

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

STATE FARM MUTUAL AUTO-
MOBILE INSURANCE COMPANY,

CASE NO.: CVA1 - 06 - 19

Appellant,

Lower Court Case No.: 2005 - CC - 005459-O

vs.

CARRIE CLARK,

Appellee.

Appeal from the County Court,
for Orange County,
Deborah Blechman, Judge.

Hinda Klein, Esq. and Doreen E. Lasch, Esq.
for the Appellant.

Bruce H. Kauffman, Esq.
for the Appellee.

Before O'KANE, KOMANSKI and THORPE, JJ.

PER CURIAM.

**AMENDED ORDER REVERSING FINAL DECLARATORY JUDGMENT
and DENYING MOTIONS FOR APPELLATE COUNSEL FEES¹**

INTRODUCTION

This is an appeal by the defendant below, State Farm Mutual Automobile Insurance

¹ This order amends the Court's Order Reversing Declaratory Judgment and Denying Motions for Appellate Counsel Fees dated July 28, 2008. Appellant requested this amendment so as to change the designation of appellant's counsel to Hinda Klein, Esq. and Doreen Lasch, Esq. in place of William Hefley, Esq. who was identified as appellant's counsel in the original order. Appellant claims that Mr. Hefley was trial counsel and not appellate counsel. The motion is granted as unopposed. In all other respects, this Court's Order Reversing Declaratory Judgment and Denying Motions for Appellate Counsel Fees dated July 28, 2008, is unchanged.

Company (“Appellant” or “State Farm”), of the trial court’s Final Declaratory Judgment in favor of the plaintiff, appellee Carrie Clark (“Appellee” or “Clark”). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument.

The issue in this appeal is whether a PIP² carrier is required by section 627.736(6), Florida Statutes, to provide a PIP log, pre-suit, to its insured. We conclude that it is not and reverse.

FACTS

Carrie Clark was involved in an automobile accident and collected PIP benefits under an auto insurance policy issued by the appellant, State Farm Mutual Automobile Insurance Company. Clark, through her attorney, requested a copy of her PIP log from State Farm. When the PIP log was not forthcoming, Clark filed the instant lawsuit. The complaint contains a claim for declaratory judgment (Count I) as well as counts sounding in breach of contract (Count II) and breach of statutory duty pursuant to section 627.736(6)(d), Florida Statutes (Count III). State Farm generated a PIP log for Clark and forwarded it to her attorney who received it after filing suit.

Clark moved for summary judgment on the declaratory judgment claim and voluntarily dismissed the other two counts of her complaint. State Farm then moved for a summary judgment in its favor. The trial court granted Clark’s motion, denied State Farm’s and entered a final judgment in Clark’s favor. In its order granting Clark’s motion for summary judgment, the

²“PIP” is an acronym for “personal injury protection.” With limited exception, “each motor vehicle owner or registrant required to be licensed in Florida is required to carry a minimum amount of personal injury protection, or PIP insurance, for the benefit of the owner and other designees.” *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005). This coverage includes benefits for accident-related medical expenses, disability (lost wages) and death. § 627.736(1)(a),(b),(c), Fla. Stat. (2005).

County Court held that:

[A] PIP payout log is information gathered by the insurer in its investigation of the injured person's claim as anticipated within section 627.736(6), Florida Statutes and has an obligation to the injured person to furnish, upon proper request, a copy of all information obtained by the insurer under the provisions of this section.

Thereafter the County Court entered the final declaratory judgment from which State Farm now appeals.

PARTIES' ARGUMENTS ON APPEAL

State Farm contends that it has no statutory duty to provide Clark with a PIP log. The applicable statute, section 627.736(6)(d), does not, State Farm notes, mention the term "PIP log" or an equivalent. State Farm argues that section 627.636(6), Florida Statutes, provides a means for a PIP carrier to obtain information from certain third parties during its investigation of a claim and further allows for the injured person to acquire this information. The PIP statute does not, State Farm contends, impose a duty upon the insurer to collect or record or create any information for the insured's benefit. In State Farm's view, the PIP statute does not require the insurer to make a pre-suit production of any information other than what the carrier has obtained in its investigation of the claim, as set forth in section 627.636(6).

Clark contends that lower court correctly granted her summary judgment motion because section 627.736(6)(d), Florida Statutes, has been interpreted by numerous county courts and circuit courts sitting in an appellate capacity (including this one), as requiring a PIP carrier to provide its payment log, pre-suit, upon the insured's request. Clark concedes that the PIP statute does "not expressly, by its literal terms, state that an automobile insurer must provide a PIP payout log to its insured." (Appellee Ans. Br. 6.) Nevertheless, Clark contends that she is

entitled to obtain a PIP log upon request “as a matter of equity” as well as legislative intent, public policy and “the spirit of the PIP statute.” (*Id.*)

STANDARD OF REVIEW

“An order in a declaratory judgment action is generally accorded a presumption of correctness on appellate review. However, to the extent that the decision rests on a question of law, the order is subject to full, or de novo, review on appeal.” *Reform Party of Fla v. Black*, 885 So. 2d 303, 310 (Fla. 2004). In this case, the declaratory judgment was based upon the trial court’s resolution of a legal issue, i.e. whether section 636.736, Florida Statutes, requires a PIP carrier to produce a PIP payout log to an insured upon her pre-litigation request. Therefore, the de novo standard applies.

THE PIP STATUTE DOES NOT REQUIRE THE CARRIER TO PRODUCE A PIP LOG

Section 627.736(6)(d), Florida Statutes provides, “The injured person shall be furnished, upon request, a copy of all information obtained by the insurer under the provisions of this section, and shall pay a reasonable charge, if required by the insurer.” The title of subsection 6 of section 627.736 is “Discovery of facts about an injured person.” This subsection permits the carrier to informally obtain information about a claimant from employers and medical providers, § 627.736(6)(a),(b), Fla. Stat. (2005), and if this is not successful, to bring an action to compel production of the information sought. § 627.736(6)(c), Fla. Stat. (2005).³

When a PIP carrier has acquired such information, the insured may, in turn, obtain it herself. § 627.736(6)(d), Fla. Stat. (2005). In ruling that State Farm was obligated by this

³ Specifically, Section 627.736(6)(a) permits the insurer to obtain a sworn statement of the injured person’s earnings from the period of the personal injury and for a reasonable period before the injury. Section 627.736(6)(b) allows an insurer to acquire medical information related to the injured party’s history, condition, treatment, dates, and costs of such treatment from the medical provider. Under Section 627.736(6)(c) an insurer may seek relief from the courts if a dispute arises as to what information the insurer is entitled to receive from the insured’s employer or medical provider.

statutory provision to provide a PIP log to Clark upon request before she instituted suit, the County Court relied upon the then-prevailing view which was followed by numerous county courts and circuit courts, including this one, statewide. Since that time, district courts of appeal have weighed in on this issue and have adopted a contrary view.

The Fifth District Court of Appeal recently addressed the issue of an PIP carrier's duty to produce a PIP log in *State Farm Mutual Automobile Insurance Co. v. Florida Emergency Physicians*, 978 So. 2d 197 (Fla. 5th DCA 2008). There, the court of appeal granted a carrier's petition for a writ of certiorari, quashed a circuit court order and directed the lower court to reconsider its decision in light of *GEICO General Insurance Co. v. Florida Emergency Physicians*, 972 So. 2d 966 (Fla. 5th DCA 2007). The *GEICO* court held that "the circuit court's conclusion that [the PIP carrier] was required to provide a PIP log to [its insured's assignee] is not supported by Florida law." *Id.* at 969.⁴ In so holding, the *GEICO* panel quoted at length the opinion of the Third District Court of Appeal in *Southern Group Indemnity, Inc. v. Humanitary Health Care*, 3D06-2788, 32 Fla. L. Weekly D1396 (Fla. 3d DCA May 30, 2007):

