within the scope of an arbitration agreement is a decision for the court, not an arbitrator in accordance with N.J.S.A. 2A:23B-6. There is no authority in New Jersey which specifically allows for med-pay subrogation. N.J.S.A. 2A:15-97 prohibits recovery of health benefits and has been interpreted to prohibit med-pay subrogation. Multiple trial courts under identical facts have concluded that based on the existing case law and N.J.S.A. 2A:15-97, med-pay subrogation is prohibited in New Jersey.

Accordingly, it is clear that Judge Franzblau's decisions on Progressive's motions for summary judgment were proper, procedurally and substantively and should be affirmed by this Court.

Respectfully submitted,

VELLA & MAREN
Attorneys for Plaintiffs Progressive Garden State Insurance Company, Drive NJ Insurance Company and Progressive Specialty Insurance Company



By: Robert A. Maren
Bar #: 01957-1987

Dated: May 31, 2024

PROGRESSIVE GARDEN STATE INSURANCE COMPANY, DRIVE NJ INSURANCE COMPANY AND PROGRESSIVE SPECIALTY INSURANCE COMPANY, **Appellant/Plaintiff(s),** v. ALLSTATE NJ INSURANCE COMPANY **Respondent/Defendant(s).**	: : : : : : : : : : : :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1037-23 Team 2 **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY Law Division: Morris County Docket No.: MRS-L-328-23 **SAT BELOW:** Hon. Noah Franzblau, J.S.C.

DEFENDANT-RESPONDENT'S BRIEF/APPENDIX IN SUPPORT OF APPEAL FILED BY DEFENDANT-RESPONDENT ALLSTATE NJ INSURANCE COMPANY

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PROCEDURAL HISTORY

On October 7, 2022 a Verified Complaint and Order to Show Cause was filed as a summary proceeding pursuant to Rule 4:67-1. That action seeking to vacate seven inter-company arbitration awards pursuant to N.J.S.A. 2A:23B-23 was filed by Plaintiff Progressive Garden State Insurance Company, Drive NJ Insurance Company, and Progressive Specialty Insurance Company (herein after "Progressive") against Allstate NJ Insurance Company (herein after "Allstate") and was assigned docket number MRS-L-1762-22. (Da28 – Da37). On November 18, 2022 the Honorable Louis S. Sceusi, J.S.C. entered the Order to Show Cause setting forth a return date. (Da38 – Da41). On November 29, 2022, Allstate filed an Answer a with counterclaim seeking to enforce the inter-company arbitration awards. (Da42 – Da61). On December 23, 2022, Progressive filed an answer to Allstate's counterclaim in docket number MRS-L-1762-22. (Da62 – Da68). On December 20, 2022, counsel for Allstate filed a motion to issue a commission for the service of a subpoena in Florida and an Order issuing the commission was entered by the Honorable Lousi S. Sceusi, J.S.C. on January 13, 2023. (Da69 – Da75). On February 23, 2023 Progressive filed a second summary proceeding by way of Verified Complaint and an Order to Show Cause against Allstate seeking to vacate two additional arbitration awards which was assigned docket number MRS-L-328-23. (Da76 – Da84). On February 24, 2023, the Honorable Marcy M.

McMann, J.S.C. entered an Order to Show Cause setting forth a return date (Da85 – Da88). On April 11, 2023 Allstate filed an Answer with a counterclaim seeking to enforce the inter-company arbitration awards. (Da89 – Da97). On March 24, 2023 counsel for Allstate filed a motion to enforce litigants rights on the original docket and an Order was entered on April 19, 2023 enforcing litigants rights. On April 18, 2023, Progressive filed an answer to Allstate's counterclaim in docket number MRS-L-328-23. (Da98 – Da101). On May 2, 2023, counsel for Allstate filed a motion to consolidate which was granted and a consolidation Order was entered on May 12, 2023 by the Hon. Lousi S. Sceusi, J.S.C. (Da102 – Da103). On May 11, 2023 counsel for Allstate filed a motion to hold Arbitration Forums, Inc. in contempt for failure to comply with the terms of the Order enforcing litigants rights previously entered.

Counsel for Arbitration Forums, Inc. filed opposition to the motion to hold Arbitration Forums, Inc. in contempt and filed a cross motion seeking to vacate the prior Order and quash the subpoena. Oral argument was conducted before the Hon. Lousi S. Sceusi, J.S.C. on June 19, 2023, and Judge Sceusi entered an Order on June 26, 2023 with a written statement of reasons, vacating the prior Order enforcing litigants rights but refused to quash the subpoena. See June 26, 2023 Orders as (Da104 – Da117).

At the time of the June 19, 2023 hearing the Hon. Louis S. Sceusi, J.S.C.

indicated that the Order to Show Cause would not be assigned an additional return date until after such time as the discovery could be procured from Arbitration Forums, Inc. The transcript for the June 19, 2023 hearing was unavailable as "not on the record". The Subpoena was served on AF by personal service on July 21, 2023. (Da259).

On September 21, 2023, counsel for Progressive filed two motions seeking to vacate the inter-company arbitration awards in this matter. (Da269 - Da278 and Da489 – Da494). On October 3, 2023, counsel for Allstate filed a motion to enforce litigants rights against Arbitration Forums, Inc. as they had failed to comply with the properly served subpoena to produce records.

Both the aforementioned motions were returnable on October 20, 2023.

On October 4, 2023, counsel for Arbitration Forums, Inc. filed a motion seeking to quash the subpoena which was the subject of the motion to enforce litigants rights. On October 11, 2023, Allstate filed a letter brief with the Court which advised we would be relying on our previously submitted briefs in opposition to Progressive's motion seeking to vacate the arbitration awards. On October 13, 2023, Progressive filed information with the Court indicating that in the 268 page motion seeking to vacate the arbitration awards there was a two-page certification of Lewis Midlarsky that had previously not been part of the discovery or briefs. (Da260 – Da261).

On October 17, 2023, Allstate filed a supplemental brief seeking to provide evidence that Progressive's conduct in satisfying numerous prior arbitration awards entered in favor of Allstate should estop them from their arguments in this matter.

On October 18, 2023, counsel for Progressive, with consent, sought an adjournment of the October 20, 2023 return date.

That adjournment request was denied by the Court clerk who also indicated that Allstate's October 17, 2023 submission was an impermissible sur-reply which would not be considered by the Court.

The hearing pursuant to R. 4-67.5 was conducted on October 20, 2023. All of the submitted Briefs were considered by the Court and the Court entered two Orders vacating the nine inter-company arbitration awards obtained in favor of Allstate. (Da1 – Da5). Each Order was supported by a statement of reasons. (Da10 – Da27).

The Court subsequently denied the motion to enforce litigants rights returnable November 3, 2023 indicating that as the underlying matter had been decided the relief sought was moot. (Da6 – Da9).

Defendant now appeals the three aforementioned orders. (Da262 – Da267).

STATEMENT OF FACTS

1. On and between July 24, 2018 and September 23, 2022 the defendant, Allstate, and plaintiffs, Progressive were signatories to the Arbitration Forums, Inc., Medical Payment Subrogation Arbitration Agreement. See Medical Payment Subrogation Arbitration Agreement (Da118 – Da119) and relevant pages of the Arbitration Forums Member Directory. (Da120 – Da122).

2. On July 19, 2020 Allstate filed a Medpay arbitration that was assigned Docket Number D061-00171-20 as a result of a motor vehicle accident which occurred on October 25, 2019 involving the injured party Aytekin Sirin and the Progressive insured, Kiana Salano. On or about July 22, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $8,115.84. See arbitration award (Da123 – Da129).

3. On July 9, 2020 Allstate filed a Medpay arbitration which was assigned Docket Number D061-00142-20 as a result of a motor vehicle accident which occurred on July 24, 2018 involving the injured party Mario Liberato Fernandez and the Progressive insured, Hector Herrera. On or about August 1, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $10,000.00. See arbitration award attached as (Da130 – Da138).

4. On August 20, 2020 Allstate filed a Medpay arbitration which was assigned Docket Number D061-00244-20 as a result of a motor vehicle accident

which occurred on November 19, 2018 involving the injured party Cristino Santo and the Progressive insured, Roger Bennett. On or about August 23, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $1,972.84. See arbitration award (Da139 – Da146).

5. On August 20, 2020 Allstate filed a Medpay arbitration which was assigned Docket Number D061-00252-20 as a result of a motor vehicle accident which occurred on July 10, 2019 involving the injured party Rolando Genao and the Progressive insured, John French. On or about August 23, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $10,040.00. See arbitration award (Da147 – Da155).

6. On August 10, 2020 Allstate filed a Medpay arbitration which was assigned Docket Number D061-00223-20 as a result of a motor vehicle accident which occurred on November 29, 2019 involving the injured party Galo Ricaurte Arrieta and the Progressive insured, Joseph Siocha. On or about August 23, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $9,400.00. See arbitration award (Da156 – Da164).

7. On August 19, 2020 Allstate filed a Medpay arbitration which was assigned Docket Number D061-00237-20 as a result of a motor vehicle accident which occurred on May 17, 2019 involving the injured party Luis Amadia-Martinez and the Progressive insured, James Rogers. On or about September 20,

2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $4,877.24. See arbitration award (Da165 – Da171).

