9. Plaintiff and Plaintiff's counsel knew or should have known at the time suit was filed, that they had sued the wrong insurance company, yet Plaintiff continued to maintain its suit against ALLSTATE INSURANCE COMPANY for almost a year.

10. Plaintiff had multiple opportunities to correct its mistake and failed or refused to do so. ALLSTATE INSURANCE COMPANY filed its Motion for Summary Judgment as to incorrect carrier, and subsequently filed its Motion to Tax Fees & Costs pursuant to F.S. §57.105 providing Plaintiff with the 21 day Safe Harbor Provision in which to cure the wrongful conduct. Plaintiff failed or refused to do so.

11. Defendant's Motion for Summary Judgment and Motion for Entitlement to Attorney's Fees and Costs Pursuant to Florida Statutes §57.105 were properly noticed for hearing for July 27, 2009.

12. Plaintiff filed not affidavits or memoranda in opposition to Defendant's Motion for Summary Judgment and Motion for Entitlement to Attorney's Fees and Costs Pursuant to Florida Statutes §57.105.

Therefore, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's, ALLSTATE INSURANCE COMPANY, Motion for Summary Judgment is hereby GRANTED.

2. Defendant's, ALLSTATE INSURANCE COMPANY, Motion for Entitlement to Attorney's Fees and Costs Pursuant to Florida Statutes §57.105 is hereby GRANTED.

3. The Court finds that Defendant properly complied with the conditions precedent to support its entitlement to attorneys fees and costs pursuant to F.S. §57.105.

4. The Court finds that Plaintiff and Plaintiff's attorney knew or should have known that the claim when initially presented to the court and during the past year was not supported by the material facts necessary to establish the claim; and was not supported by the application of existing law to those material facts.

5. The Court makes express findings that the Law Office of Gonzalez & Associates, LLC was not acting in good faith by initiating and maintaining this suit.

6. Central Florida Rehab Center, Inc. and the Law Office of Gonzalez & Associates, LLC shall each be jointly and severally responsible for Defendant's reasonable attorney's fees and costs.

7. Defendant shall go hence without day.

8. The Court reserves jurisdiction to determine the amount of reasonable attorney's fees, interest and costs to be awarded to Defendant.

* * *

Criminal law—Battery—Evidence—Hearsay—Exceptions—Excited utterance—911 tape—If evidence is presented to establish that victim is mother of person who made 911 call, defendant is caller's father, and phone call occurred close enough in time to startling event to prevent reflective thought, caller's voice on tape-recording of 911 call qualifies as excited utterance—Non-testimonial parts of 911 tape that are admissible without caller appearing at trial are identified

STATE OF FLORIDA, Plaintiff, v. MARK PAYTON, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 48-09-MM-6089-O. August 18, 2009. Mike Murphy, Judge. Counsel: Office of the State Attorney, Christopher Atcachunas, Orlando.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION IN LIMINE IN REFERENCE TO THE 911 CALL

THIS CAUSE having come on to be heard on the DEFENDANT'S MOTION *IN LIMINE* in reference to the 911 call and the Court being fully advised on the premises, it is hereby ORDERED that the Motion is Granted in part and Denied in part as follows:

In *Davis v. Washington*, 547 U.S. 813, 829 (2006), the United States Supreme Court stated that trial courts should, through *in limine* procedures, redact or exclude any testimonial evidence that violates a defendant's right to confront witnesses, as trial courts already do with unduly prejudicial portions of otherwise admissible evidence. In the instant case the Defense has moved to exclude portions of a 911 call made by a caller that the Defense expects will not be testifying at the trial. The Defense's position is that the communications on the tape are hearsay statements that do not fall within any exception, and even if it did fall within an exception, its admissibility would violate the Defendant's constitutional right to confront the witnesses against him. The State's position is that the communications on the 911 call fall within the excited utterance exception and are non testimonial, such that its admission does not violate the requirements of the Sixth Amendment's Confrontation Clause.[1]

In *State v. Francis*, 16 Fla. L. Weekly Supp. 438a (Fla. 9th Cir., Orange County 2009) this Court last wrote an opinion on this subject, and therefore, to be consistent, that opinion is relied upon in forming the basis of this opinion. Additionally, the Court will make the following assumptions[2] for this motion *in limine*: First, the victim of the battery will testify as to her relationship to the caller or at least there will be competent evidence that establishes that the caller's mom is the listed victim and that the Defendant is the caller's father.[3] And second, the victim will testify as to the time of the event (as related to the 911 call) or some other competent evidence will be introduced to establish that the time of the startling event and phone call occurred close enough in time to prevent reflective thought by the caller.[4]

Assuming the above assumptions hold true, except as noted below, the caller's voice on the phone call qualifies as an excited utterance under Fla. Stat. 90.803(2).[5] The next issue then is whether the admissibility of the phone call, without the caller appearing at trial, will violate the Defendant's sixth amendment rights.[6]

The following is a break down of the time on the tape and this court's ruling taking into account the cases relied upon in *Francis* as well as *Barron v. State*, 990 So. 2d 1098 (Fla. 3d DCA 2008) and *MJ v. State*, 994 So. 2d 485 (Fla. 3d DCA 2008).