Subsection 627.736(6) does not provide for nor address the insured's right to access documents prepared internally by the insurer. As the insurer's PIP payout log is a document generated by the insurer and is not a document the insurer obtained pursuant to subsection 627.736(6), the circuit court, acting in its appellate capacity, applied the incorrect law by finding that: (1) paragraph

⁴ Reference herein to the Fifth District Court of Appeal's *GEICO* decision corresponds to *GEICO General Insurance Co. v. Florida Emergency Physicians*, 972 So. 2d 966 (Fla. 5th DCA 2007). Several weeks later, that court decided another case involving the same parties and the same issue of an insured's pre-suit entitlement to a PIP log, with the same result - the insured (or an assignee) is not so entitled under section 627.736(6)(d). See *GEICO Gen. Ins. Co v. Fla. Emergency Physicians*, 972 So. 2d 1013 (Fla. 5th DCA 2008).

627.736(6)(d), Florida Statutes (2003), requires an insurer to provide its PIP payout log to an insured or the insured's assignee, presuit

GEICO Gen. Ins. Co. v. Fla. Emergency Physicians, 972 So. 2d at 969 (quoting *S. Group Indem., Inc. v. Humanitary Health Care, Inc.*, 3D06-2788, 32 Fla. L. Weekly at D1397).⁵

Indeed, in *Southern Group Indemnity*, the court of appeal did “not merely disagree with the circuit court’s interpretation of paragraph 627.736(6)(d), [it] conclude[d] that the statute is completely inapplicable.” *S. Group Indem., Inc. v. Humanitary Health Care*, 975 So. 2d 1247, 1250 (Fla. 3d DCA 2008).

The *Southern Group Indemnity* panel of the Third District Court of Appeal also held that an insurer’s provision of a PIP log after the insured’s assignee has filed suit, is not tantamount to a confession of judgment. *S. Group Indem., Inc. v. Humanitary Health Care*, 975 So. 2d at 1250. While *Southern Group Indemnity* concerned a request for a PIP log by an insured’s assignee, the holding clearly applies to insureds, themselves, as “[f]ollowing an assignment, the assignee stands in the shoes of the assignor.” *Leesburg Cmty. Cancer Ctr. v. Leesburg Reg’l Med. Ctr., Inc.*, 972 So. 2d 203, 206 (Fla. 5th DCA 2007). The right of an assignee to a PIP log is coextensive with that of the insured.

We reverse the judgment declaring that section 627.736(6) requires State Farm to produce a PIP log to Clark. A remand, however, is in order here. Count I of Clark’s complaint and her motion papers seek a declaration of Clark’s right to a PIP log on both statutory (section

⁵ Following the release of *GEICO* by the Fifth District Court of Appeal, the Third District Court of Appeal granted a motion for rehearing in *Southern Group Indemnity, Inc. v. Humanitary Health Care*, withdrew its prior opinion and issued a second opinion in that case. *S. Group Indem., Inc. v. Humanitary Health Care*, 975 So. 2d 1247 (Fla. 3d DCA 2008). The above quoted language relied upon by the Fifth District in *GEICO*, appeared again in the second *Southern Group Indemnity* opinion in which the same result was reached but with two judges dissenting from the court’s denial of rehearing en banc. *Id.* at 1251.

627.736(6)(d)) and contractual (policy of insurance) grounds. The County Court's order granting Clark's motion for summary judgment specifically mentions section 627.736 but makes no ruling as to whether there State Farm had a contractual duty to provide a PIP log. This is not surprising inasmuch as the State Farm policy was never before the court below. Both here and in the County Court, the parties devote almost all of their efforts to arguments concerning section 627.736(6)(d). We remand this case in order for the County Court to rule upon the contract-based arguments which could not be disposed of on this record, should Clark's counsel choose to pursue them.