8. On December 7, 2021 Allstate filed a Medpay arbitration which was assigned Docket Number D061-00212-21 as a result of a motor vehicle accident which occurred on May 7, 2021 involving the injured party Joel A. Ramos and the Progressive insured, Alex Barrantes Arrieta. On or about September 23, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $5,000.00. See arbitration award (Da178 – Da186).

9. On October 13, 2020 Allstate filed a Medpay arbitration which was assigned Docket Number D061-00391-20 as a result of a motor vehicle accident which occurred on October 18, 2018 involving the injured party Zarinah N. Yasin and the Progressive insured, Nadiyah Johnson-Bell. On or about October 27, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $5,000.00. See arbitration award (Da172 – Da177).

10. On August 29, 2022 Allstate filed a Medpay arbitration which was assigned Docket Number D22018718B8-C1 as a result of a motor vehicle accident which occurred on September 1, 2020 involving the injured party Hazel Quesada and the Progressive insured, Chyna White. On or about October 31, 2022, the Arbitrator entered an award in favor of Allstate NJ Insurance Company in the amount of $500.00. See arbitration award (Da187 – Da209).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT IMPROPERLY VACATED THE ARBITRATION AWARDS AS PURSUANT TO N.J.S.A. 2A:23-6 AND THE ARBITRATION FORUMS MEDPAY ARBITRATION AGREEMENT, AN ARBITRATOR SHALL DECIDE WHETHER A CONDITION PRECEDENT HAS BEEN FULFILLED AND WHETHER A CONTRACT CONTAINING A VALID AGREEMENT TO ARBITRATE IS ENFORCEABLE. (Da 1– Da27)

It is undisputed that both Allstate and Progressive are signatories to the Arbitration Forums Medical Payments Subrogation Arbitration Agreement. Da118 to Da119 are copies of the Arbitration Forums Medical Payment Subrogation Agreement as well as a copy of the printouts confirming Progressive is a signatory to the MedPay Arbitration Agreement. (Da120 – Da122). That arbitration agreement states in article first "Signatory companies must forego litigation and arbitrate any medical payment subrogation claims through Arbitration Forums, Inc. (herein after referred to as AF)." This agreement is applicable in all 50 states. The arbitration agreement contains exclusions which would remove the matter from the jurisdiction of Arbitration Forums, which state:

> Article Second
> Exclusions
> No company shall be required, without its written consent, to arbitrate any claim or suit if:

> (a) it is not a signatory company nor has given written consent; or
> (b) it creates any cause of action or liabilities that do not currently exist in law or equity; or
> (c) its policy is written on a retrospective or experience-rated basis; or
> (d) any payment which such signatory company may be required to make under this Agreement is or may be in excess of its policy limits. However, an Applicant may agree to accept an award not to exceed policy limits and waive their right to pursue the balance directly against the Respondent's insured; or
> (e) it has asserted a denial of coverage**;** or
> (f) any claim for the enforcement of which a lawsuit was instituted prior to, and is pending at, the time this Agreement is signed; or
> (g) under the insurance policy, settlement can be made only with the insured's consent; or
> (h) medical payment subrogation claims are prohibited by statute or judicial decision. (Da118).

Arbitration Forums has developed rules pursuant to the inter-company arbitration agreement which address the adjudication of claims where a party alleges that a claim is excluded from jurisdiction under Article Second. Article Fifth: "AF, representing the signatory companies, is authorized to: (a) make appropriate Rules and Regulations for the presentation and determination of controversies under this Agreement;…". (Da119). The arbitration awards in this matter are governed by the Arbitration Forums, Inc. rules. (Da210 – Da220). Those rules are interpreted by AF in the Arbitration Forums, Inc. reference guide. (Da221 – Da235).

The Arbitration Forums Rules and Regulations, Rule 2-4 (Da212) require that a party asserting a bar to jurisdiction must do so in the affirmative defenses

section of their answer or those defenses are waived. Arbitration Forums defines an affirmative defense as "A complete defense that does not address the allegations, but instead asserts that the filing is excluded from compulsory arbitration. See also Exclusion." (Da218 – Da220). The definitions section further defines exclusion as "A complete defense that does not address the allegations, but instead asserts that the filing is excluded from compulsory arbitration which precludes the arbitrator(s) from ruling on the disputed issue(s)." (Da218 – Da220).

In the reference guide to Arbitration Forums agreement, and rules, under Rule 2-4, which addresses affirmative defenses the reference guide states :

> It is critical for the parties to note, where appropriate, if the case involves an Affirmative Pleading or Affirmative Defense/Exclusion. Rule 2-4 requires the use of the specific section to assert either. This ensures the parties are aware of any issues regarding jurisdiction and, equally important, alerts the arbitrator. An arbitrator may only consider affirmative pleadings or defenses/exclusions included in the appropriate section, and nowhere other than this section… An affirmative defense/jurisdictional exclusion, on the other hand, is an argument that does not address negligence or damages, but rather raises an objection to compulsory arbitration's jurisdiction over the claim based on Article Second, Exclusions, of the arbitration agreements, or certain Rule infractions. Regardless of who is at fault or what damages are owed, the assertion of an affirmative defense/exclusion suggests the case cannot be heard because arbitration lacks jurisdiction over the matter. Affirmative defenses/exclusions include:
> • Non-signatory party

> • Action does not exist in law or equity (i.e., subrogation prohibited, no right of recovery, or prior release)
> • No liability policy in effect, denial of coverage, or policy limits
> • Filing a late counterclaim (Rule 2-2)
> Asserting an affirmative defense/exclusion does not mean that such defense is necessarily valid. The party must also explain the grounds for the defense and submit evidence to prove it. A party should also complete the entire filing even when raising an affirmative defense/exclusion, as the arbitrator(s) could deny it and continue to hear the case. (Da230 – Da233).

Rule 3-5 discusses the requirements for arbitrator consideration and states with regard to affirmative defenses that:

> Rule 3-5 (a) pertains to affirmative pleadings and defenses/exclusions. An arbitrator may not raise these arguments for a party. Per Rule 2-4 (Chapter 17), the parties must assert these arguments, if applicable, where provided or they are waived. It is also important to note that supporting evidence must be listed and submitted, i.e., case law, statute, etc. Last, AF strongly recommends that a party asserting an affirmative defense/exclusion regarding a lack of jurisdiction complete the entire filing, including its liability and damages arguments and evidence as though the defense does not apply. This is because the arbitrator will continue to decide liability and/or damages if the affirmative defense/exclusion is denied. (Da234 – Da235).

The rules established pursuant to the arbitration agreement grant the arbitrator the power to decide if a matter is excluded from jurisdiction.

N.J.S.A. 2A:23B-6.a. states "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to

the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." As signatories to the Arbitration Forums Medical Payment Subrogation Arbitration Agreement the parties are contractually bound to arbitrate Medpay subrogation claims with Arbitration Forums pursuant to the Arbitration Forums rules and regulations. Those rules grant the arbitrator the power to determine if a specific matter is excluded from the jurisdiction of Arbitration Forums.

N.J.S.A. 2A:23B-6.c. indicates that an arbitrator shall decide whether a condition precedent to arbitrate has been fulfilled or whether a contract containing a valid agreement to arbitrate is enforceable. As a condition precedent to arbitration the arbitrator was empowered both by the statute and the arbitration agreement to decide if the jurisdiction exclusions remove the matter from arbitration or allow it to proceed. In each of the nine arbitrations which were the subject of this Order to Show Cause, Progressive raised an Affirmative Defense of no jurisdiction. Each matter was properly presented to the arbitrator by counsel for the parties and argued by counsel at the hearing. Progressive intentionally allowed each matter to proceed, acknowledging their contractual obligation to allow the arbitrator to decide the jurisdictional exclusion. Progressive did not file an action pursuant to N.J.S.A. 2A:23B-6.b seeking to have the court decide whether an agreement to arbitrate exists or the controversy is subject to the agreement to

arbitrate. Had such an action been filed, the above analysis would have required the court to compel the issue to arbitration for a ruling by an arbitrator on the jurisdictional exclusions.

In all nine arbitrations, the arbitrator entered an award indicating that there was jurisdiction to hear the matter in Arbitration Forums pursuant to the contract between the parties.

POINT II

THE ARBITRATOR'S AWARDS WERE PROPERLY ENTERED IN ACCORDANCE WITH N.J.S.A. 2A:23B-1 ET SEQ. AND THE ARBITRATION FORUMS MEDPAY SUBROGATION AGREEMENT. (Da1 – Da27).

At the heart of this matter are nine inter-company arbitration awards entered in favor of Allstate which were vacated by the trial court. In those nine arbitrations, counsel for Allstate and counsel for Progressive both filed the contentions placed before the arbitrator and appeared personally at the hearing. David J. Dickinson, Esq. appeared in all nine instances for Allstate. For Progressive, Tony Oh, Esq. from Progressive's house counsel appeared at two hearings, and Joshua Thier, Esq. from Progressive's house counsel appeared at seven hearings. Of the nine arbitration awards, in eight instances the arbitrator hearing the matter was an attorney, Suzanne Mayer, Esq. served as the arbitrator on three matters, Robert Distefano, Esq. served as the arbitrator on five matters,

and a claims adjuster Richard Califano served as the arbitrator on one matter.

