IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

KEVIN M. MCCARTY, in his official capacity as the Commissioner of the FLORIDA OFFICE OF INSURANCE REGULATION,

Appellant,

vs.

Case No. 1D13-1355
L.T. No. 2013-CA-0073

ROBIN A. MYERS, D.C., et al.,

Appellees.

APPELLANT'S REPLY BRIEF

On Appeal from a Non-Final Order of the
Second Judicial Circuit, in and for Leon County, Florida

PAMELA JO BONDI
ATTORNEY GENERAL

C. Timothy Gray (FBN 602345)
Assistant General Counsel
J. Bruce Culpepper (FBN 898252)
Assistant General Counsel
Office of Insurance Regulation
Larson Building, Room 647-B
200 E. Gaines Street
Tallahassee, Florida 32399
(850) 413-2122
(850) 922-2543 (fax)

Allen Winsor (FBN 016295)
Solicitor General
Rachel Nordby (FBN 056606)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes and Rules

SUMMARY OF REPLY ARGUMENT

The trial court's Injunction Order should be reversed because it is rife with facial and substantive defects.

First, the Order lacks specific details and directions, leaving the Office to guess as to its scope and effect. The Order also lacks detailed factual findings to support its conclusions—a prerequisite for injunctive relief. And the Order likewise fails to require a bond—another prerequisite for injunctive relief. Each of these facial defects independently requires reversal.

Second, the Order incorrectly applies settled legal principles concerning Appellees' standing and the merits of their access-to-courts claim. Appellees lack standing to assert the hypothetical claims of others, a failing they cannot rectify by including a fictional "Jane Doe" Plaintiff. Regardless, the Amendments do not violate access to courts because they have not fundamentally changed the PIP system. Claimants retain substantial benefits under the amended system, and the law continues to provide a reasonable alternative to traditional tort remedies.

STANDARD OF REVIEW

Appellees argue that the standard of review is abuse of discretion because the "trial court considered the evidence presented." Ans. Br. at 6. But because the court based its Order on an issue of law, this Court's review is de novo. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 933-34 (Fla. 1st DCA 2012) (Fla. 1st DCA 2012) (explaining that "review of a trial court's order on a motion for injunction is a hybrid inquiry" under which "legal conclusions are subject to de novo review"); *Lawnwood Med. Ctr., Inc. v. Desai*, 54 So. 3d 1027, 1029 (Fla. 4th DCA 2011) (reviewing an order granting a temporary injunction and stating "any legal conclusions are subject to de novo review" (internal quotation marks omitted)).

REPLY ARGUMENT

I. THE TEMPORARY INJUNCTION ORDER IS FACIALLY DEFECTIVE.

Appellees do not dispute that "[t]he issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly." *Shands at Lake Shore, Inc. v. Ferrero*, 898 So. 2d 1037, 1038 (Fla. 1st DCA 2005) (quoting *City of Jacksonville v. Naegele Outdoor Adver. Co.*, 634 So. 2d 750, 752 (Fla. 1st DCA 1994)). Nor do they quibble with the fact that a temporary injunction is invalid unless it strictly complies with Rule 1.610. *Yardley v. Albu*, 826 So. 2d 467, 470

(Fla. 5th DCA 2002). Instead, Appellees argue the Order *does* strictly comply with the Rule, an argument belied by the Order itself. Rather than overcoming the Order's numerous defects, Appellees' Answer Brief highlights the Order's invalidity and demonstrates the confusion the Order injected into Florida's insurance market.

A. The Order Provides No Specific Direction.

The Order is invalid because it fails to "describe in reasonable detail the act or acts restrained without reference to a pleading or another document." Fla. R. App. P. 1.610(c). This invalidity is obvious on the Order's face, and even Appellees do not argue that the Order's text directs or prohibits particular action. Instead, Appellees look beyond the Order's text and argue that the injunction "*could* be complied with by the mere issuance of a simple memorandum." Ans. Br. at 30 (emphasis added). But the Order says nothing of the "issuance of a simple memorandum"—nor does it specify any other means of compliance. Although Appellees can speculate how the Office might comply with the injunction, the need for speculation demonstrates the Order's invalidity as a matter of law. *See Pizio v. Babcock*, 76 So. 2d 654, 655 (Fla. 1954) ("The one against whom [an injunction] is directed should not be left in doubt about what he is to do.").