MOTIONS FOR APPELLATE ATTORNEY'S FEES

Clark has filed a motion seeking an award of appellate counsel fees and costs pursuant to sections 627.736 and 627.428, Florida Statutes, and Rule 9.400 of the Florida Rules of Appellate Procedure.⁶ Inasmuch as we reverse the final declaratory judgment in Clark's favor, she is not a prevailing party and her motion for counsel fees should be denied.

State Farm also moves to recover its appellate counsel fees. The basis for this request is Clark's rejection of its proposal for settlement made pursuant to section 768.79, the so-called offer of judgment statute. After receiving State Farm's offer of judgment, Clark withdrew Counts II and III of her complaint which were based upon allegations that State Farm violated the PIP statute and breached its policy of insurance. Count I, an action for declaratory judgment, went forward. In opposing State Farm's counsel fee motion, Clark argues that the offer of judgment statute, by its terms, applies only to a "civil action for damages." §768.79(1), Fla. Stat. (2005). To determine whether a case is a "civil action for damages" in the context of the offer of

⁶ Section 627.736 merely provides that section 627.428 shall apply to PIP disputes. §627.736(8), Fla. Stat. (2005). Section 627.428, in turn, provides for an award of counsel fees where an insured prevails against an insurer.

judgment statute, courts should look to whether the “real issue” is one for damages or declaratory relief. *Nat’l Indem. Co. of the South v. Consol. Ins. Servs.*, 778 So. 2d 404, 408 (Fla. 4th DCA 2001). Here, Clark voluntarily withdrew Counts II and III of her complaint, leaving only the declaratory judgment claim. Even before she formally withdrew these counts, the “real issue” in this case concerned State Farm’s duty to produce the PIP log. In a motion for summary judgment filed in July 2005, Clark argued that

by [State Farm’s] production of the PIP payout log to [Schetter], the very relief prayed for within her Complaint, Count I Declaratory Judgment, Count 2 Breach of Contract and Count 3 Violation of Section 627.736(6)(d), Florida Statutes, [State Farm] has confessed judgment on the issue at bar and, in effect, abandoned all defenses in this matter.

(R. 15.)

In a motion to abate discovery, also filed in July 2005, Clark contended that “[o]n June 27, 2005, [State Farm] provided the PIP payout log to Plaintiff, which was specifically the relief sought and at issue within Plaintiff’s three-count Complaint in this case.” (R. 24 .) We conclude, therefore, that the “real issue” in this case was whether State Farm was obligated to produce its PIP log and therefore this was not an “action for damages.” As a result, the offer of judgment statute does not apply and State Farm’s counsel fee application is denied.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

- 1) The trial court’s Final Declaratory Judgment in favor of appellee, Carrie Clark, be and hereby is **REVERSED**; and
- 2) Appellee, Carrie Clark’s motion for appellate counsel fees be and hereby is **DENIED**;
- 3) Appellant, State Farm Mutual Automobile Insurance Company’s motion for appellate

counsel fees be and hereby is **DENIED**; and

4) This matter be and hereby is **REMANDED** to the trial court for further proceedings not inconsistent with this Order.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this
__11__ day of __September_____, 2008.

_____/S/_____
JULIE H. O’KANE
Circuit Judge

_____/S/_____
WALTER KOMANSKI
Circuit Judge

_____/S/_____
JANET C. THORPE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to:

1) Hinda Klein, Esq., CONROY SIMBERG, P.A., Venture Corp. Center I, 3440 Hollywood Boulevard, Second Floor, Hollywood, Florida 33021; and

2) Bruce H. Kauffman, Esq., THE LAW OFFICES OF PETER A. SHAPIRO & BRUCE H. KAUFFMAN, P.A., 211 East Livingston Street, Orlando, FL 32801;

on this __11__ day of __September_____, 2008.

_____/S/_____
Judicial Assistant