With regard to the arbitration award bearing docket D061-00142-20 (Da130 – Da138) this matter arises from a motor vehicle accident which happened on July 24, 2018 in Jersey City, NJ. The injured party Mario Liberato Fernandez was operating a personal vehicle as an Uber driver when he was involved in an accident that was caused by a Progressive Garden State Insurance Company insured. Subsequent to the accident Mr. Fernandez received $10,000 in Medpay benefits from Allstate.

At the time Allstate filed their inter-company arbitration Allstate's contentions stated:

> At the time of this accident Mario Liberato Fernandez was operating a vehicle and providing a prearranged ride for a transportation network company, Rasier LLC, commonly known as Uber. Pursuant to N.J.S.A. 39:5h-2 the vehicle being operated by Mr. Liberato Fernandez was a personal vehicle which is defined as a motor vehicle that is used by a transportation network company driver to provide prearranged rides. A personal vehicle is not considered an automobile as defined by N.J.S.A. 39:6a-2 while the transportation network company driver is providing a prearranged ride. Pursuant to the provision of N.J.S.A. 39:5h-10.c. The insurance policy issued by applicant covering the transportation network company was obligated to provide medical payments benefits in the amount of at least $10,000 per person for the benefit of the transportation network company driver. Per the attached medical bill loss history, the applicant's policy holder is Rasier LLC and applicant is entitled to recover their medpay payments from the respondent as the respondent's insured struck applicant's insured.

The collateral source rule N.J.S.A. 2a:15-97 bars recovery of benefits paid by any source as a result of a civil action brought for personal injury or death. An exclusion to that statutory section are actions brought pursuant to the provisions of N.J.S.A. 39:6a-1, et seq. The collateral source rule contained in the pip statute, namely N.J.S.A. 39:6a-12 precludes admissibility or recovery of any payments made pursuant to N.J.S.A. 39:6a-4 or 10 from recovery in a plaintiff's personal injury suit. The determination as to whether applicant is entitled to recover turns on the determination of whether this action is governed by the provisions of N.J.S.A. 39:6a-1, et seq. And whether the payments made by the applicant can be considered pip payments made pursuant to N.J.S.A. 39:6a-4 or 10. The genesis of the med-pay coverage required on the applicant's policy in the amount $10,000.00 arises from N.J.S.A. 39:5h-10.c.2. That statutory section is distinctly different than the provision of N.J.S.A. 39:5h-10.b.2 which requires pip coverage under N.J.S.A. 39:6a-4 when the transportation network company driver is logged onto the transportation company network but is not providing a prearranged ride. The provisions of N.J.S.A. 39:5h-1, et seq. implement provisions of the automobile reformation reform act N.J.S.A. 39:6a-1, et seq. and address the amount and terms of coverage that must be made available to insureds operating a "personal vehicle" providing a prearranged ride. N.J.S.A. 39:5h-1, et seq., references the provisions of N.J.S.A. 39:6a-1, et seq. and N.J.S.A. 5h-10.g. states that the coverage required pursuant to subsections b. and c. of this section shell be deemed to meet the financial responsibility requirements of the "motor vehicle security-responsibility law" which is N.J.S.A. 39:6a-1 et seq. The policy which is required to maintain the medical payments benefits coverage set forth in N.J.S.A. 39:5h-10 is necessarily a policy which is required to comply with and is governed by N.J.S.A. 39:6a-1, et seq. New Jersey's collateral source rule N.J.S.A. 2a:15-97 bars recovery of medical

expenses paid from collateral sources "in any civil action brought for personal injury or death, except actions brought pursuant to the provisions of p.l.1972, c. 70(c.39:6a-1 et seq.) The legislature in enacting that legislation could have narrowed the actions for personal injury to those governed by N.J.S.A. 39:6a-9.1 or to payments made pursuant to N.J.S.A. 39:6a-4 but chose not to do so. The statute as written has a broad interpretation as to which claims are personal injury actions covered by N.J.S.A. 39:6a-1, et seq and as this action and the policy provisions requiring med-pay coverage are governed by the provisions of N.J.S.A. 39:6a-1, et seq. The collateral source rule set forth in N.J.S.A. 2a:15-97 does not bar applicant's claim. The collateral source rule contained in N.J.S.A. 39:6a-1, et seq. is set forth in N.J.S.A. 39:6a-12 which clearly excludes medical payments which are made pursuant to N.J.S.A. 39:6a-4 or 10 and that collateral source rule would not exclude recovery of the med-pay benefits paid pursuant to N.J.S.A. 39:5h-10. Respondent raises the matter of Warnig v. Atlantic County Special Services which is inapplicable to this matter. In Warnig the insurance carrier paid medical expense benefits to their insured who was operating a school bus and who was eligible for workers compensation benefits. The court found that the collateral source rule set forth in N.J.S.A. 39:6a-6 was inapplicable to that claim as the payments were not made pursuant to N.J.S.A. 39:6a-4 or 10. The court likewise addressed the issue that under the extended medical expense benefits coverage provision of the personal automobile policy there is no coverage available for an individual when workers compensation applies. Warnig is inapplicable to this claim. Respondent also cites to Mid-Century Insurance v. Freeman which is a trial court level opinion and which is not persuasive. The court in Mid-Century did not address the exception to the collateral source rule in matters governed by N.J.S.A. 39:6a-1, et seq. Respondent cites to a portion of an unpublished opinion of Judge Ragonese

> which offers no context or explanation of the matter in which that arose. As in Freeman that portion of an opinion does not address the exception to the collateral source rule governed by claims arising under N.J.S.A. 39:6-1-et seq.
> Respondent has filed as least four inter-company arbitrations against the applicant and the relevant docket number are: d061-00049-20-00, d061-00045-20-00, d061-00069-20-00, and d061-00019-20-00. In those matters Progressive argues " N.J.S.A. 2a:15-97 upon reviewing provisions of the cited statute does not deny a carrier a right of recovery but rather clearly supports the contractual obligation of a claimant to protect an insurer's right of recovery with respect to a third party's claim against a liable party. It furthermore is clear in stating that N.J.S.A. 2a: 15-97 is applicable "except actions brought pursuant to the provisions of p.l. 1972, c.70 (c. 39:6a-1 et.seq.)" or those involving automobile type losses. Since this matter did not involve motor vehicles, one of which meets the statutory definition of an "automobile", the pleading that progressive's right of recovery is barred cannot be upheld statutorily, and progressive's contractual right of recovery should be upheld. **(statute)"** progressive recognizes that there is a right to recover medpay benefits based on the exception to the collateral source rule created by claims pursuant to N.J.S.A. 39:6a-1-et seq. As set forth above, applicant has proved the prima fascia case of a right or recovery and liability is established at 100% against the respondent.
>
> Applicant's insured was traveling straight when respondent's insured opened his car door into applicant's insured's vehicle. (Da130 – Da138).

When Progressive filed their answer with regard to this claim they raised two affirmative defenses. The first affirmative defense stated:

> Affirmative Defense - Not a Compulsory Dispute - No Consent AD justification: 'Lack of Jurisdiction - Article

> Second of the AFI Med-Pay forum agreement states in pertinent part that: No company shall be required, without its written consent, to arbitrate any claim or suit if: (b) such claim, or suit creates any cause of action or liabilities that do not currently exist in law or equity; or *** (h) medical payment subrogation claims are prohibited by statute or judicial decision. Progressive Insurance Company DOES NOT consent to arbitrate this matter. The New Jersey Supreme Court stated in Grover v. Universal Underwriters Ins. Co., 80 N.J. 221 (1979): In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be. Stated another way, the arbitrator's authority is circumscribed by whatever provisions and conditions have been mutually agreed upon. Any action taken beyond that authority is impeachable. Id. at 228-29; see also, Fawzy v. Fawzy, 199 N.J. 456, 469 (2009).' (Da130 – Da138).

That affirmative defense was ruled on by the arbitrator at which

time the arbitrator stated:

> Denied for Respondent 1 - Affirmative Defense denied. Allstate and Progressive Garden State are members of Arb Forums for med pay subrogation dispute resolution. Membership is voluntary. Both have voluntary agreed to forgo litigation and have these disputes resolved in Arb Forums. As for the cause of action, there is no statute or reported court decision in New Jersey that has been provided in this matter that states med pay subrogation is barred in New Jersey. Common law causes of action remain viable unless and until the New Jersey legislature or Courts rule otherwise. (Da130 – Da138).

