IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

PROGRESSIVE SELECT
INSURANCE COMPANY,
Appellant,

v.

FLORIDA HOSPITAL
MEDICAL CENTER
a/a/o Larry Hunt,
Appellee.
_____/

Case No.: 2017-CV-000146-A-O
Lower Case No.: 2013-SC-011421-O

Appeal from the County Court,
for Orange County, Florida,
Steve Jewett, County Judge, and
Faye L. Allen, County Judge.

Michael C. Clarke, Esquire,
Danielle M. Lutyk, Esquire, and
Betsy E. Gallagher, Esquire,
for Appellant.

Robert J. Hauser, Esquire, and
Alexander Thomas Briggs, Esquire,
for Appellee.

Before O'KANE, THORPE, and CRANER, J.J.

PER CURIAM.

In this PIP case, defendant Progressive Select Insurance Co. (Progressive) timely appeals the trial court's order granting plaintiff's amended motion for final summary judgment, which was entered in favor of plaintiff Florida Hospital Medical Center (Florida Hospital).[1] We reverse and remand for further proceedings.

[1]This Court has jurisdiction under section 26.012(1), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Facts

Larry Hunt, the insured, was injured in an automobile accident. He received emergency and other medical services from Florida Hospital on May 31, 2009. Florida Hospital obtained an assignment from Hunt and billed Progressive $587.50 for the services.

Progressive reimbursed Florida Hospital $440.63 for the charge, or 75% of the $587.50. Progressive in its explanation of benefits indicated that the "allowable amount has been calculated pursuant to Florida Statute 627.736(5) which limits reimbursement to 75% of the hospital's usual and customary charges for emergency services." *See* § 627.736(5)(a)2.b., Fla. Stat. (2008). However, the insurance policy did not state that Progressive would limit its PIP reimbursement to "75% of the hospital's usual and customary charges for emergency services" pursuant to the statutory fee schedule set forth in section 627.736(5)(a)2. Rather, the policy stated that Progressive would pay "80% of all reasonable expenses incurred for medically necessary medical" services, or "all" such expenses if extended PIP coverage had been purchased.

Florida Hospital then filed suit on December 16, 2013, claiming that its charge was reasonable and that Progressive had failed to reimburse it in accordance with the law. Progressive in its answer denied Florida Hospital's allegation that its charge was reasonable. Progressive in its affirmative defense asserted that Florida Hospital's charge was not reasonable and that under section 627.736(4)(b), Florida Statutes (2008), it was entitled to "contest reasonableness of the charge at any time including after payment of the claim."

The parties then participated in discovery. On May 18, 2016, Florida Hospital deposed Tamara Zimmer, a corporate representative for Progressive. In her deposition, Zimmer stated that in limiting the reimbursement to $440.63, Progressive allowed 75% of Florida Hospital's usual and customary charge. Zimmer indicated that at the time Progressive processed the bill, Progressive did not dispute that Florida Hospital had billed its usual and customary charge so it

"could expedite payment quickly." Zimmer also indicated that the "75% of the hospital's usual and customary charges for emergency services" language in the explanation of benefits referred to the statutory fee schedule limitation for hospitals set forth in section 627.736(5)(a)2.b., Florida Statutes (2008). However, Zimmer acknowledged that the "75% of the hospital's usual and customary charges for emergency services" language was not in the policy.

Progressive filed discovery requests seeking information on how Florida Hospital determined its charges. Florida Hospital objected to many of the discovery requests, and argued among other things that the "primary issue" was whether Progressive in its policy had elected the fee schedule set forth in section 627.736(5)(a)2.b., Florida Statutes (2008), and that the reasonableness of its charge was "not at issue." Florida Hospital also filed a motion for a protective order. Progressive filed motions to compel. The trial court's order on March 31, 2016 hearing, filed on May 23, 2016, granted Florida Hospital's motion for a protective order.[2] The court's order found that Progressive issued payment at 75% of Florida Hospital's "usual and customary charges." The court's order also found that in light of *Geico General Insurance Co. v. Virtual Imaging Services, Inc*., 141 So. 3d 147, 150 (Fla. 2013),

> a fact dependent inquiry into the reasonableness of submitted charges is inappropriate. Given the fact that [Progressive] attempted to use the statutory fee schedule to process the claim at issue there is no need for further discovery on the reasonableness of the charge in this matter.

Florida Hospital then filed its amended motion for summary judgment. On October 23, 2017, the trial court conducted a hearing on Florida Hospital's amended motion.[3] At the hearing,

[2] The court's order was entered by Judge Steve Jewett, the first trial judge assigned to the instant case. The court noted that it "has rendered numerous discovery orders on similarly situated cases with the same Plaintiff and Defendant," and that Progressive had withdrawn its motions to compel.

[3] The amended motion for summary judgment was addressed by Judge Faye L. Allen, the second and present trial judge assigned to the instant case.

Florida Hospital argued that the reasonableness of its charge was not at issue and that it was entitled to summary judgment. For support, Florida Hospital pointed out that Judge Jewett's order on March 31, 2016 hearing granted its motion for a protective order on authority of *Virtual Imaging*, and that Progressive's motions to compel had been withdrawn. Florida Hospital noted that according to Judge Jewett's order, a fact dependent inquiry into the reasonableness of the charges would be inappropriate. Florida Hospital also pointed out that when Progressive processed the claim pursuant to the fee schedule, it had already determined that the bills represented usual and customary charges and had therefore conceded reasonableness. Florida Hospital noted that Progressive's policy did not otherwise allow it to use the fee schedule. *See Virtual Imaging*, 141 So. 3d at 150.

Progressive acknowledged that its motions to compel had been withdrawn, noting that in similar cases, Judge Jewett and other Orange County judges were granting motions for protective order and not allowing discovery on reasonableness. However, Progressive argued that discovery aside, Florida Hospital was still not entitled to summary judgment because Florida Hospital had not satisfied its burden of proving reasonableness. According to Progressive, "usual and customary" and "reasonableness" are "not one and the same," since under section 627.736(5)(a)1., Florida Statutes (2008), "usual and customary" does not establish reasonableness but is merely a factor that "may" be considered. Thus, when Progressive attempted to accept the charges as "usual and customary" pursuant to the fee schedule, *see* section 627.736(5)(a)2., it was not conceding that they were reasonable. Progressive acknowledged that it was not entitled to apply the statutory fee schedule since it had failed to provide notice in its policy, *see Virtual Imaging,* 141 So. 3d at 150, but urged that Florida Hospital still had to prove the reasonableness of its charges under *Progressive Select Insurance Co. v. Emergency Physicians of Central Fla.*, 202 So. 3d 437 (Fla.

5th DCA 2016), and that it could contest the reasonableness of the charge "at any given time." *See* § 627.736(4)(b).

The trial court's final summary judgment agreed with Florida Hospital's position. First, the court determined that Progressive's policy failed to elect the fee schedule reimbursement methodology. As a result, under *Virtual Imaging*, Progressive was not permitted to limit its reimbursement to 75% percent of Florida Hospital's "usual and customary charges" pursuant to section 627.736(5)(a)2.b., Florida Statutes (2008).

Next, the trial court determined that reasonableness was not at issue so that Florida Hospital was entitled to summary judgment. The court explained that *Progressive Select* was distinguishable because the charges in *Progressive Select* had originally been processed at 200% of Medicare, not at a percentage of the usual and customary charges as in in the instant case. The court also explained that when Progressive accepted Florida Hospital's bills as usual and customary charges, it effectively admitted that they were reasonable. In this connection, the court noted that section 627.736(5)(a)1., Florida Statutes (2008), which encompasses the fact-dependent inquiry, includes a consideration of "usual and customary charges" in determining whether a charge is reasonable. The court also noted that according to Progressive's corporate representative Zimmer, Progressive accepted Florida Hospital's charge as usual and customary. Finally, the court explained that Progressive did not initially challenge the reasonableness of Florida Hospital's charge and, even after *Virtual Imaging* was decided in 2013, Progressive did not come forth with any evidence challenging the reasonableness of the charges.

Analysis

Progressive's first point on appeal is that the trial court reversibly erred in granting summary judgment in Florida Hospital's favor on the reasonableness issue. According to Progressive, even if an insurer fails to provide the requisite notice that it intends to limit

reimbursement pursuant to the permissive fee schedule under section 627.736(5)(a)2., Florida Statutes (2008), it is still entitled to contest the issue of reasonableness under the fact-dependent inquiry of section 627.736(5)(a)1. pursuant to *Progressive Select*. Thus, in Progressive's view, the court erred in failing to follow *Progressive Select*.

