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

STAND-UP MRI OF ORLANDO,
a/a/o Eusebio Isaac,

Appellant,

v.

PROGRESSIVE AMERICAN INSURANCE
COMPANY,

Appellee.

_____/

CASE NO.: CVA1 06-58
LOWER COURT CASE NO.:
2005-SC-4899-O

Appeal from the County Court,
in and for Orange County, Florida,
Judge Antoinette Plogstedt.

Todd E. Copeland, Esquire,
for Appellant.

Eric Biernacki, Esquire,
for Appellee.

Before DAWSON, G. ADAMS, and STRICKLAND, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT'S JUDGMENT

Stand-Up MRI of Orlando ("Appellant"), as assignee of Eusebio Isaac, brought an action to recover Personal Injury Protection ("PIP") benefits for treatment rendered to Eusebio Isaac, an insured of Progressive American Insurance Company ("Appellee"). Appellant filed a timely appeal of the trial court's order granting Defendant's motion for final summary judgment. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A).

On November 5, 2004, Eusebio Isaac was involved in an automobile accident. At the time of the accident, Isaac was covered under a PIP policy of insurance issued by Progressive which provided $10,000.00 in PIP benefits, which was in full force and effect. As a result of the injuries sustained in the accident, Isaac sought treatment from Appellant. On December 27, 2004, Appellant performed a test on Isaac consisting of an MRI of the lumbar spine with additional flexion and extension sequences. On the same day, Isaac executed an assignment of benefits to Appellant; Appellant then billed Appellee for the primary MRI and two charges for the flexion and extension sequences. In February 2005, Appellee paid the claim for the MRI but denied the claims for the flexion and extension sequences.

After the claim denial, Appellant's counsel forwarded a fifteen day demand letter to Appellee requesting payment of all outstanding amounts, interest, postage, and statutory penalties. The demand letter also requested that if the Appellee declined to pay the claims, that it hold the disputed funds in reserve pending resolution of the dispute. In Appellee's response to the demand letter, it upheld the denial for the two claims based on an independent peer review.

On June 6, 2005, Appellant filed a complaint against Appellee. At the time the litigation commenced, PIP benefits had not been exhausted. However, on June 17, 2005, the benefits were exhausted. Subsequently, Appellee was served with Plaintiff's suit on June 27, 2005. Appellee then moved for summary judgment on the basis of exhaustion of benefits. In response, Appellant filed its own motion for summary judgment. At a May 18, 2006 hearing, the trial court granted Appellee's motion for summary judgment and denied Appellant's motion for summary judgment. Appellant served a motion for rehearing on July 7, 2006. On August 11, 2006, the trial court entered an order denying Appellant's motion for rehearing. Appellant timely filed its notice of appeal on August 23, 2006.

The issue in this case is whether the trial court erred in granting Appellee's Motion for Summary Judgment. The standard of review for summary judgment is de novo. *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001). Accordingly, this Court must determine if there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id*. at 491-92, citing Fla. R. Civ. P. 1.510(c). It is the moving party's burden to show that no genuine issue of material fact exists. *Krol*, 778 So. at 492. Therefore, this Court must consider the evidence in the light most favorable to the nonmoving party, and if the slightest doubt exists, summary judgment must be reversed. *Id.*

On appeal, Appellant argues that the trial court incorrectly granted summary judgment in favor of Appellee because policy benefits were exhausted shortly after Appellant filed suit. Appellant argues that it properly submitted its claim to Appellee when there were sufficient benefits remaining under the PIP policy. However, Appellant asserts that Appellee elected to deny payment and continued to pay subsequent claims submitted by other providers. Accordingly, Appellant argues that the bill is now overdue pursuant to section 627.736, Florida Statutes, and that Appellee is obligated to pay Appellant's claim plus statutory interest and penalties. Thus, Appellant asserts that Appellee violated its assignment of benefits and its right to priority payment over subsequent claims

On the other hand, Appellee contends that, in the absence of bad faith, it is not obligated to pay more than the policy limits. Additionally, Appellee maintains that it was not required to set aside a reserve fund before PIP benefits were exhausted from which it could pay Appellant's claim.