Progressive raised a second affirmative defense which stated:

> Affirmative Defense - Not a Compulsory Dispute - No

> Consent AD justification: 'Not a Compulsory Dispute - No Consent Respondent further relies on the unpublished decision (in a OTSC) from a 2019 case where an award of Medpay subrogation in Arb Forums was vacated: ST. PAUL PROTECTIVE INSURANCE COMPANY V.DRIVE NEW JERSEY INSURANCE COMPANY MRSL- 85-19 Here, the Medical Payment Subrogation Arbitration Agreement clearly provides that "[n]o company shall be required, without its written consent, to arbitrate any claim or suit if: ... (h) medical payment subrogation claims are prohibited by statute or judicial decision." (Miller Cert., exhibit A). As discussed above, medical payment subrogation claims are prohibited under New Jersey law. Moreover, although there are no published decisions that prohibit recovery in circumstances similar to this one, medical payment subrogation claims are clearly prohibited in workers' compensation cases. The only judicial decision directly on point is unpublished. By rendering a decision on this matter, the arbitrator clearly exceeded his authorized powers as this was not a matter that he was authorized to hear. For this reason, this court finds that the arbitration award should be vacated. The court declines to address the remainder of Plaintiffs arguments as this court has concluded that the arbitration award should be vacated based upon the arbitrator exceeding his powers. Based on the foregoing analysis, Plaintiff's Order to Show Cause is granted in part and denied in part. A confirming Order accompanies this Statement of Reasons. Furthermore, it cannot go unnoticed or unmentioned that Allstate fails to cite to any statute or judicial decision that would permit it to pursue its Med-Pay subrogation claims.' (Da130 – Da138).

That affirmative defense was addressed by the arbitrator who stated:

> Denied for Respondent 1 - Affirmative Defense denied. Progressive relies on Orders from two OTSC brought against them to vacate med pay arb decisions obtained BY Progressive, in 2015 and 2019. The decisions in the

> OTSC is binding upon those parties, in those cases alone, with those facts and arguments raised. While both have been read and considered here, neither is binding and are not a bar to Arb Forums hearing this matter. As already stated in the prior AD raised, and acknowledged in this AD by Respondent itself, there is no reported court decision barring med pay subrogation in New Jersey. The bar on subrogating med pay benefits the Court of Workers' Compensation is inapplicable here. An injured party is ineligible for med pay benefits if injured in the course of their employment and eligible for workers' comp benefits. Since the carrier never owed med pay, the Court did not allow them to subrogate for reimbursement of same. That is not the situation here as this does not involve a workers' comp claim. Both Allstate and Progressive have VOLUNTARILY agreed to resolve these disputes in Arb Forums, not on a case-by-case basis, but in general. Progressive has even brought several med pay subrogation claims in Arb Forums in 2020, as included by Applicant in its evidence. Progressive has granted Arb Forums jurisdiction as an Applicant and Respondent. Arb Forums and this arbitrator have jurisdiction to decide the matter on the merits. (Da130 – Da138).

Progressive also filed exhaustive contentions setting forth their position which stated:

> This loss occurred on 7/24/18.
>
> Allstate has filed this arbitration demand on behalf of MARIO LIBERATO FERNANDEZ seeking $10,000.00 in Medical Expenses.
>
> The Progressive Garden State Insurance Company is a Personal policy issued to Hector Herrera with Policy Form 9611 D NJ (02/16), effective Dates 3/12/18 -- 9/12/18 with 100/300 Liability coverage. There is a 250 K PIP Endorsement on the policy.

A bodily injury lawsuit has been filed on behalf of MARIO LIBERATO FERNANDEZ. The lawsuit is pending in the Superior Court of New Jersey, Law Division, Passaic County and is assigned Docket number PAS-L-2141-20 Identified as a defendant is Hector Herrera, who is insured by Progressive Garden State Insurance Company.

PIP subrogation is permissible under N.J.S.A. 39:6A-9.1 and a recent amendment to the statute prohibits any claim of PIP subrogation from going forward when there is a pending bodily injury claim as both are payable out of the insured's bodily injury liability limits.

The case should remain deferred until the bodily injury claim is resolved.
Thus, so long as the bodily injury claim of MARIO LIBERATO FERNANDEZ is pending, Allstate is precluded from proceeding with a PIP subrogation claim which is based on the alleged negligence of Hector Herrera.
Med pay reimbursement is not permitted in New Jersey: Respondent argues that Med-pay benefits cannot be subrogated in New Jersey. New Jersey case law dictates that there is no statutory right to subrogation for Med Pay benefits, as there is for personal injury protection ("PIP") benefits.

Respondent argues that the collateral source rule barred such a recovery for Med-Pay payments made. The Court based its decision on two grounds. First, the origin of the insurer's Med-Pay obligation is not found within the express mandate of the auto statute, N.J.S.A. 39:6A-1. Respondent relies on the long line of case law (both published and unpublished) addressing same. Respondent contends that Med pay benefits cannot be subrogated in New Jersey. New Jersey case law dictates that there is no statutory right to subrogation for Med Pay benefits, as there is for personal injury protection ("PIP")

benefits. The seminal case can be found in Warnig v. Atlantic County Special Services, 363 N.J. Super. 563 (App. Div. 2003), the Appellate Division agreed and affirmed the lower court's holding that the insurer could not be reimbursed for Med Pay benefits. Id. at 565. In Warnig, petitioner Dana Warnig was injured in a motor vehicle accident, while a passenger on a bus owned by the respondent, and her employer, Atlantic County Special Services. When the accident occurred, petitioner carried a policy of insurance for her personal automobile with Prudential Property & Casualty Insurance Company ("Prudential") that provided $250,000 in PIP benefits and $10,000 in Med Pay benefits. Id.

After the worker's compensation benefits had ended, petitioner sought the available PIP benefits from the Prudential policy. Id. at 565. Prudential determined that petitioner was not entitled to PIP coverage because she was a passenger on a commercial vehicle at the time of the accident, and instead provided $10,000 in Med Pay to the petitioner for chiropractic treatment. Id. Prudential then intervened in petitioner's pending worker's compensation action, seeking reimbursement of the $20,000 Med Pay benefits it had paid out. Id. at 566. Respondent filed a motion for summary judgment, arguing that Prudential was not entitled to reimbursement of the Med Pay benefits under the collateral source rule, N.J.S.A. 39:6A-6. Id. The Judge of Compensation granted Respondent's motion under that rationale. Id. Prudential appealed the decision of the Compensation Court, asserting that the Judge of Compensation reached the incorrect holding that Prudential was not entitled to recover the Med Pay benefits under the collateral source rule. Id.

Specifically, it is argued that "benefits paid under the Med Pay portion of a personal automobile policy are no different from PIP benefits and should receive the same treatment under the collateral source rule..." Id. The Appellate Division upheld the decision of the

Compensation court that Med Pay benefits are not included within the ambit of the collateral source rule. Id. at 569. It noted that N.J.A.C. 11:3-7.3(b) "requires some medical expense benefits to be provided for injuries resulting from accidents not otherwise qualifying for PIP medical expense benefits." Id. at 567. The court then held that 'Iglus Med Pay benefits are not of statute but of a regulation promulgated under legislative authority by the Commissioner of Insurance." Id. at 568. (citing Ingersoll v. Aetna Cas. And Surety Co., 138 N.J. 236 (1994)). The court held that "Med Pay benefits are expressly not available in cases where a party is entitled to basic PIP benefits or where other PIP coverage applies," and that the Supreme Court in Ingersoll established that "benefits paid under the Med Pay Portion of an automobile policy do not fall within the purview of N.J.S.A. 39:6A-4 or N.J.S.A. 39:6A-10. Id.

The views expressed by the Appellate Division in Warnig were again upheld in an unpublished opinion by the Appellate division eight years later in the unreported decision of Encompass Ins. Co. of New Jersey v. Trans Ware, Inc, et als, 2011 WL 1135186 (N.J. Super. A.D.),

Similar to the facts of Warnig. Encompass paid out Med Pay benefits to its insured for injuries she sustained while a passenger on a bus that was involved in a motor vehicle accident. Encompass then sought reimbursement of the Med Pay benefits it paid out from the drivers of the bus and the motor vehicle responsible for the collision as well as the insurance carrier for the bus, RLI. The collective defendants filed a motion for summary judgment asserting that Encompass did not have a statutory right to recovery of the Med Pay benefits it paid to its insured. Encompass opposed the motion on the grounds that it was entitled to equitable contribution from the defendants for the Med Pay benefits it 'erroneously paid' to its insured. The trial court ruled in favor of Encompass, and the appeal followed. The Appellate Division reversed and remanded the ruling of the trial court, finding that

Encompass did not have a statutory right to recovery of Med Pay benefits. Like Warnig, the court relied on the language of Ingersoll, supra, in noting that Med Pay benefits are not statutory in nature but are instead benefits paid out pursuant to regulations instituted by the Commissioner of Insurance and are not recoverable by a carrier.

Further, the Collateral Source Rule, N.J.S.A. 2A:15-97, which prohibits recovery in personal injury actions of amounts "plaintiff receives or is entitled to receive ... for the injuries allegedly incurred from any other source other than a joint tortfeasor," has been interpreted by Perreira v. Rediger, 169 N.J. 399 (2001) to prohibit subrogation claims to recover medical bills which are covered by insurance (except where 39:6A specifically allows recovery). Thus, subrogation recovery of Med Pay benefits is prohibited, and insurance regulations permitting subrogation and lien clauses for Med Pay are invalid as they are violate N.J.S.A. 2A:15-97. See further the discussion of N.J.S.A. 2A:15-97 below and the unreported Appellate Division case of Walsh v. Starr Transit, 2008 WL 199740 (N.J. Super. A.D.), indicating that N.J.S.A. 2A:15-97 applies to Med Pay and prohibits recovery of Med Pay.