0 to 1:52, non testimonial, admissible.

1:53 to 1:58, state stipulated out.

1:59 to 2:06, hearsay conversation between operators, inadmissible.

2:06 to 2:57, testimonial, and therefore inadmissible as the responses were to questions by the paramedic dispatcher after their operator already indicated to the sheriff operator that the paramedics would "stage" due to the Sheriff's Office advancing and therefore the caller's answers were not in response to questions that the primary purpose were to enable police assistance to meet or resolve an ongoing/present emergency. (Additionally, 2:37 to 2:57 state already stipulated out).[7]

2:57 to 3:09, hearsay conversation between operators, inadmissible.

3:09 to 3:33, non testimonial, admissible.

3:34 to 3:41, state stipulated out.

3:42 to 4:20, no longer an excited utterance as this is at least the third time the caller has relayed the event, each time with more detail, therefore it appears the caller has now engaged in reflective thought, even if prior to this time frame the caller had not engaged in reflective thought. Therefore, this portion is inadmissible.

4:20 to 436, spontaneous statement, non testimonial, admissible.

4:37 to 4:58, state stipulated out.

4:59 to 6:04, spontaneous statement, non testimonial, admissible.

6:05 to 6:12, state stipulated out.

6:13 to end, spontaneous statement, non testimonial, admissible.

[1]At this point, the State believes the juvenile caller on the 911 will tape (a person other than the listed victim) will not be appearing voluntarily at the trial and the State has not made a request for a Writ of Bodily Attachment for the witness.

[2]Florida trial courts are not authorized to render advisory opinions. See e.g., *Dr. Phillips, Inc., v. L&W Supply Corp.*, 790 So. 2d 539 (Fla. 5th DCA 2001). However, the purpose of the Defendant's Motion and the State's response is to allow both parties to be prepared for trial and the State the opportunity to appeal an adverse ruling. While those factors alone would not allow an advisory opinion, it would be impossible to comply with the US Supreme Court's procedural guidance of an *in limine* ruling without providing for the scope of such an *in limine* ruling. Furthermore it can be argued that since the admissibility of the tape is an actual controversy, the fact this opinion provides for assumptions does not take away from a real controversy.

the victim or Defendant by name. Therefore, additional competent evidence will be needed to make this phone call relevant to the instant prosecution.

[4]In *Moss v. State*, 14 Fla. L. Weekly Supp. 121a (Fla. 9th Cir. App. 2006), this was established by the State introducing evidence of the appearance of a "pink mark on the victim's head," other observations of the victim made by the responding officer, and it was undisputed that the victim's statement was made within five to ten minutes of the battery.

[5]If the assumptions do not hold true, than the following would occur: If the first assumption does not come true, the tape would not be relevant and therefore this ruling is moot. If the second assumption does not come true, the State would be unable to establish the lack of time for reflective thought and the excited utterance portions of the 911 call would not qualify as an excited utterance and would be inadmissible. See *JAS v. State*, 920 So. 2d 759 (Fla. 2d DCA 2006) and *State v. Ratner*, 953 So. 2d 36, 38 (Fla. 4th DCA 2007).

[6]The phone call is seven minutes and seven seconds in length. The State has agreed that independent of this ruling, the State will not introduce the portions of the call that pertain to weapons and or drugs. (The times between 1:53 and 1:58; 2:37 and 2:57; 3:34 and 3:41; 4:37 and 4:58; and 6:05 and 6:12).

[7]Included within this portion of the tape is the caller identifying himself by name. A telephone caller's "self identification is not competent evidence of identity." *Byer v. Florida Real Estate Commission*, 380 So. 2d 511, 512 (Fla. 3d DCA 1980). Therefore that portion of the call would remain inadmissible unless the State established the caller's identity pursuant to *Ziegler v. State*, 402 So. 2d 365, 374 (Fla. 1981).

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Overdue bills—Request for documentation—Where insurer made timely request for additional documentation regarding claims and received no response from medical provider, claims were not overdue at time of filing suit and lawsuit is premature

HIALEAH MEDICAL CORP. A/A/O SUNRIDE MORA, Plaintiff, vs. MERCURY INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Civil Division. Case No. 08-12702 SP 25. July 17, 2009. Andrew S. Hague, Judge. Counsel: Ana D'Costa, Shirejian & O'Hara, Mercury Ins. Group, Aventura. Munir Barakat.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT PURSUANT TO F.S. §627.736(6)(b)

THIS MATTER having come on to be heard on June 10, 2009, on Mercury Insurance Company's ("Mercury") Motion for Final Summary Judgment based on its request for additional documentation, pursuant to F.S. § 627.736(6)(b), and the Court being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that:

Defendant's Motion is hereby granted.