Appellees next rely on an Office employee's testimony, which they characterize as relating to "the effect of the Temporary Injunction." Ans. Br. at 32. Even if an employee's testimony could rectify an order's facial invalidity, the testimony here (which came after the Order) did not. As Appellees acknowledge, the employee testified that an Office memorandum could *not* restore the status quo ante. But more to the point, one witness's opinions about a temporary injunction's effect cannot relieve a trial court of its obligation to "describe in reasonable detail the act or acts restrained," Fla. R. App. P. 1.610(c), which the trial court did not do.

Appellees next contend that the Order was sufficiently specific because it "related to 'those sections of the law which require a finding of emergency medical condition . . . or that prohibit payment of benefits for services provided by acupuncturists, chiropractors, and massage therapists.'" Ans. Br. at 30-31. But even if the Order specified the sections to which it "related," it still provides no instruction as to what the Office is to *do* "related" to those sections. The Office is not charged with making findings of emergency medical condition. Nor is it the Office's role to determine whether a certain medical practitioner is eligible for payment under a PIP policy. Those determinations are made by individual insurance companies under individual policies issued to individual consumers.

Apparently recognizing that *insurers* make these determinations and that

insurers pay claims, Appellees repeatedly claim that *insurers* are complying with the injunction. Ans. Br. at 29, 30, 31, 33, 35; *see also id*. at 39 ("[T]he largest PIP insurance carrier already demonstrated that it can and will comply with the trial court's Order for Temporary Injunction . . . ."). Far from supporting the trial court's decision, however, this assertion underscores the Order's lack of direction. Appellees did not sue any insurer, and they sought no injunctive relief against any insurer. Nonparties' "compliance" with an injunction not directed to them has no bearing on whether the Order sufficiently described the acts restrained.

Moreover, Appellees' evidence on this point (which was not before the trial court when the Order issued[1]) highlights the harms the Order inflicted on the insurance market. That a nonparty insurer altered its business practices in response to the uncertainty of this litigation does not prove the Order was clear; it reveals a state of confusion in the insurance market directly attributable to the Order.[2] And it further undermines the trial court's casual suggestion, unsupported by factual findings, that "there appears to be no adverse consequence to the public interest" in

[1] Appellees' Appendix includes the Tighe Affidavit, which was not filed in the trial court until April 18, 2013. *See* Docket, *Myers v. McCarty*, 2013-CA-0073 (Fla. 2d Cir. Ct.).

[2] The amicus briefs of the Personal Insurance Federation of Florida and the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America, Florida Insurance Council, and American Insurance Association further illustrate the uncertainty pervading Florida's insurance market.

issuing the injunction. A. 1 at 2.

B. The Order Includes No Specific Findings of Fact.

Next, the Order contains no specific factual findings to support its conclusions, even though "[c]lear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction," *Naegele Outdoor,* 634 So. 2d at 754. In response to the Order's failing, Appellees insist that the court actually did make "specific findings of fact," but they struggle to identify them. Ans. Br. at 34. According to Appellees, the trial court's "specific findings of fact" were:

> "1) '[Appellees] are chiropractic physicians, massage therapists, and acupuncturists,'";
>
> "2) Appellees challenged Chapter 2012-197 requesting declaratory relief";
>
> "3) Appellees seek to enforce a right vested in the public at large and as such have established that they suffered a specific injury";
>
> "4) Appellees provide healthcare to those covered by PIP insurance benefits and Appellees possess a 'sufficient interest in the outcome of the case,'";
>
> "5) Appellees 'have alleged and proven irreparable harm and inadequate legal remedy,'"; and
>
> "6) Appellees have demonstrated a substantial likelihood of success on the merits."