Recently, in an unpublished case, Mid-Century Insurance Co. v. Freeman, 2016 N.J. Super. Unpub. LEXIS 1127 (Law Div. May 16, 2016), the court found that Med-Pay payments are subject to the collateral source rule and, accordingly, cannot be recovered by way of subrogation.

In Mid-Century, the carrier sought a declaratory ruling that a cause of action existed under New Jersey law for the recovery of Med-Pay benefits through subrogation against the tortfeasor. The defendant carrier, New Jersey Indemnity, opposed the application, contending that the Med-Pay payments were subject to the collateral source rule. The underlying facts of this case involved an injury suffered by Tanya Alvarado, an insured of Mid-Century,

who was a passenger in a vehicle owned by Shore Service Co. when it was struck in the rear by a vehicle owned and operated by John Freeman, an insured of New Jersey Indemnity. Ms. Alvarado was a passenger in a taxicab, not an automobile, and, thus, was not eligible for PIP benefits. However, she was eligible for medical payments under the Med-Pay provisions of her automobile policy. Mid-Century paid $5,206 in medical payments on her behalf. Mid-Century then filed an arbitration petition against New Jersey Indemnity to recover the $5,206 that it paid. New Jersey Indemnity asserted as an affirmative defense that New Jersey law bars recovery of Med-Pay payments. The arbitrator upheld their position and found that New Jersey law barred the claim. In this declaratory judgment action, the court examined the statutory provisions in AICRA (N.J.S.A. 39:6A-1, et. seq.), as well as the Supreme Court's reasoning in Perreira v. Rediger, 169 N.J. 399 (2001), in which the Court found that a health insurer that paid benefits to an insured had neither a common law, nor statutory subrogation right against the tortfeasor. Against this background, the Court found that the collateral source rule barred such a recovery for Med-Pay payments made. The Court based its decision on two grounds. First, the origin of the insurer's Med-Pay obligation is not found within the express mandate of the auto statute, N.J.S.A. 39:6A-1.

Respondent also submits a Decision authored by The Honorable Judge David Ragonese, who decided on this very issue. He stated Med pay would not be reimbursable for the reasons stated below:

"Here, there is neither a statutory exception nor conflict necessitating an exception to the Collateral Source Rule. undoubtedly, Drive NJ's payment to Mr. Phang in the amount of $10,328.74 for his healthcare constitutes "benefits" under Section 97 and is neither exempted workers' compensation benefits nor the proceeds from a life insurance policy. That amount is, therefore, not

recoverable through subrogation or reimbursement. Nor is there any conflict between Section 97 and any other statutory provision which would compel exclusion from the Collateral Source Rule's proscription, for these reasons, the Court finds that New Jersey provides no right to subrogation of Med Pay benefits payments.

This conclusion is supported by the Appellate Division's decision in Warnig v. Atlantic County Special Servs., 363 N.J. Super. 563 (App. Div. 2003). The issue in Warnig was whether an insurer who paid benefits to its insured, pursuant to an extended medical expense benefit ("medpay") could be reimbursed in a workers' compensation proceeding pursuant to the collateral source rule. In holding that it could not, the court reasoned that "the Legislature made no provisions for Med-Pay under the amended version of the collateral source rule" even though it could have "chosen to extend coverage of the collateral source rule to include Med-Pay benefits[.]" Id. at 571. The court concluded that without legislative authority, it could not provide the insurer with a reimbursement right to Med-Pay benefits. Ibid. The Court can see no reason why the rationale in Warnig is limited to workers' compensation proceedings, and no reason why the same conclusion should not apply here - in the absence of legislative authority, Drive NJ cannot seek reimbursement of Med-Pay benefits."

The within demand for reimbursement must be denied in its entirety pursuant to the caselaw above.

Liability; Respondent reserves the right to present an argument on liability.

Amendment 6/4/21: The bodily injury lawsuit filed on behalf of MARIO LIBERATO FERNANDEZ is still pending. The lawsuit is pending in the Superior Court of New Jersey, Law Division, Passaic County and is assigned Docket number PAS-L-2141-20 Identified as a defendant is Hector Herrera, who is insured by

Progressive Garden State Insurance Company.

The case should remain deferred until the bodily injury claim is resolved.

Amendment 6/17/22: The Deferment can be removed as the BI has resolved.

Respondent further relies on the unpublished decision (in a OTSC) from a 2019 case where an award of Med-pay subrogation in Arb Forums was vacated:

ST. PAUL PROTECTIVE INSURANCE COMPANY V. DRIVE NEW JERSEY INSURANCE COMPANY MRS-L-85-19

Here, the Medical Payment Subrogation Arbitration Agreement clearly provides that "[n]o company shall be required, without its written consent, to arbitrate any claim or suit if: ... (h) medical payment subrogation claims are prohibited by statute or judicial decision." (Miller Cert., exhibit A).
As discussed above, medical payment subrogation claims are prohibited under New Jersey law. Moreover, although there are no published decisions that prohibit recovery in circumstances similar to this one, medical payment subrogation claims are clearly prohibited in workers' compensation cases. The only judicial decision directly on point is unpublished. By rendering a decision on this matter, the arbitrator clearly exceeded his authorized powers as this was not a matter that he was authorized to hear. For this reason, this court finds that the arbitration award should be vacated. The court declines to address the remainder of Plaintiffs arguments as this court has concluded that the arbitration award should be vacated based upon the arbitrator exceeding his powers.

Based on the foregoing analysis, Plaintiff's Order to Show Cause is granted in part and denied in part. A confirming Order accompanies this Statement of

> Reasons.
>
> The within demand for reimbursement must be denied in its entirety pursuant to the caselaw above. (Da130 – Da138).

Having denied the jurisdictional objections, the arbitrator heard the matter, entered an arbitration award in favor of Allstate setting liability at 100% against Progressive and awarding the $10,000 in damages. (Da130 – Da138). In entering that award the arbitrator stated:

> Summary of the dispute
> Allstate subrogates for med pay benefits paid after its driver, allegedly driving on a pre-arranged ride for Uber, was injured after striking the open door from the parked Progressive vehicle. Allstate relies on N.J.S.A. 5H-10.c in support of its paying of med pay benefits. Progressive Garden State does not admit liability but does not challenge it either in its Contentions, but defends the matter on jurisdictional bases and denies Allstate's cause of action and Arb Forums ability to hear same.
> Liability Decision
>
> Respondent 1 PROGRESSIVE INS
> GROUP admits 0% liability.
> Applicant ALLSTATE INS
> GROUP proved 100% liability against Respondent 1 based on: Respondent driver opening its door when it was unsafe to do so, causing Applicant driver to strike same.
>
> Damages Decision
>
> Applicant ALLSTATE INS GROUP proved $10,000.00 (All Damages)
> Progressive's damage challenge regards any non-medical payments, such as expenses, which are not subject to

reimbursement in a med pay subrogation claim (unlike in a 9.1 PIP claim). Allstate's damages sought are for medical payments only and Allstate has established same with a ledger and EOBs for the payments made. There are no expense payments included.

What evidence caused you to render this decision and why?
Allstate's driver was driving for Uber at the time of this loss, on a pre-arranged ride, as asserted by Allstate. Relying upon N.J.S.A. 5H-10.c, Allstate paid med pay benefits to its driver for his injuries. Allstate's insured was injured while driving and Progressive's insured opened the door to his parked vehicle in same was struck by Allstate's driver. The police report supports liability on Progressive's driver. While liability is not admitted to by Progressive, it is not argued or defended either. Progressive relies upon a string of decisions from New Jersey courts in support of its position that med pay subrogation is not allowed in New Jersey. As argued by both parties, it involves the collateral source rule and whether same acts as a bar. Respondent relies upon Warnig v. Atlantic County Special Services, which is inapplicable to this matter. In Warnig, the carrier paid med expense benefits to its insured who was operating a school bus and who was eligible for workers comp benefits. The Court found that the Collateral Source Rule, N.J.S.A. 39:6A-6, did not apply to that claim as the payments were not made pursuant to N.J.S.A. 39:6A-4 or 10. Also important, the Court relied upon the fact that the auto insurance policy itself excluded coverage for med pay benefits since the insured was eligible for workers comp. Respondent also relies upon Mid-Century Insurance v. Freeman which is an unpublished trial court opinion and unpersuasive. The Court in Mid-Century didn't address the applicability of N.J.S.A. 39:6A-1, et seq. by way of the application of the verbal threshold nor did it address the fact that the calculation of medical benefits pursuant to the med pay benefits coverage portion of the policy was required to be accomplished by

> using the calculations in N.J.S.A. 39:6A-1, et seq. Encompass v Trans Ware is also unreported and not included in evidence. However, in that case, the court remanded the case giving Encompass an opportunity to amend its complaint to pursue reimbursement. Ingersoll v Aetna included by Respondent was a med pay case, but involved the issue of stacking benefits and has no application here. Walsh v Starr Transit is also unpublished and more importantly, does not involve a med pay subrogation claim. The issue in Walsh was whether the trial court erred in not allowing the medical benefit payments of $10,000 to be introduced at the trial under the collateral source rule, and if the issue was preserved on appeal. Perreira v Rediger is a ban on health insurance subrogation in NJ due to ERISA and federal preemption. Perreira does not involve med pay subrogation and is not a bar to same. The other cases cited by Progressive such as Fawzy involved enforcing an agreement to arbitrate the issue of child custody in a divorce; and Grover v Universal Underwriters was addressed in the AD section, as were the Orders in the OTSC submitted by Respondent. As briefed and argued by Allstate, the Collateral Source rule does not bar Allstate's claim. PIP benefits are specifically excluded from being introduced at trial and recovered as set forth in N.J.S.A. 39:6A-12, as the PIP are paid pursuant to 6A-4 or 10. N.J.S.A. 39:6A-9.1 sets for the criteria for when the PIP is subject to reimbursement. This is not a 9.1 claim though, and not excluded by 39:6A-12. There is nothing in the collateral source rule excluding recovery of med pay benefits paid by Allstate as required under N.J.S.A. 39:5H-10.
>
> State Negligence Law applied to award calculations:
> 50% Comparative
> (Da130 – Da138).