In *Progressive Select*, the provider billed the insurer for medical services it had rendered to the insureds. 202 So. 3d at 437. The reimbursements were reduced to 80% of 200% of the allowable amount under the Medicare Part B fee schedule pursuant to section 627.736(5)(a)2.f., Florida Statutes (2008). *Id*. The provider then sued for additional payment. *Id*. The county court granted summary judgment in the provider's favor, finding that the insurer had improperly used the fee schedule in reimbursing the billed amounts. *Id*. On appeal, the circuit court found that the insurer should have "clearly" elected the fee schedule limitation if it wanted to limit its payments in accordance with the fee schedule. *Id*. at 438. The court further determined that the insurer was precluded from engaging in discovery and litigating reasonableness. *Id.*

On certiorari review, *Progressive Select* determined that because the insurer had "failed to elect specifically to limit payments based on the fee schedule," it "may not avail itself of the fee schedule limitation" according to *Virtual Imaging*. 202 So. 3d at 438. However, *Progressive Select* also determined that even though the insurer had failed "to elect to use the fee schedule limitation in its policy," it was "not precluded" from litigating the reasonableness of the provider's bill under section 627.736(5)(a)1. *Id*. Thus, *Progressive Select* quashed "that part of the decision under review that prohibits [the insurer] from engaging in discovery and contesting the reasonableness of [the provider's] bill." *Id*.

We conclude that the trial court erred in failing to follow *Progressive Select*, which we find controlling. As indicated, the trial court determined that *Progressive Select* was distinguishable because the charges in *Progressive Select* had originally been processed at 200% of Medicare, not

at a percentage of the usual and customary charges. However, even though the insurer in *Progressive Select* had specifically relied on section 627.736(5)(a)2.f., Florida Statutes (2008), the portion of the statutory fee schedule relating to 200% of Medicare for medical services, nothing in *Progressive Select* purports to limit its holding to section 627.736(5)(a)2.f. or otherwise exclude from its holding section 627.736(5)(a)2.b., the portion of the statutory fee schedule for hospitals that Progressive had originally relied on in the instant case. Rather, as indicated, *Progressive Select* determined that even though the insurer had failed "to elect to use the fee schedule limitation in its policy," it was "not precluded" from litigating the reasonableness of the provider's bill under section 627.736(5)(a)1. 202 So. 3d at 438. Further, under section 627.736(4)(b), an insurer is entitled to assert "at any time," even "after payment of the claim," that the charge was "unreasonable" or "in excess of that permitted under, or in violation of, subsection (5)." Thus, we read the reference to "fee schedule limitation" in *Progressive Select* as pertaining to the entire schedule of maximum charges listed in section 627.736(5)(a)2., which includes section 627.736(5)(a)2.b. as well as section 627.736(5)(a)2.f.

We do not agree with the trial court's determination that when Progressive accepted Florida Hospital's bills as usual and customary charges pursuant to section 627.736(5)(a)2.b., Florida Statutes (2008), Progressive effectively admitted that they were reasonable. To be sure, as the trial court observed, section 627.736(5)(a)1., which encompasses the fact-dependent inquiry, also includes a consideration of "usual and customary charges" in determining whether a charge is reasonable. However, as indicated in *Progressive Select*, "usual and customary charges" is just one of the factors to be considered in a fact-dependent inquiry pursuant to section 627.736(5)(a)1.: "Under the statute, reasonableness is determined by 'usual and customary charges,' 'reimbursement levels in the community,' and 'various federal and state medical fee schedules applicable to automobile and other insurance coverages.'" 202 So. 3d at 438. In any event, it is

beyond dispute that Progressive accepted Florida Hospital's bills as usual and customary charges merely for purposes of applying the fee schedule limitation set forth in section 627.736(5)(a)2.b., which allows the insurer to limit reimbursement to 75% of the hospital's "usual and customary charges" for "emergency services and care." Thus, when Progressive accepted Florida Hospital's bills as usual and customary charges, it was not admitting that the total amount billed was reasonable. Rather, it was only admitting that under the fee schedule a reasonable total charge would be 75% of the total amount billed. As indicated, Zimmer in her deposition stated that in limiting the reimbursement to $440.63, Progressive allowed 75% of Florida Hospital's usual and customary charge, and indicated that the "75% of the hospital's usual and customary charges for emergency services" language in the explanation of benefits referred to the statutory fee schedule limitation for hospitals set forth in section 627.736(5)(a)2.b.