This Court recently addressed the identical issue of the effect of exhaustion of benefits on a claim for personal injury protection benefits when a PIP claim is made to the insurer before the

benefits are exhausted. *State Farm Mut. Auto. Ins. Co. v. JRA Diagnostics, Inc.*, No. CVA1 05-60 (Fla. 9th Cir. Ct. Mar. 8, 2007). The following is taken directly from that opinion.

In *Simon v. Progressive Express Insurance Company*, 904 So. 2d 449 (Fla. 4th DCA 2005), the Fourth District Court of Appeal held that an insurance company has no obligation to set aside or reserve funds for claims that are reduced or denied. In *Simon*, a physician (Simon) accepted a reduced payment from Progressive for services rendered to its insured. 904 So. 2d at 449. Simon resubmitted the claim seeking the balance owed. *Id.* Progressive informed Simon that the remaining funds were committed to another provider because he had accepted a reduced payment without advising Progressive that the claim would be resubmitted. *Id.* Simon argued that Progressive should not have paid other providers and that he had a priority claim to the funds. *Id.* However, the court determined that Simon did not have a priority claim because he accepted partial payment and did not notify Progressive that he was amending his claim. *Id.* at 450.

The court declined to accept Simon's argument that an insurance company is required to reserve any available funds at the time a claim is submitted. *Id.* Doing so, the court reasoned, "would result in unreasonable exposure of the insurance company and would be to the detriment of the insured and other providers with properly submitted claims." *Id.* Further, any payments that were reduced or denied "would have to be held in reserve until the statute of limitations period expired or suit was filed and concluded." *Id.* As a result, this would create delays in the payment of other claims and defeat the purpose of the PIP statute's prompt pay provisions. *Id.*

Based on *Simon*, Appellee is correct that it was not required to hold remaining PIP benefits in a reserve fund when a claim has been reduced or denied. However, *Simon* is not dispositive of the remaining issue in this case, which is whether Appellee violated Appellant's

right to priority payment over subsequent providers and therefore may be responsible for the claim plus statutory interest and penalties.

There have been numerous decisions regarding whether an insured or its assignee can maintain an action against the insurer once benefits have been exhausted. Circuit courts and county courts addressing this issue have come to varying conclusions. For example, some courts have ruled that when benefits are exhausted, an insured cannot recover additional PIP benefits but may still seek statutory penalties for an insurer's late payment. *Sanders v. State Farm Mut. Auto. Ins. Co.*, 10 Fla. L. Weekly Supp. 789b (Fla. 17th Cir. Ct. June 5, 2003); *First Choice Med. Ctr. v. Progressive Express Ins. Co.*, 12 Fla. L. Weekly Supp. 994a (Fla. Seminole Cty. Ct. June 27, 2005). Other courts have held that an insurer must pay overdue claims even if benefits have been exhausted if the insurer wrongfully withheld or misapplied benefits. *Physicians First Choice Interpretation v. Allstate Ins. Co.*, 10 Fla. L. Weekly Supp. 675c (Fla. 11th Cir. Ct. July 15, 2003); *Barton Lake Healthcare Ctr. v. Progressive Express Ins. Co.*, 13 Fla. L. Weekly Supp. 355a (Fla. Orange Cty. Ct. Jan. 11, 2006). Still other courts have held that when PIP benefits are exhausted, the insured/assignee has no further interest in the contract and the insurer is not required to pay more than it was obligated to pay in the contract of insurance. *MTM Diagnostic, Inc. v. State Farm Mut. Auto. Ins. Co.*, 9 Fla. L. Weekly Supp 581e (Fla. 13th Cir. Ct. Nov. 20, 2000); *Heartland Rehab. Serv. v. Nationwide Mut. Fire Ins. Co.*, 12 Fla. L. Weekly Supp. 601a (Fla. 4th Cir. Ct. Apr. 6, 2005).

