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

PROGRESSIVE CONSUMERS
INSURANCE CO.

Appellant,

v.

JEAN P. FLORESTAL, LMT & CNMT,
a/a/o SALLY HARPER

Appellee.
_____/

CASE NO.: CVA1 06-56
LOWER COURT CASE NO.:
2003-SC-8994

Appeal from the Small Claims Court,
in and for Orange County, Florida,
Judge Deborah Blechman.

Douglas H. Stein; Anania, Bandklayder,
Blackwell, Baumgarten. Torricella & Stein,
for Appellant.

Kevin Weiss; Weiss Legal Group for Appellee.

Before ROCHE, MCDONALD, and LAUTEN.

FINAL ORDER REVERSING TRIAL COURT'S FINAL SUMMARY JUDGMENT AND REMANDING FOR TRIAL

Petitioner Progressive Consumers Insurance Co., Defendant/Appellant ("Progressive") timely filed a Notice of Appeal of the Orange County Court's Final Judgment entered in favor of Jean P. Florestal, L.M.T. & C.N.M.T. a/a/o Sally Harper, Plaintiff/Appellee ("Florestal") on August 15, 2006. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

On May 27, 2003, Sally Harper was involved in a car accident that resulted in injury to her spine and areas of soft tissue in her back. At the time of the accident, Ms. Harper was

insured under a policy of Personal Injury Protection coverage issued by Progressive. She sought the care of Dr. Michael H. Verne, D.C., a chiropractor who ultimately referred her to Florestal, a licensed massage therapist and certified neuromuscular therapist. As a result of the doctor-patient relationship, Mr. Florestal received an assignment of benefits from Ms. Harper. Florestal performed medical massage on Ms. Harper between May 30, 2003 and June 24, 2003. Florestal submitted bills totaling $1410.00 to Progressive. Upon receiving the bills, Progressive reduced the amount to be paid and included in an Explanation of Benefits that Florestal's charges were unreasonable for his geographic location. When Progressive did not pay the $525.00 Mr. Florestal alleges was due, he sued to recover the amount Progressive alleged was not covered.

The ensuing, protracted litigation is the subject of this current appeal. On July 19, 2006, County Court Judge Deb Blechman ruled on Appellee's motion for summary disposition and found in favor of the Appellee. Judge Blechman commented at the hearing that Appellant had failed to produce any substantive evidence/witnesses to refute Appellee's expert testimony that his charges for medical massage were not unreasonable, unnecessary, or fraudulent.

This appeal comes to this Court from a final summary judgment. When reviewing a final summary judgment this Court's standard of review is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *Kaplan v. Morse*, 870 So. 2d 934, 935 (Fla. 5th DCA 2004). A party is not entitled to summary judgment unless there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Volusia County*, 760 So. 2d at 130. It is the moving party's burden to conclusively establish that there is no dispute as to any material fact. *Kaplan*, 870 So. 2d at 935. "[U]nless the facts are so crystallized that nothing remains but questions of law," summary judgment should not be granted. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985).

Appellant raises four separate arguments on appeal. The first three relate to the issuance of the summary judgment in favor of the Appellee. The Appellant contends that the trial court erred in granting summary judgment because issues of material fact remained in regards to: Appellee's complaint, Appellant's affirmative defenses, and Appellant's counterclaims. The final assignment of error alleges that Sally Harper's treating chiropractor should not have been awarded an expert witness fee. Since remand on one of the issues is warranted, we will dispense with discussion of the remaining arguments.

Appellant argues that summary judgment was improper because conflicting affidavits filed by both parties created a genuine issue of material fact. Appellee submitted his affidavit stating: "All of the bills Sally Harper incurred with my office were reasonable in the amount billed, necessary and related to the motor vehicle accident of May 27, 2003." In direct opposition to Florestal's affidavit, Appellant's expert, David Bennett, a Doctor of Chiropractic, swore: "The $65.00 per unit fee charged by Jean Patrick Florestal for services rendered to Sally Harper for CPT code 97124 was above the usual, reasonable and customary fee, and therefore, unreasonable." (R. at 540.) The two affidavits clearly represent opposite viewpoints.

As the Appellant has accurately noted, summary judgment is not proper "if the evidence raises any issues of material fact, if it is conflicting, if it will permit different inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact." *Jewett v. Leisinger*, 655 So. 2d 1210, 1212 (Fla. 4th DCA 1995). Given the treatment traditionally associated with affidavits filed by nonmoving parties following a motion for summary judgment, Appellant certainly makes a strong case that summary judgment was improperly issued in Appellee's favor.

While it is certainly true that a trial court's decision comes to the appellate court clothed in a presumption of correctness, *Easterling v. Keels*, 681 So. 2d 744 (Fla. 1996), a competing presumption is present when a motion for summary judgment is involved. As the Florida Supreme Court has noted, "[m]indful as we are of the presumption of correctness which attaches to an order of the trial court, nevertheless we must draw every possible inference in favor of the party against whom the motion is made." *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 32 (Fla. 1977) citing *First Realty Corp. v. Standard Steel Treating Co.*, 268 So. 2d 410, 413 (Fla. 4th DCA 1972). With this in mind, this Court must view the facts in the light most favorable to the nonmoving party, Florestal.

The Appellee cites a recent case heard by the Eleventh Circuit, where a similar set of facts was presented before the court. In *Progressive American Ins. Co. v. Maria Cartaya. M.D., P.A. a/a/o Madays Lorenzo*, 14 FLW Supp 1087a (Fla. 11th Cir. Ct. October 22, 2007), a treating physician, Dr. Cartaya, sought reimbursement from Progressive for medical services provided to Madays Lorenzo. In support of her motion for summary judgment Dr. Cartaya submitted an affidavit stating her qualifications, diagnosis, and the reasonableness of her charges. *Id.* The court stated that: "Once the moving party tenders competent evidence to support the motion, the opposing party must come forward with counter evidence to reveal a genuine issue." *Id.* (citation omitted). It is well established that "it is not sufficient for the opposing party merely to assert an issue does exist." *Id.* (citation omitted). In analyzing the case, the Eleventh Circuit determined that: "Progressive failed to file an affidavit to counter Dr. Cartaya's affidavit, or in the alternative, provide a medical opinion to support their defense that the treatment was not reasonable, related or necessary." *Id.* The full record of that case is not before this Court, and we are unable to determine whether Progressive actually failed to file an affidavit or failed to

provide a medical opinion. In either case, the Appellant here has presented an affidavit to counter Florestal's claims. This clearly distinguishes the instant appeal from the *Cartaya* case.

The final error alleged by the Appellant concerns the trial court's order granting expert witness fees to Ms. Harper's treating chiropractor, Dr. Verne. Appellant claims that an award of expert witness fees to a treating physician for attending a deposition has no sound basis in Florida jurisprudence. Unfortunately for the Appellant there is no transcript of the trial court's hearing held on June 9, 2005 at which time the motion for expert witness fees was heard. Clear Florida case law states: "It is incumbent upon the appellant to bring to this court such parts of the record as are necessary to support his contentions on appeal." *Conner v. Coggins*, 349 So. 2d 780, 781 (Fla. 1st DCA 1977) citing *Howell v. State*, 337 So. 2d 823 (Fla. 1st DCA 1976); *Chipola Nurseries, Inc. v. Div. of Admin. Dept. of Transportation*, 294 So. 2d 357 (Fla. 1st DCA 1974). Without such transcripts from the June 9, 2005 hearing this Court cannot weigh the merits of the trial court's decision. As such, the order granting Dr. Verne's expert witness fees is affirmed.

In ruling on this appeal, this Court does not rule on the appropriateness of the Mitchell Medical Database and the possibility of its use at trial. While mentioned at the hearing on the motion for summary disposition, the database does not have any relation to Dr. Bennett's affidavit as it was used only by the insurance adjusters. The decision to include or exclude the Mitchell database at trial is an issue that the trial court will take up on remand.

Finally, the Appellant filed its "Motion for Attorney's Fees Pursuant to Proposal for Settlement," on September 26, 2007. The Appellant is the prevailing party under this decision and as such is entitled to attorney's fees. Its "Proposal for Settlement" was not ambiguous as to which claims would be settled as against Mr. Florestal. Despite the fact that no release was

attached to the proposal, the Florida Supreme Court has held that a release need not be attached to the offer so long as the summary adequately informs the offeree of the terms of the offer. *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006). This Court finds that Appellant's proposal to be sufficiently specific and in compliance with Fla. R. Civ. P. 1.442(c)(2)(C).

Considering the foregoing, a material issue of fact remains as to whether Appellee's charges were reasonable. This issue must be decided by a jury and as such the trial court's issuance of a final order on summary disposition was improper and must be reversed. Additionally, Appellant is entitled to Attorney's Fees for successfully prosecuting this appeal, and assessment of those fees will be made by the trial court.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Judgment" is **REVERSED** and that the Appellant's "Motion for Attorney's Fees Pursuant to Proposal for Settlement" is **GRANTED.** This case is **REMANDED** to the trial court for proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this _20_ day of ___November_____, 2008.

__/S/_____
RENEE A. ROCHE
Circuit Judge

__/S/_____
ROGER J. MCDONALD
Circuit Judge

__/S/_____
FREDERICK J. LAUTEN
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 to:

KEVIN B. WEISS, ESQ., Weiss Legal Group, P.A., 698 North Maitland Ave., Maitland, FL 32751;

ADAM ROSS LITTMAN, ESQ., Jacobs & Goodman, P.A., 890 State Road 434, Altamonte Springs, FL 32714;

JASON R. URBANOWICZ, ESQ., Rissman, Barrett, et. al., 201 East Pine St., 15th Floor, Orlando, FL 32801; and**,**

DOUGLAS H. STEIN, ESQ., Anania, Bandklayer, et. al., 4300 Bank of America Tower, 100 SE Second Street, Miami, FL 33131 on this _20____ day of __November_____, 2008.

____/S/_____
Judicial Assistant