The procedural hearing of this arbitration was conducted exactly as required pursuant to the inter-company arbitration agreement as set forth in Point I. Both

parties were allowed to assert their contentions and Progressive raised their objection to jurisdiction as an affirmative defense. The arbitrator reviewed the submissions of both parties and allowed the parties to present their evidence at a telephonic hearing conducted prior to the arbitration award date of August 1, 2022. Clearly the arbitrator's ruling on this matter is consistent with the procedure outlined in the inter-company arbitration agreement and addresses all of the issues raised by the parties.

In each of the other eight arbitration awards the parties filed similar contentions and appeared personally at the hearing. In all of the other eight matters the arbitrator ruled on Progressive's objection to jurisdiction and found that there was jurisdiction pursuant to the inter-company arbitration agreement and that Allstate was entitled to a recovery from Progressive.

POINT III

THE ARBITRATOR'S AWARDS ARE FINAL AND BINDING AND SHOULD BE ENFORCED AND ENTERED AS A JUDGMENT. (Da1 – Da27).

In their opinion the Court cites AAA Mid-Atlantic Ins. of N.J. v. Prudential Prop. & Cas. Ins. Co., 336 N.J. Super. 71 (App. Div. 2000) for the proposition that the Court rather than an arbitrator should resolve purely legal questions. AAA Mid-Atlantic involved a claim for reimbursement between a PIP carrier and a homeowner's policy wherein the PIP carrier was seeking reimbursement pursuant

to the statutory provisions of N.J.S.A. 39:6A-9.1. AAA Mid-Atlantic has been subsequently overruled by both a statutory enactment and subsequent judicial decision. N.J.S.A. 2A:23B-1 et seq. was enacted in 2003 and sets forth the statutory requirements for construing arbitration agreements and conducting arbitrations. That statute limits the Court's jurisdiction to determining whether an agreement to arbitration exists or if a controversy subject to an agreement to arbitrate. N.J.S.A. 2A:23B-6.b. N.J.S.A. 2A:23B-7.d states that "the court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." Clearly that statutory section mandates that simple legal issues regarding the merit of the claim are no longer to be addressed by the court but are required to be determined by an arbitrator. Legal issues should not be decided by the Court as the Court does not have jurisdiction to bar arbitration for claims that lack merit or for which the grounds for the claim have not been established.

In State Farm Indemnity Company v. National Liability and Fire Insurance Company, 439 N.J. Super. 532 (App. Div. 2015) State Farm sought to compel National Liability to arbitrate a claim which arose pursuant to N.J.S.A. 39:6A-11. National Liability denied that the parties were residents of the same household and thus argued there was a question as to State Farm's right of recovery. National Liability argued that the factual issue of determining coverage was required to be

submitted to the court rather than to an arbitrator. The Appellate Division set forth the policy favoring Arbitration and ruled that mandatory arbitration required the submission of all issues to arbitration rather than bifurcating issues between the Courts and arbitration. Clearly the ruling in State Farm, 439 N.J. Super. 532 (App. Div. 2015) compelling statutory required arbitration on all issues overrules the prior ruling in AAA Mid-Atlantic, 336 N.J. Super. 71 (App. Div. 2000).

The scope of review of an arbitration award is narrow, otherwise the purpose of the arbitration agreement, which is to provide an expedient and fair resolution of disputes, would be severely undermined. Fawzy v. Fawzy, 199 N.J. 456, 470, (2009) There is a strong preference under New Jersey law for confirmation of arbitration awards. Minkowitz v. Israeli, 433 N.J. Super. 111, 135 (App. Div. 2013). Arbitration awards are granted great deference. Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201 (2013). The party seeking to vacate an arbitration award "bears the burden of demonstrating 'fraud, corruption, or similar wrongdoing on the part of the arbitrator.'" Minkowitz, 433 N.J. Super. at 136 (*quoting* Tretina Printing, Inc. v. Fitzpatrick & Assocs., 135 N.J. 349, 357 (1994). There is a strict review of private contract arbitration, limited by a narrow construction of the statutory grounds. Pressler & Verniero, *Current N.J. Court Rules*, comment 3.3.3 on R. 4:5-4 (*citing* Tretina which overruled Perini Corp. v.

Greate Bay Hotel & Casino, Inc., 129 N.J. 479, (1992), which had permitted judicial intervention for gross errors of law by the arbitrators). Id.

The narrow grounds to vacate an arbitration award are set forth in N.J.S.A. 2A:23B-23.

> N.J.S.A. 2A:23B-23 Vacating an Award
>
> a. Upon the filing of a summary action with the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
>
> (1) the award was procured by corruption, fraud, or other undue means;
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (3) The arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
> (4) an arbitrator exceeded the arbitrator's powers;
> (5) there was not agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to the subsection c. of section 15 of this act not later that the beginning of the arbitration hearing; or
> (6) The arbitration was conducted without proper notice of the initiation of the arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

As discussed above, the clear and longstanding law in this area does not permit the court to vacate an award absent a showing of wrongdoing on the part of the arbitrator. There is no such wrongdoing here.

By accepting jurisdiction, the arbitrator did not exceed the arbitrator's powers pursuant to N.J.S.A. 28:23B-23(4). The arbitrator was acting within the powers granted to the arbitrator by the inter-company arbitration agreement. As set forth above the inter-company arbitration agreement and the rules and regulations adopted by Arbitration Forums specifically give the arbitrator the power to determine whether there is jurisdiction to hear a matter in arbitration. As that power was granted to the arbitrator the determination that there is jurisdiction to hear the matter was within the arbitrator's power.

Plaintiff's application to vacate also asks this Court to subvert the agreed upon rules of Arbitration Forums, Inc. As per the PIP Arbitration Agreement, Article Third, Decisions (b): "The decision of the arbitrator(s) is final and binding without the right of rehearing or appeal." The "final and binding" language and waiver of the right to appeal is consistent with the strong preference under New Jersey law for confirmation of arbitration awards. See New Jersey Manufacturers Insurance Company v. Travelers Insurance Company, 198 N.J. Super. 9 (App. Div. 1984).

POINT IV

MED-PAY BENEFITS ARE NOT PIP BENEFITS AND HAVE ALWAYS BEEN RECOVERABLE UNDER NJ LAW. (Da1 – Da27).

In Ingersoll v. Aetna Casualty & Sur. Co., 138 N.J. 236 (1994), the Supreme Court of New Jersey addressed the issue of the applicability of the provisions of N.J.S.A. 39:6A-1 et seq. to Medpay payments. In that matter the injured party was riding a motorcycle and sought Medpay payments under two separate automobile insurance policies. The Trial Court ruled that the statutory bar in N.J.S.A. 39:6A-4.2 preluded the stacking of Medpay benefits and that determination was upheld by the Appellate Division. The Supreme Court reversed, drawing a distinction between Medpay benefits and PIP benefits ruling that only PIP benefits were barred from stacking pursuant to N.J.S.A. 39:6A-4.2. The Supreme Court addressed Medpay benefits and stated:

> The question is whether the extended-medical-expense-benefits provision of the Aetna policy is beyond plaintiff's reach because of section 4.2's anti-stacking provision. We think not. The extended medical benefits are a creature not of statute but of a regulation promulgated under legislative authority by the Commissioner of Insurance. That regulation, N.J.A.C. 11:3-7.3(b), requires that every automobile policy "include excess medical payments coverage, corresponding to Section II, Extended Medical Expense Benefits Coverage of the personal automobile policy."
>
> …
>
> …as we understand the statutory scheme, the Commissioner's implementation thereof, and the

> insurance industry's accommodation thereto, the extended-medical-expense-benefits provision represents a very narrow window of coverage to a limited class of persons who, like plaintiff in this case, are ineligible for basic PIP benefits…
> The Aetna policy, which follows the standard form, recognizes the difference between that coverage and basic PIP by declaring the extended coverage inapplicable if the insured person is entitled to basic PIP benefits. Ingersol Supra at 239.

The Court recognized that extended medical benefits coverage, now commonly known as Medpay, was created not by statute but by regulation promulgated under legislative authority by the Commissioner.

The functional difference between basic PIP coverage and Section II coverage were sufficient to satisfy the Court that the Legislature did not intend to include the extended-medical-expense-benefits coverage in the PIP statute's prohibition against stacking. The Court ultimately concluded that the Medpay benefits were not PIP benefits that were barred by the anti-stacking provision of the PIP statute.

In Warnig v Atlantic City Council Special Services, 636 N.J. Super. 563 (App 2003), the injured party was working as a bus aide and received $10,000 in Medpay benefits from their personal automobile insurance policy. The Medpay carrier sought to recover those benefits from the workers compensation carrier pursuant to the provisions of N.J.S.A. 39:6A-6.

N.J.S.A. 39:6A-6 states:

> The benefits provided in sections 4 and 10 of P.L. 1972, c.70 (C.39:6A-4 and 39:6A-10), the medical expense benefits provided in section 4 of P.L. 1998, c. 21(C.39:6A-3.1) and the benefits provided in section 45 of P.L. 2003, c. 89(C.39:6A-3.3) shall be payable as loss accrues, upon written notice of such loss and without regard to collateral sources, except that benefits, collectible under workers' compensation insurance, employees' temporary disability benefit statutes, Medicare provided under federal law, and benefits, in fact collected, that are provided under federal law to active and retired military personnel shall be deducted from the benefits collectible under sections 4 and 10 of P.L. 1972, c.70 (C.39:6A-4 and 39:6A-10), the medical expense benefits provided in section 4 of P.L. 1998, c. 21(C.39:6A-3.1) and the benefits provided in section 45 of P.L. 2003, c. 89(C.39:6A-3.3).
>
> If an insurer has paid those benefits and the insured is entitled to, but has failed to apply for, workers' compensation benefits or employees' temporary disability benefits, the insurer may immediately apply to the provider of workers' compensation benefits or of employees' temporary disability benefits for a reimbursement of any benefits pursuant to sections 4 and 10 of P.L. 1972, c.70 (C.39:6A-4 and 39:6A-10), medical expense benefits pursuant to section 4 of P.L. 1998, c. 21(C.39:6A-3.1) or benefits pursuant to section 45 of P.L. 2003, c. 89(C.39:6A-3.3) it has paid.

This statutory section allows a PIP carrier paying benefits pursuant to N.J.S.A. 39:6A-4 or 10 to recover their PIP payments from a workers compensation carrier.

The Court addressed Medpay benefits and stated:

> Here, it is clear the statute does not expressly cover Med-Pay benefits. We note that the Legislature recently revisited the statute and made amendments in 2003. However, the Legislature made no provisions for Med-

> Pay under the amended version of the collateral source rule. The Legislature was put on notice of the Court's interpretation that Med-Pay benefits did not fall within the purview of the collateral source statute by its 1994 decision in Ingersoll. See Ingersoll, supra, 138 N.J. at 239 (establishing that Med-Pay portion of an automobile policy does not fall within the purview of N.J.S.A. 39:6A-4 or N.J.S.A. 39:6A-10). If the Legislature was dissatisfied with the current framework, it could have chosen to extend coverage of the collateral source rule to include Med-Pay benefits when it amended the statute in 2003. We infer from this non-action by the Legislature that it accepted the court's current interpretation of the statute. Warnig Supra at 571.

The Court further stated:

> Moreover, Med-Pay benefits, represent "a very narrow window of coverage to a limited class of persons who . . . are ineligible for PIP benefits." Ingersoll, supra, 138 N.J. at 240. Given the narrow reach of these benefits, we cannot conclude that the Legislature intended them to be treated like PIP benefits pursuant to N.J.S.A. 39:6A-6, but neglected to say so. Warnig Supra at 571.

Based on the above, the Court distinguished Medpay benefits from PIP benefits. The Court did not address the general recoverability of Medpay benefits. Having made the distinction, the Court held that as Medpay benefits were not PIP benefits, a carrier paying Medpay benefits could not seek to recover Medpay benefits under the collateral source rule in N.J.S.A. 39:6A-6 which addresses only the recovery of PIP benefits.

In the "New Jersey Insurance Bulletins and Related Materials Automobile Circular Letters Circular Letter Automobile 9," dated February 22, 1973 (Da236 –

Da254), the Commissioner of Insurance set forth interpretations of the provisions of the NJ Automobile Reparations Reform Act which became effective January 1, 1973. That circular addresses the payment and recovery of PIP benefits pursuant to N.J.S.A. 39:6A-4. On page three of that circular, it addresses vehicles covered under the no-fault law as well as vehicles that are not covered under the no-fault law. The circular discusses the availability of PIP benefits for vehicles covered under the no-fault law and specifically excludes benefits from those vehicles not covered under the no-fault law. With regard to the medical payments available when an individual is occupying a vehicle not covered by the No Fault Law, on page 9 of the circular it states:

Medical Payments and PIP

> Medical payments coverage with a minimum of $1,000 per person must be supplied and will be excess over other collectible insurance, including PIP benefits, and will be subrogable.
>
> There are situations where an injured person might not be covered under PIP such as injured while riding in a truck, bus, or cab, for example.

Clearly, as of the enactment of the NJ Automobile Reparations Act in January 1973 the med-pay payments required by that enactment were and still are subrogable pursuant to the subrogation provisions of the insurance contract. In County of Bergen Employee. Benefit Plan v. Horizon Blue Cross Blue Shield of N.J. 412 N.J. Super. 126 (App. Div. 2010) the Court stated:

> Prior to 1987, New Jersey followed the common-law collateral source rule, which prohibited a tortfeasor from reducing payment of a tort judgment by the amount of money received by an injured party from other sources. In effect, the common-law collateral source rule 'allow[ed] an injured party to recover the value of medical treatment from a culpable party, irrespective of payment of actual medical expenses by the injured party's insurance carrier. County of Bergen at 132-133.

Clearly Medpay benefits were recoverable prior to the enactment of N.J.S.A. 2A:15-97 and continue to be recoverable as they are not barred by the Collateral Source Rule as set forth in Point V. Currently the requirement to provide Medpay coverage in automobile insurance policies is codified in the provision of N.J.A.C. 11:3-7.3.(b). Additionally, Medpay benefits are available under polices of insurance approved by the Department of Banking and Insurance which insure motorcycles and commercial motor vehicles, as well as the requirement to provide Medpay benefits pursuant to N.J.S.A. 39:5H-10. Medpay coverage may also be obligated to be paid when an out of state vehicle, which maintains Medpay coverage in their home state, enters the State of New Jersey.

POINT V

N.J.S.A. 2A:15-97 DOES NOT BAR MED-PAY SUBROGATION CLAIMS AS THEY ARE "ACTIONS BROUGHT PURSUANT TO THE PROVISIONS OF… 39:6A-1 et. seq." (Da1 – Da27).

The collateral source rule, N.J.S.A. 2A:15-97 addresses the deduction for duplicate benefits. That statute specifically states that:

> In any civil action brought for personal injury or death, except actions brought pursuant to the provisions of P.L.1972, c. 70 (C. 39:6A-1 et seq.), if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, …

In each of the nine arbitration awards, the injured party was injured in a motor vehicle accident which resulted in their receiving Medpay benefits. In each injured party's civil action for personal injury, it is governed by the provisions of N.J.S.A. 39:6A-1 et seq. The definition of N.J.S.A. 39:6A-2 would define whether either of the vehicles met the definition of a motor vehicle or an automobile. Those definitions would further delineate whether the injured parties' damages were economic loss or noneconomic loss. Those definitions also set forth the definitions of a standard automobile insurance policy and a basic automobile insurance policy. N.J.S.A. 39:6A-3 sets forth the statutory minimums in liability coverage required by defendant. N.J.S.A. 39:6A-3.1 and N.J.S.A. 39:6A-3.3 delineate the coverages required if defendant maintained a basic or special automobile insurance policy respectively. N.J.S.A. 39:6A-8, the verbal threshold, and the selection made regarding the threshold required by N.J.S.A. 39:6A-8.1 may bar the injury party's claim if defendant's vehicle is an automobile and injured party elected the verbal

threshold on their personal insurance policy. N.J.S.A. 39:6A-4.5 might limit the injured person's cause of action for recovery if they were convicted of drunk driving at the time of the accident. Pursuant to N.J.S.A. 39:6A-13.2 counsel for the injured party is entitled to receipt of the delineated policy information from the insurance company for defendant. N.J.S.A. 39:6A-14 requires that the injured party's policy maintain uninsured motorist coverage as required by N.J.S.A. 17:28-1.1. N.J.S.A. 39:6A-15 is applicable to the loss in that either the injured party or defendant could suffer penalties for false or fraudulent representation in the course of the claim. Pursuant to N.J.S.A. 39:6A-25 and the subsequent sections of the statute the injured party's cause of action in the Superior Court is subject to Superior Court arbitration.

Based on the above, the civil action for personal injury of the injured party is a claim governed by the provisions N.J.S.A. 39:6A-1 et seq. The injured party's entitlement to have their medical bills paid by a collateral source does not preclude admissibility of those payments in a civil action for personal injury as N.J.S.A. 2A:15-97 does not apply to their civil action for personal injury.