The purpose of the PIP statute is to ensure the prompt payment of PIP benefits. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000). "An insurer is required to pay bills in the order in which it receives them." *First Care Chiropractic Ctr., Inc. v. Progressive Express Ins. Co.*, 13 Fla. L. Weekly Supp. 1149a (Fla. 9th Cir. Ct. Aug. 14, 2006), citing *State Farm v. Ray*, 556 So.

2d 811 (Fla. 5th DCA 1990). An insurer has thirty days in which to verify and pay a claim and that time cannot be tolled. *January v. State Farm Mut. Ins. Co.*, 838 So. 2d 604 (Fla. 5th DCA 2003). Furthermore, the English Rule, which establishes priority of assignments, gives priority to the assignee that first gives notice to the creditor. *State Farm v. Ray*, 556 So. 2d at 812 (citing *Blvd. Nat'l Bank of Miami v. Air Metal Indus., Inc.*, 176 So. 2d 94 (Fla. 1965)). When an insurer wrongly denies or withholds payment, it does so at its own risk and must suffer the consequences of its actions. *Seminole Cas. Ins. Co. v. Schtupak*, 9 Fla. L. Weekly Supp 529a (Fla. 17th Cir. Ct. 2002).

In the present case, Appellee, at its own risk, elected to partially deny Appellant's claims. After the action commenced, Appellee asserted exhaustion of benefits as a defense. However, at the time of the initial denial, there were sufficient PIP benefits remaining under the policy to pay the amount billed by Appellant. Furthermore, PIP benefits remained available until after Appellant filed its complaint. Appellee disregarded Appellant's priority claim per the assignment of benefits and paid benefits to other providers who had subordinate claims to Appellant. Pursuant to section 627.736(4) and (8), Florida Statutes, it appears that the benefits are overdue, therefore the trial court's order finding that Appellee is not liable because benefits were exhausted should be reversed. Thus, this case is remanded for further proceedings in the trial court. If the trial court finds that Appellee is responsible for Appellant's claim, then Appellee will also be responsible for statutory interest and penalties. Due to this case being reversed and remanded for further proceedings, there is no need to address Appellant's arguments regarding pursuing penalties, interest and attorney's fees even if Appellee was not required to pay the claim.

Appellant has timely filed a motion to tax attorney's fees and costs pursuant to sections 627.736(8) and 627.428, Florida Statutes, and Florida Rule of Appellate Procedure 9.400. Conditioned upon Appellant ultimately prevailing in this litigation, Appellant is awarded its appellate attorney's fees and that the assessment of those fees is remanded to the trial court. *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 919 So. 2d 473, 475 (Fla. 3d DCA 2005); *Hart v. Bankers Fire and Cas. Ins. Co.*, 320 So. 2d 485, 487 (Fla. 4th DCA 1975). In addition, Appellant is entitled to have costs taxed in its favor by filing a proper motion with the trial court within thirty days after the issuance of the mandate in this case.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The trial court's Final Judgment in favor of Appellee is **REVERSED** and this cause is **REMANDED** for further proceedings.

2. Appellant's motion for appellate attorney's fees is **GRANTED**, conditioned upon Appellant ultimately prevailing in this litigation

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 27__ day of _____June_____, 2007.

_____/S/_____
DANIEL P. DAWSON
Circuit Judge

_____/S/_____
GAIL A. ADAMS
Circuit Judge

_____/S/_____
STAN STRICKLAND
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 **Todd E. Copeland, Esq., and Robert J. Crohan Jr., Esq., Todd E. Copeland & Associates, P.A., 338 North Magnolia Avenue, Suite B, Orlando, FL 32810; Douglas H. Stein, Esq., Anania, Bandklayder, Blackwell, Baumgarten, Torricella & Stein, P.A., 4300 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131-2144;** and **Eric Biernacki, Esq., Adams & Diaco, P.A., One South Orange Avenue, Suite 301, Orlando, FL 32801** on the ___27__ day of _____June_____, 2007.

_____/S/_____
Judicial Assistant