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COURT OF APPEALS

STATE OF NEW YORK

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VIVIANE ETIENNE MEDICAL CARE, P.C.,

Respondent,

-against-

No. 75

COUNTRY-WIDE INS. CO.,

Appellant.

-----

Judicial Institute  
84 North Broadway  
White Plains, New York 10603  
April 28, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 75.

2 Counsel, would you like any rebuttal time?

3 MR. TORTO: Yes, Your Honor. Three  
4 minutes, please.

5 CHIEF JUDGE LIPPMAN: Three minutes. Sure.  
6 Go ahead. You're on.

7 MR. TORTO: Good afternoon. My name is  
8 Thomas Torto. I represent the defendant-appellant  
9 Country-Wide Insurance Company. This case presents  
10 the court with a question of what is the standard of  
11 proof, the burden of proof, on a motion for summary  
12 judgment by a healthcare provider.

13 CHIEF JUDGE LIPPMAN: What is the standard  
14 of proof, counsel?

15 MR. TORTO: We suggest that the standard of  
16 proof should be the same standard that is well-known  
17 and familiar law. Eliminate all questions of fact  
18 and - - - and show, as a matter of law, the movant is  
19 entitled to relief based on an affidavit, based on  
20 personal knowledge, which presents the documents that  
21 they rely on in admissible form.

22 JUDGE PIGOTT: But what do we do about the  
23 fact that this whole no-fault scheme was designed to  
24 get this stuff done. And here we are - - - I - - - I  
25 forget what the date of the accident was in - - -

1 '04, and we're still fighting over 6,000 dollars.  
2 And you're in the Court of Appeals. You've got  
3 twenty-eight affirmative defenses over 6,000-dollar  
4 claim. They've got whatever - - - whatever they got.

5 I mean, it seemed to me that when - - -  
6 when you had the invoices July, August, September - -  
7 - I - - - I - - - I don't - - - I don't think they  
8 went to November - - - you didn't do anything. Now,  
9 it would seem to me you'd say, well, we don't have  
10 the - - - the medical backup, which you're allowed to  
11 do. You didn't do that. And - - - and now all of a  
12 sudden, because you - - - you want to fight this  
13 thing, you're saying well, they didn't - - - they  
14 didn't give us the backup. Aren't you supposed to do  
15 that quickly?

16 MR. TORTO: No. I don't think - - - in  
17 this case, these eight NF-3s in question, there is no  
18 way that a claim examiner looking at these claim - -  
19 - looking at these NF-3s - - -

20 CHIEF JUDGE LIPPMAN: Counsel, but why  
21 didn't the burden shift to you once they - - - once  
22 they did these forms or gave you the form? You mean,  
23 you just do absolutely nothing? If you wanted to ask  
24 them for more verification, it would be one issue.

25 MR. TORTO: No, no.

1 CHIEF JUDGE LIPPMAN: But you go over the  
2 time limit and you do absolutely nothing. Why is it  
3 better in that circumstance, in the context, as Judge  
4 Pigott is just saying, of these no-fault situations,  
5 why is it better to do this? Why - - - or isn't it a  
6 case, they submit the forms, you act; if you don't  
7 act, they recover? If you do something, fine. Ask  
8 them for more information. Why didn't you do that?

9 MR. TORTO: Well, first, you can't tell - -  
10 -

11 CHIEF JUDGE LIPPMAN: And they did submit  
12 an affidavit by someone with knowledge about these  
13 forms.

14 MR. TORTO: Right. But these forms - - -  
15 these claim forms are not the claim forms of the  
16 plaintiff. That's the whole point here.

17 JUDGE FAHEY: Well, right. But - - - but  
18 they still have to do that - - -

19 MR. TORTO: They're the bills of the  
20 provider.

21 JUDGE RIVERA: And are you saying you  
22 wouldn't know that when you have it?

23 JUDGE FAHEY: I guess the question is that  
24 - - -

25 MR. TORTO: You wouldn't know that. Look

1 at these bills.

2 JUDGE RIVERA: So you would never ask, show  
3 me the underlying information that shows, indeed,  
4 those services were provided. You would never ask?

5 MR. TORTO: No. You might ask. But I'm  
6 just saying look at this - - -

7 JUDGE RIVERA: Well, when - - - when would  
8 you might? What would trigger I might ask?

9 MR. TORTO: Well, if there was a problem  
10 with - - - with the - - - the bills itself. If they  
11 raised a - - - raised a red flag, if you wanted a - -  
12 - a medical report or some kind of medical backup.  
13 But if you did nothing, you would not know - - - in  
14 this case the record shows that nobody knew - - -

15 CHIEF JUDGE LIPPMAN: All right. But you -  
16 - - but you did do nothing.

17 JUDGE FAHEY: Okay. But - - -

18 MR. TORTO: Right.

19 CHIEF JUDGE LIPPMAN: Judge Fahey, go  
20 ahead.

21 JUDGE FAHEY: It seems to me you got - - -  
22 there's a two-prong analysis here. There's a burden-  
23 of-proof analysis and a waiver analysis. So how is  
24 this not waiver on your part?