Ans. Br. at 34 (alterations in brief). Aside from stating the obvious—that Appellees are providers challenging the law—these "findings" do little more than parrot the

elements for granting a temporary injunction. *See Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (recognizing that an injunction order "must do more than parrot each tine of the four-prong test" (quoting *Santos v. Tampa Med. Supply*, 857 So. 2d 315, 316 (Fla. 2d DCA 2003))). Beyond the conclusory observation that "[i]t seems clear to me that the Plaintiffs have alleged and proven irreparable harm and inadequate legal remedy," the Order makes no findings of Appellees' purported irreparable harm. A. 1 at 2. And other than stating that "there appears to be no adverse consequence to the public interest in maintaining the status quo if the injunction is issued," the Order makes no findings about the public interest. *Id.*

The Order's generalized statements on the temporary-injunction factors are not the "[c]lear, definite, and unequivocally sufficient factual findings" necessary to support this extraordinary relief. *Naegele Outdoor*, 634 So. 2d at 754; *see also id*. at 753 ("If it is to be subject to meaningful review, an order granting a temporary injunction must contain more than conclusory legal aphorisms.").

Appellees cannot cure the Order's lack of fact-findings by offering new facts on appeal. Their appendix nonetheless includes dozens of affidavits purporting to prove irreparable harm. S*ee* Ans. Br. at 21; Appendix to Ans. Br., Tab 3. But these affidavits (which Appellees call "John Doe" affidavits) were not before the trial

court when it considered Appellees' motion for a temporary injunction, and they cannot retroactively fix the trial court's failure to make specific fact findings.[3]

Because the trial court made no clear and definite factual findings, the Order is facially defective. *See Waste Pro of Fla., Inc. v. Emerald Waste Servs., LLC*, 17 So. 3d 916, 916 (Fla. 1st DCA 2009) (reversing temporary injunction order "because of a lack of specific factual findings").

C. The Order Requires No Bond.

The Order is also defective because it is not conditioned on a bond, despite the unequivocal requirement that, absent exceptions inapplicable here, "[n]o temporary injunction shall be entered unless a bond is given." Fla. R. Civ. P. 1.610(b). Appellees contend that the trial court complied with this requirement by

[3] Even if these "John Doe" affidavits were properly before this Court, and even if Appellees could assert the rights of these nonparties, the affidavits do not support Appellees' claims. The affidavits do not establish that the affiants will suffer the type of *future* irreparable harm required to support the entry of an injunction. Most are dated from early 2013 and offer vague complaints about the affiants' inability to find work, loss of income, and other economic hardships that, in large part, predate the challenged law's January 1, 2013 effective date. Additionally, the alleged harms are economic in nature and therefore do not constitute irreparable harm. *See B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*, 549 So. 2d 197, 198 (Fla. 3d DCA 1989) (explaining that an injury is not irreparable when it is pecuniary in nature and can be compensated by a monetary award); *see also State, Dep't of Transp. v. Kountry Kitchen of Key Largo, Inc.*, 645 So. 2d 1086, 1086 (Fla. 3d DCA 1994) (explaining that an alleged loss of business does not support a finding of irreparable injury); *City of Boynton Beach v. Finizio*, 611 So. 2d 74, 75 (Fla. 4th DCA 1992) (explaining that threatened loss of employment does not constitute irreparable harm).

leaving the bond issue open. Ans. Br. at 35. But whether the trial court "reserved" on the bond issue or denied a bond request outright, the result is the same: The trial court entered an injunction without requiring a bond. This was not an option the trial court had. *See Fla. High Sch. Athletic Ass'n v. Rosenberg*, No. 4D13-907, 2013 WL 3197072, at *1-*2 (Fla. 4th DCA June 26, 2013) (reversing and remanding because, although "this might not be the ordinary type of injunction involving business or some other form of damages, it is nevertheless a temporary injunction," and the trial court erred in failing to require a bond); *Pinder v. Pinder*, 817 So. 2d 1104, 1105 (Fla. 2d DCA 2002) ("Under the compulsory language of the rule, the trial court has no discretion to dispense with the requirement of a bond.").