In Perreira v Rediger, 169 N.J. 399 (2001) The Supreme Court addressed the issue of the recovery of medical bills paid by a health insurance policy. That matter involved two claims arising from a dog bite and a slip and fall in which the health insurer sought to recover their payments pursuant to the subrogation agreement in

their health insurance policy. In Perreira the court addressed the subrogation theory and indicated that the subrogation provision in the health insurance policy was invalid as that subrogation provision was not authorized to be included in health insurance policies until after the enactment of N.J.S.A 2A:15-97. The Department of Insurance lacked the authority to authorize such a subrogation provision. The court further stated that there was no common law right of subrogation in the health insurance field and found no evidence of a common law right of subrogation that pre-dated the enactment of N.J.S.A. 2A:15-97. Clearly Perreira is inapplicable to this matter as the right of subrogation of Medpay benefits in an automobile insurance policy predated the enactment of N.J.S.A. 2A:15-97. The inclusion of subrogation provisions in an automobile policy likewise pre-dated the enactment of the collateral source rule. The collateral source rule does not apply to civil actions for personal injury arising from motor vehicle accident cases as they are actions brought pursuant to the provisions of N.J.S.A. 39:6A-1 et seq.

In Park v. Park, 309 N.J. Super. 312 (App. Div. 1998) the Appellate Division addressed the ability to recover "bus PIP" payments made pursuant to N.J.S.A 17:28-1.6. In that matter the Court recognized that bus PIP payments made pursuant to N.J.S.A. 17:28-1.6 were not PIP payments pursuant to N.J.S.A 39:6A-4 but were nonetheless recoverable. The court in Park v Park did not rule that the

payments which were not PIP payments made pursuant to N.J.S.A 17:28-1.6 were barred by the collateral source rule.

In Warnig v Atlantic City Council Special Services, 636 N.J. Super. 563 (App 2003) the court concluded that med-pay benefits are not subject to recovery pursuant to the collateral source rule set forth in N.J.S.A. 39:6A-6. That finding is consistent with sections of the no-fault statute which do not apply to med-pay benefits. A number of sections of the statute give an insurance company certain rights in regard to PIP benefits paid pursuant to N.J.S.A. 39:6A-4 or N.J.S.A. 39:6A-10. Those PIP sections of the statute do not apply to med-pay. The provisions of N.J.S.A. 39:6A-6, N.J.S.A. 39:6A-9.1, and N.J.S.A. 39:6A-12 which enumerate recovery rights for PIP payments are all inapplicable as to any claims involving Medpay benefits which are not PIP.

POINT VI

THE TRIAL COURT ERRED IN VACATING THE ARBITRATION AWARDS PRIOR TO ALLOWING THE PROPER DISCOVERY TO DETERMINE IF PROGRESSIVE WAS JUDICIALLY OR EQUITABLY ESTOPPED FROM THEIR POSITION WITH REGARD TO MEDPAY SUBROGATION IN NEW JERSEY. (Da1 – Da27).

At the time this action was filed our office was aware that Progressive had routinely filed Medpay subrogation claims in the past. Per the attached affidavit of Karen Torres-Acevedo, from 2018 to 2021 Progressive filed 161 Medpay filings

seeking to recover Medpay benefits from other insurance companies. (Da255 – Da258). In order to support an argument for judicial or equitable estoppel, Allstate obtained the attached Order dated January 13, 2023 issuing a commission to the state of Florida to serve the attached subpoena. (Da69 – Da75). The enforcement of that subpoena was the subject of motion practice which was argued before the Honorable Louis S. Sceusi, J.S.C. on June 19, 2023. While Judge Sceusi vacated the prior Order seeking to enforce litigant's rights, he denied Arbitration Forums, Inc. request to quash the subpoena and ruled that:

> Here, Arbitration Forums represents there are approximately 150 Medpay arbitration claims filed by Progressive and their associated companies during the period that the arbitrations forming the underlying basis for this action were pending. As Defendant argues, those 150 arbitration filings are relevant to Defendant's position in this matter for at least three reasons.
> First, Defendant argues, and the Court agrees, that the content of the arbitration filings may in fact be sufficient to support a claim for judicial or equitable estoppel against Progressive, as their prior positions could arguably bar them from their current position.
> Second, Progressive's arbitration arguments may be persuasive in supporting Defendant's argument that the Medpay claims are recoverable in New Jersey contrary to the present position that Progressive is taking.
> Third, and finally, the content and results of those arbitrations may bolster Allstate's argument that the arbitrator's decision as to the recoverability of Medpay in New Jersey is final and binding.
>
> The documents sought by Defendant are relevant and otherwise discoverable. There is nothing in the provisions of N.J.S.A. 2A:23B *et seq*. or the Inter-

> Company Arbitration Agreement, cited by Arbitration Forums, which would create a *privilege* with regard to the production of
> arbitration awards entered in favor of a party to litigation. Rather, the Medical Payment Subrogation Arbitration Agreement states "all matters concerning arbitration proceedings shall beheld in strict confidence." That reference is insufficient to create a claim of privilege as to an
> arbitration award. (Da111 – Da117).

On September 21, 2023 counsel for Progressive filed the Motion to vacate the arbitration awards which was returnable on October 20, 2023 that filing consisting of over 286 pages of arguments and evidence. My initial review of that motion indicated that it was the same arguments that were pending before the Court with regard to vacating the arbitration awards. In response thereto we advise the Court we would rely on our previously submitted brief in opposition to the request to vacate the arbitration awards. On October 11, 2023 Progressive advised that the Motion to vacate the arbitration awards contained a two page Certification of Lewis Midlarsky (Da260 - Da261) that had previously not been provided which indicated that Progressive was attempting to take consistent positions with regard to the handling of Medpay claims. In response to Progressive's letter of October 11, 2023 Allstate uploaded a reply to those new allegations seeking to rebut Progressive's argument by showing that Progressive had previously allowed 17 arbitrations to go to a hearing and then satisfied the awards. Additionally, Progressive had 19 matters in which they made payment of the Medpay

subrogation claim prior to allowing the matter to proceed to arbitration. The clerk indicated that that October 17, 2023 submission was an impermissible sur-rebuttal.

The motion to vacate the arbitration awards filed by Progressive was premature and should have been denied without prejudice or carried to a later date as there were outstanding discovery issues and material issues of fact. The Estoppel argument could only be raised after the Court ruled on the discovery motion which was returnable on November 3, 2023. As set forth in the June 26, 2023 opinion of the Honorable Lousi S. Sceusi, J.S.C. obtaining those arbitration awards and filings were relevant to an argument of judicial or equitable estoppel; showing that Progressive's arguments with regard to those arbitration were consistent with the law of the state of New Jersey; that the arbitration awards bolstered the validity of the arbitrator's rulings. The Trial Court erred by allowing the matter to proceed without allowing defendant the right to obtain the documentation from Arbitration Forums, Inc. which was necessary to raise a number of valid arguments, most notably, judicial, or equitable estoppel.

The subpoena was properly served on Arbitration Forums, Inc. on July 21, 2023. (Da259). Subsequently, Arbitration Forums, Inc. refused to comply with the subpoena, and we filed a motion to enforce litigants rights on October 3, 2023. That motion had been returnable on October 20, 2023 but was carried until November 3, 2023 and ultimately was found to be moot.

POINT VII

THE HEARING CONDUCTED ON OCTOBER 20, 2023, WAS A HEARING TRYING THE MATTER PURSUANT TO R. 4:67-5 AND THE COURT PROPERLY CONSIDERED ALL THE BRIEFS PLACED BEFORE THE COURT. (Da1 – Da27).

This matter was filed as a summary proceeding pursuant to R. 4:67-1. In Grabowsky v. Township of Montclair, 221 N.J. 536 (2015) the Court addressed R. 4:67-1 and stated:

> 1. A court may grant summary disposition in only two settings…. Rule 4:67-1 governs all actions in which the court is permitted by rule or by statute to proceed in a summary manner…Grabowsky at 536.

This action to vacate an arbitration award was filed pursuant to the provisions of N.J.S.A. 2A:23B-23 which requires the filling of a summary action with the Court. Pursuant to R. 4:67 the hearing conducted on October 20, 2023 was the hearing required by R. 4:67-5 under which the Court proceeded to determine the issue based on the Briefs submitted. In Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003) the Court stated:

> A summary action is not a summary judgment motion. In a proceeding conducted under R. 4:67-5, a court must make findings of facts, either by adopting the uncontested facts in the pleadings after concluding that there are no genuine issues of fact in dispute, or by conducting an evidentiary hearing. Moreover, a party in a

> summary action proceeding is not entitled to favorable inferences such as those afforded to the respondent in a summary judgment motion. Courier News at 378-379

The hearing properly proceeded as a hearing conducted under the auspices of R. 4:67-5.

CONCLUSION

For the reasons set forth above the Order of the Trial Court should be vacated and the matter remanded for entry of an Order enforcing the arbitration awards and entering them as a judgment.

Tango, Dickinson, Lorenzo,
McDermott & McGee, LLP Attorneys for Defendant, Allstate NJ Ins. Co.

David J. Dickinson

David J. Dickinson, Esq.

Dated: April 2, 2024