25 MR. TORTO: Because even if the defendant

1 defaulted - - -

2 JUDGE FAHEY: Um-hum.

3 MR. TORTO: - - - that still doesn't exc -  
4 - - automatically entitle the plaintiff to recover.

5 JUDGE FAHEY: But they're entitled to an  
6 answer from them. That's why - - - that - - - that's  
7 why I - - - I'm asking you about the waiver analysis.

8 MR. TORTO: Right.

9 JUDGE FAHEY: They - - - they're - - - I'm  
10 not saying they're entitled to summary judgment, but  
11 going back to the process itself, by not responding,  
12 you waive your response. And we don't even have to  
13 really get to the burden-of-proof analysis, which is,  
14 I think, what the Second Department was getting at.

15 MR. TORTO: Yes. But the - - - I think the  
16 - - - the mistake that the Second Department made was  
17 concluding that this bill, that this - - - these  
18 eight claims - - -

19 JUDGE FAHEY: Um-hum.

20 MR. TORTO: - - - are the claims of the  
21 provider.

22 JUDGE STEIN: Well, you don't disagree that  
23 you can't, at any point now, go back and challenge  
24 whether, in fact, that - - - that those services were  
25 rendered.

1 MR. TORTO: Right.

2 JUDGE STEIN: What you're saying is is that  
3 - - - is that they have to present that proof to the  
4 court. It's just like a default judgment.

5 MR. TORTO: Correct.

6 JUDGE STEIN: So even if there's nobody on  
7 the other side - - - which effectively there is no  
8 one on the other side - - -

9 MR. TORTO: Correct.

10 JUDGE STEIN: - - - because you've been  
11 precluded. But even in those situations, they have  
12 to come forward with evidence in admissible form to  
13 show that they're entitled to recover - - -

14 MR. TORTO: Correct.

15 JUDGE STEIN: - - - on those claims. Isn't  
16 that - - - isn't that what you're essentially saying?

17 MR. TORTO: Correct. That's our position.

18 JUDGE STEIN: Okay.

19 MR. TORTO: That's our position.

20 JUDGE READ: They have to make a prima  
21 facie case.

22 MR. TORTO: Right. The plaintiff should  
23 not be in a better position because the defendant  
24 answered.

25 JUDGE RIVERA: Well, it depends how you

1 define that prima facie case, right? That's the  
2 difference between the - - -

3 MR. TORTO: Well - - -

4 JUDGE RIVERA: - - - at the Appellate  
5 Department the difference between the majority and -  
6 - - and the dissent.

7 MR. TORTO: Correct.

8 JUDGE RIVERA: So let me just ask you. You  
9 said that you wouldn't know on the form. So why is  
10 it you denied one of them? What made that particular  
11 bill different from the others, because you did deny  
12 one?

13 MR. TORTO: No. No, they denied one. What  
14 I meant was that you would not know that this form  
15 was really created by the biller - - -

16 JUDGE RIVERA: No. I understand but - - -

17 MR. TORTO: - - - and not by the physician.

18 JUDGE RIVERA: I understand your point.  
19 But I'm saying what made this - - - I'm just asking.  
20 What made this one that you actually denied different  
21 from the rest? Looked to me like they were all  
22 generated the same.

23 MR. TORTO: Yeah. I don't know why they  
24 didn't deny the other seven.

25 JUDGE RIVERA: Okay, all right.

1 CHIEF JUDGE LIPPMAN: But what - - - but,  
2 again, how is this is consistent, your position, with  
3 the whole purpose behind the no-fault law? Aren't  
4 you going to make these things into extravaganzas  
5 every time instead of, again, you do the forms, you  
6 have time in which to react, you don't do anything,  
7 fine, the burden is on you at that point? If you do  
8 ask for more things, you get it. Why isn't it a  
9 better system under the - - - again, the philosophy  
10 behind the no-fault law, to - - - to look at it that  
11 way?

12 MR. TORTO: Because the - - -

13 CHIEF JUDGE LIPPMAN: You got the burden  
14 shift to you. You either meet it or you don't.

15 MR. TORTO: Well, still, it protects the  
16 burden - - - the integrity of the court that the  
17 movant, in the first instance, has to present the  
18 bill based on an affidavit which is based on personal  
19 knowledge and it satisfies the hearsay exception for  
20 - - -

21 JUDGE PIGOTT: Well, not - - - not your  
22 client, but some other client, if we find the way  
23 you're suggesting, the - - - the - - - the memo  
24 should go out, don't pay any claims. Because we  
25 won't have to pay these claims for at least three

1 years by the time they get to the Appellate Division,  
2 and they're going to have to get an affidavit from  
3 the doctor, and they're going to have to put that  
4 together with an affidavit of service on the biller,  
5 and by then, we're going to be fine.