THIS COURT FURTHER FINDS that:

FINDINGS OF FACT:

1. Hialeah Medical Corp. (hereinafter "Plaintiff") billed for and sought reimbursement for treatment ordered by Carlos A. Blanco, M.D., for dates of service of January 21, 2008 through May 6, 2008, for injuries the insured allegedly sustained in an automobile accident that occurred on January 17, 2008.

2. Plaintiff submitted five bills. The total billed for these dates of service was $14,405.00.

3. Mercury sent numerous (6)(b) letters to the Plaintiff (within 30 days of receipt of the bills, on March 27th, April 1st, May 5th, May 14th, and June 19th, 2008) and requested that the Plaintiff complete the OIR-B1-1809 form and demonstrate how it is eligible to receive payment for PIP benefits under the recently enacted provision of the PIP statute, §627.736(1)(a).

4. Plaintiff never responded to the (6)(b) letters.

5. The Plaintiff submitted three demand letters to Mercury on April 8th, June 12th, and June 17th, 2008; and Mercury responded to all of them, explaining to Plaintiff that the bills were not overdue since the Plaintiff had not complied with the (6)(b) letters.

6. Plaintiff then filed a one count complaint for breach of contract for failure to pay PIP benefits.

CONCLUSION OF LAW:

7. The pertinent part of F.S. § 627.736(6)(b), states:

> Every physician, hospital, clinic, or other medical institution providing, before or after bodily injury upon which a claim for personal injury protection insurance benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested to do so by the insurer against whom the claim has been made, furnish forthwith a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person. . .If an insurer makes a written request for documentation or information under this paragraph within 30 days after having received notice of the amount of a covered loss under paragraph (4)(a), the amount of the partial amount which is the subject of the insurer's inquiry shall become overdue if the insurer does not pay in accordance with paragraph (4)(b) or within 10 days after the insurer's receip of the requested documentation or information, whichever occurs later.

8. Pursuant to F.S. § 627.736(6)(b), Mercury was entitled to request additional information regarding the Plaintiff's eligibility requirements under the new PIP statute [§627.736(1)(a)], as such information went to costs, one of the enumerated categories contained in (6)(b).

9. As stated in *Kaminester v. State Farm Mutual Insurance Company*, 775 So. 2d 981 (Fla. 4th DCA 2000), *State Farm Mutual Automobile Insurance Company v. Dr. Elias Goldstein, et al.*, 798 So. 2d 807 (Fla. 4th DCA 2001), and *MRI Services, Inc. v. State Farm Mutual Automobile Insurance Company*, 807 So. 2d 783 (Fla. 2nd DCA 2002), §627.736(6)(b) is designed to enable the insurer to make inquiry of certain facts so that it can better investigate its claims. F.S. §627.736(6)(b) can move things faster because it can accelerate discovery. Specifically, (6)(b) can accelerate the insurer's investigation of the particular claim by allowing it to make a determination as to whether or not it has sufficient information to pay or deny the claim based on the information the insurer learns from the inquiry. Further, this part of the PIP statute may have the power to eliminate litigation as well as eliminate post suit discovery.

10. However, if the medical provider fails to respond to (6)(b) requests, then its claims do not become overdue. In fact, where an insurer has made a timely request for additional information, such in a case like this, "and having received no responses from the plaintiff, the claims that were the subject of the suit were not 'overdue' at the time of the complaint and are not collectible as the law suit is premature." *Professional Medical Group, Inc. a/a/o Jurgen Ugalde v. Progressive Express Insurance Company*, 13 Fla. L. Weekly Supp. 1000b (Fla. 11th Judicial Circuit July 2006).

11. In fact, numerous cases stand for the proposition that when a (6)(b) request has been made and the medical provider does not respond, the law suit is premature. *See*, e.g., *Drew Medical Inc. a/a/o Belen Vazquez) v. Progressive Express Insurance Company*, 12 Fla. L. Weekly Supp. 403b (Fla. 18th Judicial Circuit January 2005), *Physicians Extended Services a/a/o Christina L. Nelson) vs. Progressive Express Insurance Company*, 11 Fla. L. Weekly Supp. 649b (Fla. 9th Judicial Circuit April 2004), *Doctors Pain Management (a/a/o Dalon Finley) v. Progressive Auto Pro Insurance Company*, 11 Fla. L. Weekly Supp. 1071b (Fla. 9th Judicial Circuit August 2004).

12. Moreover, even if there is a dispute regarding whether or not the medical provider is required to respond to the insurer's request for additional information, the medical provider is obliged to at least advise the insurer of same pursuant to F.S. § 627.736(6)(c), which provides:

> In the event of any dispute regarding an insurer's right to discovery of facts under this section, the insurer may petition a court of competent jurisdiction to enter an order permitting such discovery. . .

It follows, then, that a medical provider respond and advise the insurer that it is disputing the insurer's request for information.

13. Here, as Plaintiff failed to respond to Mercury's timely request for additional information pursuant to F.S. §627.736(6)(b), the claims pertaining to this lawsuit are not overdue; and therefore, this lawsuit is premature.

WHEREFORE, it is ordered and adjudged: