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

PEACHTREE CASUALTY INSURANCE COMPANY,

Appellant,

v.

CASE NO.: CVA1 06-82
Lower Court Case No.: 01-CC-13331

KEVIN NOVOTNY,

Appellee.
_____/

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

Dorothy Venable Difiore, Esquire,
for Appellant.

Anthony T. Leon, Esquire,
for Appellee.

Before FLEMING, GRINCEWICZ, TURNER, J.J.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant Peachtree Casualty Insurance Company (Peachtree) timely appeals the lower court's final summary judgment rendered on November 22, 2006. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument per Florida Rule of Appellate Procedure 9.320.

Novotny filed an action for damages against Peachtree seeking personal injury protection (PIP) benefits for injuries and losses resulting from a motor vehicle accident on or about

February 2, 2001. Prior to Novotny's accident, Peachtree issued an insurance contract to Maria A. Stefopoulos (Stefopoulos), as named insured, and Novotny, as an insured driver of the same vehicle, which provided for PIP benefits up to $10,000 with a $2,000 deductible. This policy was in effect on the date of the accident.

Upon filing the action for benefits, Peachtree filed a motion to dismiss, motion for summary judgment and/or motion for more definite statement stating that Novotny's complaint failed to identify or specify: (1) his medical expenses and incurred lost earnings; (2) when the bills were submitted to the carrier for consideration; and (3) whether or not 30 days had expired since the submission of the bills. Additionally, Peachtree stated that there was no genuine issue of fact regarding whether or not Novotny signed the deductible election on the application.

The parties appeared for hearing on Peachtree's motions on April 12, 2002, at which the trial court denied without prejudice the motion for summary judgment based upon an incomplete record but granted the motion for more definite statement.

Thereafter, Novotny filed an amended complaint on April 25, 2002, stating that despite performing all conditions precedent to entitle him to recover PIP benefits under the policy, Peachtree failed to pay any of the first $2,500 in medical bills. Novotny asserts that under the terms of the insurance policy, the $2,000 deductible was not applicable to him because he was neither the named insured nor a resident dependent relative of Stefopoulos, the named insured.

Peachtree filed another motion to dismiss stating that because Novotny signed the deductible election, he was subject to the deductible pursuant to section 627.739, Florida Statutes.

In response, Novotny filed a motion for summary judgment and supporting memorandum on September 3, 2002, asserting that the only issue was whether the $2,000 PIP deductible

applied to him. Novotny argued that the plain language of the policy indicated that the PIP deductible applied only to the named insured and resident dependent relatives of the named insured, and it was undisputed that Novotny was neither the named insured nor a resident dependent relative of Stefopoulos. Alternatively, Novotny argued that if the policy was subject to two or more reasonable interpretations, then the policy was ambiguous and should be construed in favor of the insured.

It appears from the record that a hearing was held on the parties' competing motions on October 14, 2002, but an order was not immediately entered. The record also illustrates that the case was reassigned from Judge Arnold to Brewer and then back to Arnold sometime between October 14, 2002, and December 22, 2004.

On or about December 20, 2004, Peachtree filed a motion to dismiss for failure to prosecute requesting dismissal of Novotny's amended complaint because the last record activity was dated October 15, 2002. This motion was set for hearing on February 8, 2005, but prior to the hearing, an order from the October 14, 2002, hearing was entered granting summary judgment in favor of Peachtree because Novotny elected to be bound by the deductible provisions of the policy.

Following the February 8, 2005, hearing at which Peachtree did not appear, Novotny filed a motion for reconsideration of the December 21, 2004, order requesting that the court allow for a new hearing on the motions because more than two years had passed between the time of the hearing and the entry of the order, and Novotny did not learn of the order until the February hearing because it was mailed to the wrong address. The court granted Novotny's motion for reconsideration and vacated the December 21, 2004, order.

A hearing on Peachtree's motion to dismiss for failure to prosecute, Novotny's motion

for summary judgment, and Peachtree's motion to dismiss was conducted on August 24, 2005. On or about October 7, 2005, Judge Plogstedt entered orders denying Peachtree's motion to dismiss for failure to prosecute, granting in part Novotny's motion for summary judgment, and denying Peachtree's motion to dismiss. The trial court made the following findings: (1) the insurance policy was unambiguous; (2) Novotny was covered under the policy but neither the named insured nor a resident dependent relative of the named insured; and (3) the $2,000 PIP deductible did not apply to Novotny. Peachtree was ordered to serve an answer to the amended complaint within ten days.

Novotny filed a motion for final summary judgment on August 10, 2006, stating that since partial summary judgment was entered in favor of him, Peachtree had not paid any of the medical bills that were previously applied to the deductible even though all of the medical treatment was reasonable in price, medically necessary, and causally related to the motor vehicle accident. Following a hearing on November 8, 2006, the court entered final summary judgment finding that Peachtree improperly applied the $2,000 PIP deductible to Novotny; all medical billing was reasonable, medically necessary, causally related, and properly submitted; and Novotny was entitled to recover from Peachtree the sum of $2,000 plus prejudgment interest of $1,806.71. This appeal followed.

The standard of review for an order granting summary judgment is de novo. Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 130 (Fla. 2000). In reviewing a summary judgment, the appellate court must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party and if the slightest doubt exists, the summary judgment must be reversed. Krol v. City of Orlando, 778 So. 2d 490, 492 (Fla. 5th DCA 2001); Racetrac v. Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d

376, 377 (Fla. 5th DCA 1998)(judicial interpretation of state statutes is a purely legal matter and therefore subject to de novo review).