6 MR. TORTO: No. They don't need an aff - -  
7 - need an affidavit from the doctor. They need an  
8 affidavit, though, from somebody with personal  
9 knowledge of the doctor's offices practices and  
10 procedures.

11 JUDGE STEIN: Would it be - - enough

12 MR. TORTO: We don't even know who signed  
13 this document, these eight claims.

14 JUDGE PIGOTT: You didn't complain.

15 MR. TORTO: We didn't know at the time.

16 JUDGE STEIN: Would it be - - - would it be  
17 - - enough

18 MR. TORTO: The - - - the carrier, the  
19 claims examiner, would not know when these claims  
20 came in, that they were in - - - in effect created by  
21 somebody - - -

22 CHIEF JUDGE LIPPMAN: Are you changing the  
23 stat - - - are you - - - by your position, are you  
24 changing the statute that they have to put in more  
25 things then they're required to because otherwise,

1           you don't have to do anything?

2                       MR. TORTO:  No.  It's just my - - - our  
3           position is that on a motion for summary judgment,  
4           they got to - - -

5                       CHIEF JUDGE LIPPMAN:  Why shouldn't we  
6           presume from those forms that they made out a prima  
7           facie case?  And, again, you want something further,  
8           let them know.  Seek verification.

9                       MR. TORTO:  You - - - you wouldn't know  
10          during the claim process.  It wasn't until this  
11          lawsuit was started and an affidavit was submitted  
12          from a Roman Matatov, who says he's the third-party  
13          biller - - -

14                      JUDGE RIVERA:  So - - - but you get that  
15          bill - - -

16                      MR. TORTO:  - - - who created this form.

17                      JUDGE RIVERA:  But you get the - - -

18                      MR. TORTO:  He even put the codes in.

19                      JUDGE RIVERA:  Excuse me.  But you get the  
20          bill.  You decided to pay one of them, and you didn't  
21          act on - - - or, excuse me, to deny one of them.  You  
22          didn't do anything on the other ones.  What - - -  
23          what triggers the choice of what to do with the other  
24          ones?  When you're saying, I can't tell from the face  
25          of the bill, are you, in effect, saying that you

1 can't use a third-party biller system?

2 MR. TORTO: No.

3 JUDGE RIVERA: Are - - - are there  
4 documents? They look to me like they're the exact  
5 same form.

6 MR. TORTO: No. And I don't know why they  
7 didn't - - - they didn't deny the other ones.  
8 There's no explanation in the record as to why they  
9 failed to deny the others.

10 JUDGE RIVERA: But as to the practical  
11 effect - - -

12 MR. TORTO: But, nevertheless, it's - - -

13 JUDGE RIVERA: - - - what - - - what is it  
14 in the billing process? Because you seem to be  
15 suggesting there's something different about this  
16 billing process from anything else, and, therefore,  
17 they have to do something specific - - -

18 MR. TORTO: No.

19 JUDGE RIVERA: - - - in this lawsuit - - -

20 MR. TORTO: What I'm suggesting is that - -  
21 -

22 JUDGE RIVERA: - - - so they got a prima  
23 facie case.

24 MR. TORTO: - - - had they known that this  
25 bill was really created by a third-party biller - - -

1 JUDGE ABDUS-SALAAM: Well, wouldn't you - -  
2 -

3 MR. TORTO: - - - who even put the codes in  
4 - - -

5 JUDGE ABDUS-SALAAM: Counsel, wouldn't you  
6 assume - - -

7 MR. TORTO: - - - they would have asked for  
8 verification.

9 JUDGE ABDUS-SALAAM: Wouldn't you assume or  
10 shouldn't your - - - your company assume that there  
11 might be third-party billers who are doing this and  
12 that if you want more information, that you should  
13 ask for it, or deny all the claims until you get all  
14 the information that you want to make sure that the  
15 claim is a verified claim?

16 MR. TORTO: No. They - - - they can't - -  
17 - they can't just blankly deny all the claims.  
18 That'd be a violation of the regulations. I'm just  
19 saying that on a motion for summary judgment, they  
20 got the - - -

21 CHIEF JUDGE LIPPMAN: But it's not a  
22 violation of the regulations to do nothing?

23 JUDGE ABDUS-SALAAM: Right.

24 MR. TORTO: No, it is. They get precluded.  
25 The thir - - - not - - - not - - - the regs don't say

1 that. It's - - - the Court - - - Court of Appeals  
2 cases that preclude it. Yeah.

3 JUDGE READ: Yeah.

4 CHIEF JUDGE LIPPMAN: Yeah, yeah. But - -  
5 - but yeah. But what the judge is asking you - - -  
6 so you - - - you're not going to deny them. At least  
7 that would be doing something. So that would be a  
8 violation of the regs, but to do absolutely nothing  
9 is not a violation of the regs and they still can't  
10 recover?

11 MR. TORTO: Right. They still - - - they  
12 have to make out a prima facie case based on evidence  
13 in - - in - - an - an admissible form.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 JUDGE STEIN: Can I ask - - -

16 CHIEF JUDGE LIPPMAN: Oh, I'm sorry.

17 JUDGE STEIN: Can I ask you a question?

18 CHIEF JUDGE LIPPMAN: Judge Stein.

19 JUDGE STEIN: If - - - if the third-party  
20 biller goes and - - - and - - - and learns how - - -  
21 what the process is of the medical provider and how  
22 they - - - how all the information is put into the - -  
23 - - into what they get, is that enough to show  
24 personal knowledge?

25 MR. TORTO: No.

1 JUDGE STEIN: So familiarity with their  
2 process is not?

3 MR. TORTO: No. I don't think so.

4 JUDGE STEIN: But what do they - - - what  
5 do they have to - - - so a third-party biller can  
6 never have personal knowledge?

7 MR. TORTO: No. You got to - - - who - - -  
8 who provide them with the information?

9 JUDGE STEIN: So - - - so you're saying you  
10 need the affidavit of every single person in the  
11 chain from the medical provider?

12 MR. TORTO: No. I need - - - you need an  
13 affidavit to show the - - - the chain. In this - - -  
14 this case, it doesn't do it.

15 JUDGE STEIN: Well, why - - -

16 MR. TORTO: Who provided the information  
17 and to show - - -

18 JUDGE STEIN: Why can't the third-party  
19 provider go to the medical provider and have them  
20 say, look, this is how we do everything? And then -  
21 - - and then - - - and they watch and they see and  
22 they say okay, well, now we have firsthand knowledge.  
23 Why isn't that enough?

24 MR. TORTO: It's - - - it might be  
25 firsthand knowledge as to that particular part, but

1           you don't know who's providing the information. And,  
2           most importantly, who's providing the codes, who's  
3           designating the codes? This - - - a layperson  
4           designated the codes. The doctor's got to do it and  
5           the doctor's got to sign the NF-3, not a signature  
6           stamp. We don't even know that here, Your Honor.

7                        CHIEF JUDGE LIPPMAN: Okay, counsel.  
8           You'll have your rebuttal.

9                        MR. TORTO: Thank you.

10                       CHIEF JUDGE LIPPMAN: Let's hear from your  
11           adversary.

12                       MR. GOTTLIEB: Good afternoon.

13                       CHIEF JUDGE LIPPMAN: Counsel, what - - -  
14           do you have to provide the codes that your adversary  
15           is talking about?

16                       MR. GOTTLIEB: No. There's no reason to  
17           provide the codes as - - -

18                       JUDGE PIGOTT: Well, you've got two  
19           problems, it seems to me. Number one, if Mr. Matatov  
20           has access to all of these medical records, which he  
21           is certifying has - - - has to do with this accident,  
22           there's got to be a HIPAA violation in there  
23           somewhere. I don't know where Dr. Etienne would - -  
24           - would - - - would think about sending his - - - her  
25           medical records to some biller and say fill out the

1 form for me and - - - and my signature's on file and  
2 you can just mail it in. I don't know how Mr.  
3 Matatov has the medical knowledge, and I think that  
4 was Mr. Torto's point, to say this was, you know,  
5 necessary for the treatment of this - - - of this  
6 claimant. And - - - and for some reason, signature  
7 on file and someone who says, hey, my job is just to  
8 fill out forms somehow qualifies.

9 MR. GOTTLIEB: Well, I do believe there is  
10 an exception for HIPAA for when you're collecting on  
11 medical bills. And as far as the - - - the codes and  
12 who puts the information in, in their - - - in  
13 Country-Wide's reply, they said that we were  
14 misconstruing their argument. That they're not  
15 saying we have to prove that the bills were accurate.  
16 They're not saying we have to prove that the bills  
17 were medically necessary. And they're - - - we don't  
18 even have to prove that the services were provided.  
19 So if we don't have to prove all of those things - -  
20 -

21 JUDGE PIGOTT: No. He's a jump ahead of  
22 you. What - - - what he's saying is forget all the  
23 administrative stuff. Forget everything that was  
24 going on, you know, when this was going on. You're  
25 now in court, and there's rules if you're going to

1 move for 30 - - - under 3212 for summary judgment.  
2 And that's got to be a person with knowledge of the  
3 facts that bases it on, and all you've got is a  
4 mailer. And I - - - I don't - - - I don't think it's  
5 wrong to - - - to have somebody, you know, do an  
6 affidavit of service that these things were duly  
7 mailed. The complaint, as I understand it, is who's  
8 making up the - - - who says that these shock  
9 treatments are okay? Mr. Matatov. He's the one that  
10 fills in the form. He - - - it says signature on  
11 file. It's not - - - if Dr. Etienne had signed these  
12 things, I don't think there'd be a fight here. But  
13 she doesn't. I mean, it's just somebody with no  
14 medical background using, apparently, some statement  
15 from someone and wants to get paid.