II. THIS COURT SHOULD ADDRESS APPELLEES' LIKELIHOOD OF SUCCESS ON THE MERITS AND REVERSE.

A trial court cannot issue a temporary injunction unless the movant establishes a substantial likelihood of success on the merits. Not *some* likelihood, but a *substantial* likelihood. "It is not enough that a merely colorable claim is advanced." *Naegele Outdoor*, 634 So. 2d at 753. Instead, "a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested." *Id.* (quoting *Mid-Fla. at Eustis, Inc. v. Griffin*, 521 So. 2d 357 (Fla. 5th DCA 1988). Here, Appellees have failed to establish *any*

likelihood of success on the merits, and far from being "certain" that Appellees were entitled to relief, the trial court acknowledged that the issue was reasonably debatable. A. 1 at 7. ("The answer to [the constitutional] question[] is probably, like beauty, in the eye of the beholder, and reasonable people may disagree.").

A. Appellees Lack Standing to Assert Their Access-To-Courts Claim.

The trial court rejected each of Appellees' legal theories other than access to courts. A. 1 at 2 ("I find that the Plaintiffs have met their burden only as to this latter [access-to-courts] theory.") (emphasis in original). But no Appellee below asserted a violation of his or her own right of access to courts, relying instead on hypothetical claims of others. A. 2 at 29-30; A. 7 at 15-16. On appeal, they assert that "in addition to being medical providers, Appellees are also motor vehicle owners and operators that are subject to the same coverage limitations," Ans. Br. at 20, but they do not suggest—much less cite evidence that—they have been injured in an automobile accident and are unable to recover through a negligence action.

Rather than assert their own access-to-courts claims, they suggest that their financial harm is sufficient to warrant standing. But harm alone—even if there were some—is not enough to assert the rights of others. Standing encompasses "the requirement that the claim be brought by or on behalf of one who is recognized in the law as a 'real party in interest,' that is the person in whom rests,

by substantive law, the claim sought to be enforced." *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005). And no party with a real and substantive access-to-courts claim is before the Court.

Nonetheless, Appellees insist that "Jane Doe" saves the day. To the extent Appellees present "Jane Doe" to assert third-party standing, their attempt fails.[4] Generally, "one who is not himself denied some constitutional right or privilege cannot be heard to raise constitutional questions on behalf of some other person who may at some future time be affected." *Steele v. Freel*, 25 So. 2d 501, 503 (Fla. 1946); *accord Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991))). A limited exception applies when (i) the litigant suffered a concrete injury, (ii) the litigant has a close relationship with the third party, and (iii) the third party is somehow unable to protect his own interests. *Alterra Healthcare Corp.*, 827 So. 2d at 941-42 (citing *Powers*, 499 U.S. at 410-11).

[4] Although unclear, Appellees' Jane-Doe discussion is perhaps best interpreted as a third-party standing argument. To the extent Appellees instead contend that Jane Doe is an actual unidentified party asserting her own rights, this Court should reject the contention out of hand. If parties could manufacture standing by adding a fictional plaintiff, the doctrine of standing as a limitation on judicial power would be eviscerated.

Even if Appellees suffered a concrete injury (a conclusion not supported by the trial court's fact-findings), and even if Appellees had a close relationship with all Jane Does (an assertion not even advanced), Appellees cannot satisfy the third factor because there is no impediment to the third parties' vindicating their own rights of access to courts. If a negligent driver injures a third party, and if that third party sues for damages, and if the statutory PIP immunity limits those damages in a manner inconsistent with the right of access to courts, then that third party could vindicate that right in that case. And on review, this Court would have concrete facts on which to consider the same constitutional challenge Appellees advance in the abstract here.

B. The Amendments Do Not Violate Access to Courts.

Appellees are unlikely to succeed on the merits of their access-to-courts claim because the Amendments have not fundamentally changed the PIP system. The crux of Appellees' claim is that the Amendments so severely limit PIP recovery that the law no longer provides a reasonable alternative under the reasoning of *Lasky v. State Farm Ins. Co*., 296 So. 2d 9 (Fla. 1974), and *Chapman v. Dillon*, 415 So. 2d 12 (Fla. 1982). However, the 2012 Amendments remain valid under these cases because they "are reasonable attempts by the legislature to correct some of the practical problems which the no-fault law ha[s] posed,"

Chapman, 415 So. 2d at 16, and they do not prevent PIP claimants from recovering their "major and salient economic losses," *Lasky*, 296 So. 2d at 14.

Appellees paint the 2012 Amendments as draconian and dramatic, repeatedly asserting that the changes cause a 75% reduction in PIP coverage for all of Florida's driving consumers. Ans. Br. at 5, 12, 14, 18. This characterization ignores the fact that PIP claimants do not automatically receive either $2,500 or $10,000. Instead, depending on the actual claims and injuries, some claimants may receive the maximum $10,000, some may be capped at $2,500, and some may receive less than either of those thresholds. The characterization also ignores the fact that PIP benefits are not limited to medical treatments—much less acupuncture costs—but include lost wages, other disability expenses, and death benefits. *See* §§ 627.731, 627.736(1)(a)-(c), Fla. Stat. (2012). The Amendments did not modify these other benefits, which continue to provide substantial recovery to PIP claimants.

Following the Amendments, PIP claimants continue to recover their "major and salient economic losses," *Lasky*, 296 So. 2d at 14. The trial court made no findings that the remaining benefits are illusory—or that PIP claimants are not continuing to recover substantial PIP benefits every day. Because the Act remains a reasonable alternative to traditional tort, Appellees' access-to-courts claim fails.

CONCLUSION

Because the Order is facially defective and based on erroneous legal conclusions, this Court should reverse.

Respectfully Submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Rachel E. Nordby

C. Timothy Gray (FBN 602345)
Assistant General Counsel
J. Bruce Culpepper (FBN 898252)
Assistant General Counsel
Office of Insurance Regulation
Larson Building, Room 647-B
200 E. Gaines Street
Tallahassee, Florida 32399
(850) 413-2122; (850) 922-2543
tim.gray@floir.com
bruce.culpepper@floir.com

Allen Winsor (FBN 016295)
Solicitor General
Rachel Nordby (FBN 056606)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681; (850) 410-2672 (fax)
allen.winsor@myfloridalegal.com
rachel.nordby@myfloridalegal.com

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief was prepared in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210, and that a true and correct copy of the foregoing was served by electronic mail this 1st day of July, 2013, to the following:

/s/ Rachel E. Nordby
Attorney

Luke Charles Lirot
2240 Belleair Road, Suite 190
Clearwater, Florida 33764
Luke2@lirotloaw.com
jimmy@lirotlaw.com

Adam S. Levine
11180 Gulf Boulevard, Suite 303
Clearwater, Florida 33767
aslevine@msn.com
alevine@law.stetson.edu

Theodore E. Karatinos
Holliday, Bomhoff & Karatinos, PL
18920 North Dale Mabry Highway,
Suite 101
Lutz, Florida 33548
tedkaratinos@hbklawfirm.com

Jessie L. Harrell
Bryan S. Gowdy
865 May Street
Jacksonville, Florida 32204
jharrell@appellate-firm.com
bgowdy@appellate-firm.com
filings@appellate-firm.com

Mark S. Sussman
P.O. Box 640848
Miami, FL 33164
msussman@gmail.com

Katherine E. Giddings
Nancy M. Wallace
Marcy L. Aldrich
Akerman Senterfitt
106 E. College Street, #1200
Tallahassee, Florida 32301
katherine.giddings@akerman.com
nancy.wallace@akerman.com
elisa.miller@akerman.com
martha.parramore@akerman.com
marcy.aldrich@akerman.com
debra.atkinson@akerman.com

Maria Elena Abate
Matthew C. Scarfone
Colodny, Fass, Talenfeld, Karlinsky,
Abate & Webb, PA
One Financial Plaza, 23rd Floor
100 SE Third Avenue
Fort Lauderdale, Florida 33394
mabate@cftlaw.com
mscarfone@cftlaw.com

Kimberly A. Driggers
Brooks, LeBoeuef, Bennett,
Foster & Gwartney, P.A.
909 E. Park Ave.
Tallahassee, FL 32301
KDriggers@Tallahasseeattorneys.com

Paul W. Lambert
Law Office of Paul W. Lambert
502 N. Adams St.
Tallahassee, FL 32301
PLambert@PLambertlaw.com