This appeal concerns the interpretation of a PIP deductible provision in a motor vehicle insurance policy and the application of section 627.739, Florida Statutes (2000), to such policy. The policy provision at issue provides:

> I understand that I may purchase the following coverages with any of the deductibles indicated, in lieu of full coverage and receive a reduction in premium. I further understand that in accordance with Section 627.739 of "FLORIDA Motor Vehicle No Fault Law" my election of a Deductible may affect my rights and the rights of others insured under my policy to make a claim or to recover against other persons who might otherwise be responsible for losses subject to the deductible. With this knowledge, if a deductible is elected it applies to [named insured and Resident Dependent Relatives] . . . I or we have been explained the personal injury protection options by our agent, and understand we are not to elect any of the deductible options unless we have other medical and disability collateral coverages. I or we certify that we do have other medical and disability coverages to cover the personal injury protection deductibles we have selected on this application . . .

Section 627.739(1), Florida Statutes (2000), provides in pertinent part:

> The named insured may elect a deductible or modified coverage or combination thereof to apply to the named insured alone or to the named insured and dependent relatives residing in the same household, but may not elect a deductible or modified coverage to apply to any other person covered under the policy. Any person electing a deductible or modified coverage, or a combination thereof, or subject to such deductible or modified coverage as a result of the named insured's election, shall have no right to claim or to recover any amount so deducted from any owner, registrant, operator, or occupant of a vehicle or any person or organization legally responsible for any such person's acts or omissions who is made exempt from tort liability by ss. 627.730-627.7405.

Peachtree asserts that the trial court erred as a matter of law in finding that the PIP deductible could not be applied towards Novotny's medical claims even though he elected the PIP deductible when applying for coverage with Stefopoulos. Peachtree argues that the trial court rendered the second sentence of section 627.739(1), Florida Statutes, meaningless.

On the other hand, Novotny contends that the trial court did not commit error in entering

final summary judgment favoring him because under the language of the policy, he was not subject to the $2,000 PIP deductible as he was not the named insured nor a resident dependent relative of the named insured. Moreover, Novotny asserts that even if the policy is ambiguous or susceptible to more than one interpretation, the policy must be strictly construed against Peachtree as a matter of law.

The purpose of the PIP deductible is to prevent car owners with other insurance coverage from paying premiums for duplicative coverage. Chapman v. Dillon, 415 So. 2d 12, 18 (Fla. 1982). Electing a PIP deductible is optional and therefore it is presumed that the purchasers of PIP do so with knowledge of the consequences, including the possibility of incomplete coverage. Id. Because an insurance policy is a contract between the insurer and the insured, contract principles apply to its interpretation. American Strategic Ins. Co., v. Lucas-Solomon, 927 So. 2d 184, 186 (Fla. 2d DCA 2006). In Florida, insurance contracts are to be construed in accordance with the plain language of the policies as bargained for by the parties. Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000); see also American, 927 So. 2d at 186 (citing Commerce Nat'l Bank in Lake Worth v. Safeco Ins. Co. of Am., 252 So. 2d 248, 252 (Fla. 4th DCA 1971))(contracts should be construed to give effect to the intent of the parties and the insured's knowledge and understanding of the extent of coverage). When construing insurance policies, courts should read each policy as a whole and attempt to give every provision its full meaning and effect. Anderson, 756 So. 2d at 34. If an insurance policy is ambiguous or susceptible to more than one interpretation, then it must be construed strictly against the insurer and in favor of the insured. American, 927 So. 2d at 186. However, "there must be a 'genuine inconsistency, uncertainty, or ambiguity in meaning' that remains after the application of 'the ordinary rules of construction'" before the rule favoring the insured is applied. Id. (quoting

Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938 (Fla. 1979)).

In the instant case, it is undisputed that the $2,000 deductible option was selected for the subject policy and Stefopoulos elected to apply the deductible to the named insured and resident dependent relatives. Moreover, it is undisputed that Novotny also signed the deductible election and he is neither the named insured nor a resident dependent relative of Stefopoulos.

Section 627.739(1), Florida Statutes (2000), allows the named insured to elect a deductible "to apply to the named insured alone or to the named insured and [resident] dependent relatives . . . but [the named insured] may not elect a deductible or modified coverage to apply to any other person covered under the policy." Accordingly, Stefopoulos could not elect that the deductible apply to Novotny but because the statute goes on to say that "**[a]ny person electing a deductible** or modified coverage . . . shall have no right to claim or to recover any amount so deducted," it follows that individuals, such as Novotny, who are not named insureds or resident dependent relatives, but are insureds under the same policy, may separately elect a deductible. (emphasis added).

We find that Peachtree was correct in applying the $2,000 deductible towards Novotny's medical claims because proof of Novotny's intent to elect a deductible is shown by his signature on the deductible election provision and there is no evidence in the record to support the argument that the policy was ambiguous or subject to more than one interpretation.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Summary Judgment in Favor of Plaintiff" entered on November 22, 2006, is **REVERSED;** "Appellee's Motion for Attorney's Fees" is **DENIED**; and this case is **REMANDED** to the trial court for further proceedings.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the _4___ day of _September_____, 2008.

__/S/_____
JEFFREY M. FLEMING
Circuit Judge

___/S/_____
DONALD E. GRINCEWICZ
Circuit Judge

_/S/_____
THOMAS W. TURNER
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: **Dorothy Venable Difiore, Esquire**, 4921 Memorial Highway, Suite 200, Tampa, Florida 33634 and **Anthony T. Leon, Esquire,** 16 Dodecanese Blvd., Post Office Box 490, Tarpon Springs, Florida 34689 on the ____4_____ day of __September_____, 2008.

___/S/_____
Judicial Assistant