16 MR. GOTTLIEB: And were there any question  
17 as to how the information gets put in a bill or any  
18 question as to the bill - - -

19 CHIEF JUDGE LIPPMAN: Most of these things  
20 go through with just the forms?

21 MR. GOTTLIEB: Submission of the bills?

22 CHIEF JUDGE LIPPMAN: Yeah. When you fill  
23 in what you submitted, the NP-3s (sic) or whatever  
24 the hell they are.

25 MR. GOTTLIEB: Yes. They - - - any

1 provider who submits bills, it gets mailed to  
2 insurance company and the insurance company - - -

3 CHIEF JUDGE LIPPMAN: And generally gets  
4 paid. That's the normal course of this thing?

5 MR. GOTTLIEB: No. Normally they don't get  
6 paid. Usually they don't get paid, and then six, ten  
7 years later we find ourselves in court.

8 JUDGE RIVERA: So - - - so just to clarify,  
9 because he's raised this question about you - - -  
10 their - - - their claims person would not know, based  
11 on what they received, whatever challenge they might  
12 have to the underlying demand for payment of  
13 services. Is there a difference between what your  
14 third-party biller would send and what, I guess, you  
15 would have sent?

16 MR. GOTTLIEB: As to the information?

17 JUDGE RIVERA: To - - - to - - - if you  
18 billed them as - - - if you didn't use another  
19 company. If you - - - if we didn't have the cottage  
20 industry of the third-party billers, you did it  
21 yourself, does it look different?

22 MR. GOTTLIEB: The bill would be the same.

23 JUDGE RIVERA: It would look exactly the  
24 same?

25 MR. GOTTLIEB: It should look very, very

1 similar.

2 JUDGE STEIN: How - - - how difficult - - -

3 JUDGE RIVERA: They - - - I'm sorry.

4 JUDGE STEIN: Go ahead.

5 JUDGE RIVERA: I just want to - - - just a  
6 quick follow-up.

7 JUDGE STEIN: I'm sorry.

8 JUDGE RIVERA: Whatever was sent, did it  
9 indicate, SUM - - - I believe that's the company - -  
10 - SUM Billing on it anywhere?

11 MR. GOTTLIEB: I don't believe it did.

12 JUDGE RIVERA: No. Okay. Sorry.

13 JUDGE FAHEY: Can - - -

14 JUDGE STEIN: How difficult would it be to  
15 get an affidavit of - - - with - - - from someone, a  
16 per - - - with personal knowledge to submit to the  
17 court on a motion for summary judgment like they do  
18 in every other case for summary judgment and for  
19 default judgment or anything like that? How  
20 difficult is it?

21 MR. GOTTLIEB: We have an affidavit from  
22 someone with personal knowledge here. As - - -

23 JUDGE STEIN: How - - -

24 MR. GOTTLIEB: - - - to the submission of  
25 the bills. That's a prima facie case, the submission

1 of the bills and nonpayment.

2 JUDGE STEIN: How - - -

3 MR. GOTTLIEB: But as far as getting - - -

4 JUDGE STEIN: How does Mr. Matatov have  
5 personal knowledge of how the information came to be  
6 in those bills? Isn't that really what we're talking  
7 about?

8 MR. GOTTLIEB: No. What we're talking  
9 about is the submission of the bills. There is no  
10 obligation to - - -

11 JUDGE STEIN: Well, okay. We have a  
12 difference of opinion there. If what's required is  
13 that - - - that those bills be non-hearsay bills, the  
14 information in the bills be non-hearsay under the  
15 business exception - - - business exception, what  
16 would be necessary? How difficult would it be for  
17 the providers to - - - to provide that - - - those  
18 affidavits?

19 MR. GOTTLIEB: Assuming there is a 4518  
20 requirement, then that would mean the provider would  
21 be a professional affidavit writer, and when time  
22 came for trial, they would have to go to court. Same  
23 thing with treating - - -

24 JUDGE PIGOTT: Wait a minute - - - wait a  
25 minute.

1 MR. GOTTLIEB: - - - doctors in a hospital.

2 JUDGE PIGOTT: Wait a minute. A

3 professional what?

4 MR. GOTTLIEB: Affidavit writer, Your

5 Honor.

6 JUDGE PIGOTT: You're suggesting this is

7 all a joke?

8 MR. GOTTLIEB: No, I'm not.

9 JUDGE PIGOTT: Why - - - what - - - what

10 Judge Stein is suggesting is someone with knowledge

11 of the facts, probably Dr. Etienne, says I performed

12 these - - - these medical procedures on this

13 individual and it was related to the accident.

14 That's not a professional affidavit writer. That's

15 the person with knowledge of the facts upon which a

16 court's going to make a decision.

17 MR. GOTTLIEB: Instead of treating

18 patients, they will be spending more time writing

19 affidavits. So this would come at the expense - - -

20 JUDGE PIGOTT: Well, I - - - I think you're

21 being - - -

22 MR. GOTTLIEB: - - - of their ability to do

23 their - - -

24 JUDGE PIGOTT: And - - - and I was kind of

25 struck by the fact that you said they - - - they

1 never pay and it takes you ten years to collect.  
2 That's not my experience. Generally speaking, they  
3 pay fairly quickly, and you stay on top of them if  
4 you're a lawyer and - - - and it's your case, and if  
5 they don't pay, then you - - - then you - - - you  
6 begin a proceeding. I don't - - - I don't - - -  
7 their worry is that it's all fake, that somebody gets  
8 in an accident; it's a whiplash. And the next thing  
9 you got eighteen months of PT, and - - - and they got  
10 to pay it all because somebody's saying, you know,  
11 yeah, that's - - - that's what happened. And maybe  
12 it did and maybe it didn't. That's why they want a  
13 doctor.

14 MR. GOTTLIEB: Well, if - - - if they do  
15 have a concern, they can ask for verification.

16 JUDGE PIGOTT: Exactly.

17 MR. GOTTLIEB: They can say, I want to  
18 visit the place. Come for - - -

19 JUDGE PIGOTT: Aren't - - - well, aren't we  
20 down to - - - aren't we down to the real argument  
21 being, is the NF-3 prima facie or not, right?

22 MR. GOTTLIEB: Yes.

23 JUDGE PIGOTT: Okay. And you got - - - you  
24 - - - yours are - - - yours are not made by the  
25 doctor. They're - - - the - - - they're not - - -

1           they're not even signed by the doctor. It says  
2           signature on file. And the only affidavit that  
3           Matatov gives is that yeah, I mailed these. And his  
4           - - - and Mr. Torto's complaint is the underlying NF-  
5           3 is - - - is not good.

6                   MR. GOTTLIEB: His complaint comes down to  
7           something that he could have - - - Country-Wide could  
8           have verified early on.

9                   CHIEF JUDGE LIPPMAN: What's the - - - what  
10          - - - again, I come back to what's the norm in the  
11          industry? You put in these NF-3s and are they all  
12          denied? Are they generally all paid? What's the  
13          norm?

14                   MR. GOTTLIEB: Well, the - - - the norm  
15          depends. For a hospital, I'd imagine that they  
16          probably get hassled a little bit less, even though  
17          they do use a third-party biller, and this court has  
18          seen hospital affidavits which consist of, hi, my  
19          name is so-and-so. I'm a third-party biller. I  
20          mailed this bill. Here's a tif - - - certificate of  
21          mailing. As far as the providers that aren't  
22          hospitals, the norm is right now, they submit a bill  
23          and they get inundated with verification requests.

24                   CHIEF JUDGE LIPPMAN: And is your view that  
25          the - - - the Art of Healing case just was wrong?

1 MR. GOTTLIEB: Yes. The heart of - - - Art  
2 of Healing case was - - -

3 CHIEF JUDGE LIPPMAN: And - - - and I guess  
4 it's your view - - - and don't let me put words in  
5 your mouth - - - I - - - I - - - it's not a  
6 rhetorical question - - - that if that's what's  
7 required, the legislature would have to require it  
8 and that the way it is now, Art of Healing is just im  
9 - - - im - - - imposing a requirement based on, as  
10 Judge Pigott indicates, that your adversary might  
11 think, you know, this stuff is so fraudulent, you  
12 know, we want more than that. Is that - - - what - -  
13 - what is your position on that?

14 MR. GOTTLIEB: That is pretty much the  
15 position, Your Honor. It - - - they added a  
16 requirement where none existed before. Prior to Art  
17 of Healing, every department of the Appellate  
18 Division agreed that plaintiff's prima facie case was  
19 the submission of the bills and nonpayment. There  
20 was no 4518 requirement. There was no 4518  
21 requirement in the Appellate Term, First Department.  
22 It was only since the Appellate Term, Second  
23 Department decided to add medical that it invoked  
24 4518, which makes no sense considering Country-Wide's  
25 argument is you don't have to prove the truth of the

1 contents. The only reason you would invoke 4518 is  
2 if something was hearsay. It's not hearsay, Your  
3 Honor.

4 CHIEF JUDGE LIPPMAN: Okay. Anything else,  
5 counsel?

6 MR. GOTTLIEB: No, Your Honor.

7 CHIEF JUDGE LIPPMAN: Okay. Counsel,  
8 rebuttal.

9 MR. TORTO: Thank you, Your Honor. I'd  
10 like to start - - -

11 CHIEF JUDGE LIPPMAN: Counsel, why don't  
12 you answer that question? Is - - - is your position  
13 - - - and - - - and I understand where you're coming  
14 from, there may be fraud or whatever - - - is that  
15 something to - - - this requirement that Art of  
16 Healing puts in relating to the business records, et  
17 cetera - - - is that something that the legislature  
18 should be doing, or is it required now? And if it's  
19 required now, what's your basis for that other than  
20 Art of Healing?

21 MR. TORTO: I think it was always required  
22 from day one. In - - - in - - - in the amicus brief,  
23 they annex the transcripts of the colloquy with the  
24 sen - - - senator who first sponsored the bill. And  
25 the prop - - - there was a proposal to lessen the

1           burden of proof in a judicial proceeding, and the  
2           response was, it's not necessary because of the  
3           statutory op - - - option for the claimants to go to  
4           arbitration. If they don't want to comply - - - if  
5           the healthcare provider does not want to comply with  
6           the formal rules of the court, they have an option to  
7           go into arbitration.

8                         JUDGE FAHEY: Are - - - (inaudible)

9                         MR. TORTO: It's built into - - -

10                        JUDGE FAHEY: Are you - - - counselor, are  
11           you familiar with Hospital for Joint Diseases?

12                        MR. TORTO: Yes. Yes, Your Honor.

13                        JUDGE FAHEY: It's a 2007 case. Okay. You  
14           think it applies here?

15                        MR. TORTO: I - - - I do not think it  
16           controls this decision. And my reason is that - - -

17                        JUDGE FAHEY: Go ahead.

18                        MR. TORTO: - - - the defective - - - the  
19           assignment of benefits in the Hospital for Joint  
20           Diseases, though defective, was presented to the  
21           court via an affidavit based on personal knowledge  
22           that was competent.

23                        JUDGE FAHEY: So you're saying there was a  
24           better NF-3 presented in that case than is presented  
25           in this case.

1 MR. TORTO: Well - - -

2 JUDGE FAHEY: But the problem is - - -

3 MR. TORTO: It was the affidavit, Your - -  
4 - Your Honor - - -

5 JUDGE FAHEY: It was - - - it was the  
6 affidavit. Okay.

7 MR. TORTO: - - - that was - - - that was  
8 proper.

9 JUDGE FAHEY: The prob - - - the problem is  
10 they - - - they seem to say there, the Court of  
11 Appeals seems to have said then that once you don't  
12 respond, it's dispositive. You can't offer a  
13 defense.

14 MR. TORTO: Correct.

15 JUDGE FAHEY: The way I understand your  
16 argument is yes, we can't offer a defense, but they  
17 still got to meet their burden on summary judgment.

18 MR. TORTO: Right. And that's under  
19 Winegrad and Alvarez.

20 JUDGE FAHEY: Is that right, though? Is  
21 that your argument?

22 MR. TORTO: That's correct.

23 JUDGE FAHEY: Okay.

24 MR. TORTO: You don't even look at the  
25 defendant's position until the plaintiff takes on a

1           prima facie case.

2                       CHIEF JUDGE LIPPMAN:  Yeah.  But - - - but  
3           doesn't Joint Diseases stand for the principle - - -  
4           the whole idea of it is if - - - if you don't ask for  
5           further verification, you don't deny, you don't pay,  
6           it has consequences.

7                       MR. TORTO:  Correct.

8                       CHIEF JUDGE LIPPMAN:  What - - - what is  
9           the consequence?  In your case, you didn't ask for  
10          verification, you didn't deny - - - other than the  
11          one case - - - and you didn't pay.  What's the  
12          consequence of you not doing that under that case  
13          law, Joint Diseases?

14                      MR. TORTO:  They would have to pay,  
15          provided that the - - - the NF-3s, all eight of them,  
16          were submitted to the court via a proper affidavit  
17          that satisfied - - -

18                      JUDGE PIGOTT:  No.  No.

19                      MR. TORTO:  - - - the primary burden.

20                      JUDGE PIGOTT:  You have to pay if they're -  
21          - - if they're submitted to you.  Now you have to  
22          pay, and if you don't pay within thirty days - - -

23                      MR. TORTO:  Well - - -

24                      JUDGE PIGOTT:  - - - you owe it.

25                      MR. TORTO:  Well, suppose, Your Honors - -

1 -

2 JUDGE PIGOTT: I dissented in Hospital, but  
3 I'll tell you - - -

4 MR. TORTO: Yeah.

5 JUDGE PIGOTT: - - - they - - - they - - -  
6 they - - - it was very clear, we're not putting up  
7 with this nonsense of waiting eight, ten years to sue  
8 on these things.