It is of no moment that Progressive did not initially challenge the reasonableness of Florida Hospital's charges and, even after *Virtual Imaging* was decided in 2013, did not come forth with any evidence challenging the reasonableness of the charges. Progressive did not initially challenge the reasonableness of the charges because it was relying on the statutory fee schedule. Additionally, under section 627.736(4)(b), Florida Statutes (2008), an insurer may assert "at any time" that a charge was unreasonable. The record otherwise reflects that Progressive did attempt to obtain discovery on reasonableness, but as indicated the trial court's order on March 31, 2016 hearing granted Florida Hospital's motion for a protective order and thereby prevented Progressive from obtaining discovery on reasonableness. Moreover, under Florida law, the burden was on Florida Hospital to prove that its charges were reasonable, and there was no burden on Progressive to prove that the charges were unreasonable. *Derius v. Allstate Indemnity Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA), *review denied*, 719 So. 2d 892 (Fla. 1998).

Finally, on a motion for summary judgment, the movant "has the burden establishing irrefutably that the nonmoving party cannot prevail," and "it is only *after* the moving party has met this heavy burden that the nonmoving party is called upon to show the existence of genuine issues of material fact." *Hervey v. Alfonso*, 650 So. 2d 644, 645-46 (Fla. 2d DCA 1995) (emphasis in original; citations omitted). *Hervey* further explained, "[I]f the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, that *doubt* must be resolved against the moving party and summary judgment must be denied." *Id*. at 646 (emphasis in original). In our view, Florida Hospital failed to meet this "heavy burden" as it is readily evident from the record that the reasonableness of its charges remains very much at issue.

Progressive's second point on appeal is that the trial court erred by granting Florida Hospital's motion for a protective order, thereby preventing Progressive from obtaining discovery on reasonableness. As indicated, the order determined that a "fact dependent inquiry into the reasonableness of submitted charges" was "inappropriate" since Progressive had "attempted to use the statutory fee schedule to process the claim." We agree that the court erred. *See Progressive Select*, 202 So. 3d at 438 (quashing portion of decision prohibiting insurer from "engaging in discovery and contesting the reasonableness of [the provider's] bill").

Based on the above, the order granting plaintiff's amended motion for final summary judgment, rendered on November 20, 2017, and the order on March 31, 2016 hearing, filed on May 23, 2016, are reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

Progressive's motion for provisional award of appellate attorney fees, filed on July 9, 2018, is granted, contingent on a judgment of no liability or a judgment obtained by Florida Hospital that is at least 25% less than the amount of Progressive's proposal for settlement, and on the trial court's

determination that Progressive's proposal for settlement is otherwise enforceable under section 768.79, Florida Statutes (2018), and Florida Rule of Civil Procedure 1.442. The assessment of those fees is remanded to the trial court.

Florida Hospital's motion for appellate attorney's fees, filed on August 3, 2018, is denied.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this _____ day of _____, 2019.

_____
JULIE H. O'KANE
Presiding Circuit Judge

THORPE and CRANER, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Honorable Steve Jewett, Orange County Judge, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; the Honorable Faye L. Allen, Orange County Judge, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; Michael C. Clarke, Esquire, Kubicki Draper, P.A., 400 N. Ashley Dr., Suite 1200, Tampa, FL 33602; Danielle M. Lutyk, Esquire, Kubicki Draper, P.A., 400 N. Ashley Dr., Suite 1200, Tampa, FL 33602; Betsy E. Gallagher, Esquire, Kubicki Draper, P.A., 400 N. Ashley Dr., Suite 1200, Tampa, FL 33602; Robert J. Hauser, Esquire, Pankauski Hauser PLLC, 415 S. Olive Ave., West Palm Beach, FL 33401; and Alexander Thomas Briggs, Esquire, Pankauski Hauser PLLC, 415 S. Olive Ave., West Palm Beach, FL 33401, on this _____ day of _____, 2019.

_____
Judicial Assistant