9 MR. TORTO: Well, there's - - - there's a  
10 rea - - - reason for the delay here that's not in the  
11 record.

12 JUDGE PIGOTT: I understand. I - - - and I  
13 - - - I don't buy the ten years or anything else.

14 MR. TORTO: Yeah.

15 JUDGE PIGOTT: But my point is this we - -  
16 - I thought we made it clear that you've got the  
17 thirty day - - - don't come to us and say well, you -  
18 - - we'll give you more time to complain. Don't pay.  
19 Get an IME. Do something. Go to arbitration. But  
20 don't sit on them like these. I mean, these are ten  
21 years old now and - - -

22 MR. TORTO: If I could - - -

23 JUDGE PIGOTT: - - - say, you know, well,  
24 we never intended to pay them in the first place.

25 MR. TORTO: If I could, just by way of

1 analogy. Suppose that the NF-3s in this case were  
2 presented to the court via an affirmation of the  
3 attorney for the plaintiff. Wouldn't the court have  
4 the right to conclude that the plaintiff did not meet  
5 their prima facie burden?

6 JUDGE PIGOTT: Probably.

7 MR. TORTO: Because the plaintiffs have to  
8 - - - even - - - even though there's proof that the  
9 carrier got the NF-3s and didn't do anything about  
10 it.

11 CHIEF JUDGE LIPPMAN: Yeah, but there - - -

12 JUDGE RIVERA: But - - - well, whether or  
13 not you show proper billing. But - - - but let me  
14 ask you - - -

15 MR. TORTO: But the initial - - -

16 JUDGE RIVERA: - - - what kind - - -

17 MR. TORTO: - - - affidavit - - -

18 JUDGE RIVERA: - - - what - - - what is  
19 your incentive not to re - - - if you're concerned  
20 about fraud, what - - - why are you not requesting  
21 the documentation when they send the bill? Why - - -  
22 it looks purely dilatory. What are you sitting  
23 around waiting for?

24 MR. TORTO: Yeah. I don't know why they  
25 didn't, as I said before.

1 JUDGE RIVERA: I mean, but I'm asking you.

2 MR. TORTO: You know, yeah.

3 JUDGE RIVERA: You're at the Court of  
4 Appeals.

5 MR. TORTO: Yeah, they - - - they - - -

6 JUDGE RIVERA: What's the argument?

7 MR. TORTO: They - - - they missed it for  
8 some reason. You know, they - - - they - - - it did  
9 not get denied.

10 CHIEF JUDGE LIPPMAN: Do you normally - - -  
11 again, when talking about practice, do you normally  
12 ask for verification in this - - -

13 MR. TORTO: It's - - -

14 CHIEF JUDGE LIPPMAN: - - - kind of  
15 situation?

16 MR. TORTO: It's not uncommon.

17 CHIEF JUDGE LIPPMAN: Or deny it outright  
18 or - - - or pay?

19 MR. TORTO: It's not uncommon. Usually  
20 they'll pay or - - - or if there's questions raised,  
21 they'll ask for verification.

22 CHIEF JUDGE LIPPMAN: And so you're saying  
23 it's only occasionally if you miss it - - -

24 MR. TORTO: Right.

25 CHIEF JUDGE LIPPMAN: - - - that - - - that

1           you just don't answer. But even if that's the case,  
2           doesn't matter. They still haven't made out a prima  
3           facie case.

4                       MR. TORTO: Right.

5                       JUDGE RIVERA: You're saying it's unusual  
6           not to respond.

7                       MR. TORTO: On the motion for - - - on the  
8           motion for summary judgment. We're beyond all this  
9           other stuff.

10                      CHIEF JUDGE LIPPMAN: Okay.

11                      MR. TORTO: This deals with the rules of  
12           the court. You still got to make out your case. If  
13           you don't, case is denied - - -

14                      CHIEF JUDGE LIPPMAN: Okay.

15                      MR. TORTO: - - - regardless of the - - -  
16           (inaudible)

17                      CHIEF JUDGE LIPPMAN: We - - - we  
18           understand both of your positions. Thank you so  
19           much.

20                      MR. TORTO: Thank you, Your Honor.

21                      CHIEF JUDGE LIPPMAN: Appreciate it.

22                      (Court is adjourned)

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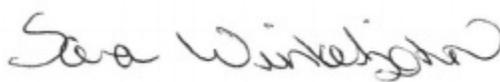
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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