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

JACQUELINE ACOSTA,

Appellant,

v.

CASE NO.: CVA1 06-87
Lower Court Case No.: 06-CC-6108

MERCURY INSURANCE COMPANY OF FLORIDA,

Appellee.
_____/

Appeal from the County Court,
for Orange County,
Deb. S. Blechman, Judge.

Peter A. Shapiro, Esquire,
for Appellant.

Louis D. Kaye, Esquire,
for Appellee.

Before M. SMITH, MUNYON, WATTLES, J.J.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant Jacqueline Acosta (Acosta) timely appeals the trial court's final judgment denying Appellant's amended motion for summary judgment and granting dismissal in favor of Appellee Mercury Insurance Company of Florida (Mercury). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Acosta filed suit against Mercury seeking a declaration as to whether Mercury should extend personal injury protection (PIP) coverage to Acosta for injuries and losses resulting from a motor vehicle accident on February 15, 2006. Prior to Acosta's accident, Mercury issued an

insurance contract to Acosta's husband, Jose Inoa, Policy No.: FL 05390502, which provided for PIP benefits and other coverage. This policy was in effect on the date of the accident. At the time of the accident, Acosta was the driver of a 1995 Mazda Protégé which was insured under the policy with Mercury.

On March 6, 2006, Acosta sent Mercury an Application for Benefits and an affidavit relating to the accident on February 15, 2006. Thereafter, on April 11, 2006, Acosta, through counsel, sent Mercury a letter confirming Acosta's statement to be taken by Mercury on April 25, 2006. The letter also stated that Mercury had not been paying Acosta's PIP benefits and that a lawsuit would be filed after May 1, 2006, if benefits were not extended by that time. Mercury took Acosta's statement on April 25, 2006. On May 3, 2006, Acosta filed a complaint for declaratory judgment based on Mercury's failure to timely extend PIP coverage. On May 9, 2006, Mercury extended coverage to Acosta and made some payments of PIP benefits towards the claim.

On August 29, 2006, the parties filed a stipulation which stated that the only remaining issue was whether Acosta was required to file a PIP demand letter pursuant to section 627.736(11)(a), Florida Statutes, as a condition precedent, prior to filing the subject lawsuit. Additionally, the parties agreed that if the trial court found that a PIP demand letter was not required prior to the filing of the lawsuit, then Mercury had confessed judgment and Acosta would be entitled to reasonable attorney's fees and costs. Alternatively, if the trial court found that a PIP demand letter was required, then the lawsuit would be dismissed without prejudice for failure to meet a condition precedent. Both parties filed motions for summary judgment. At the summary judgment hearing on November 17, 2006, Acosta argued that this was a suit for declaratory judgment and there was no requirement that a PIP demand letter be filed as a

condition precedent. Alternatively, Mercury asserted that Acosta was not merely seeking a declaratory judgment as to coverage but rather recovery of PIP benefits. After hearing the parties' arguments, the trial court denied Acosta's summary judgment motion and entered summary judgment in favor of Mercury.

On November 27, 2006, Acosta filed a motion for rehearing of the trial court's November 17, 2006 order granting summary judgment in favor of Mercury. Acosta asserted that according to the parties' stipulation, the trial court should have dismissed the lawsuit without prejudice if it found that a demand letter was required. On December 4, 2006, the trial court vacated its previous order and treated Mercury's motion for summary judgment as a motion to dismiss for failure to comply with a condition precedent to filing. The trial court entered a dismissal without prejudice finding that pursuant to section 627.736(11), Florida Statutes, Acosta was required to send a PIP demand letter to Mercury prior to filing the lawsuit.

On appeal of a judgment granting a motion to dismiss and denying a motion for summary judgment, the proper standard of review is de novo**.** S. Baptist Hosp. of Fla., Inc. v. Welker, 908 So. 2d 317, 320 (Fla. 2005)(pure question of law is subject to de novo review); Gallagher v. Dupont, 918 So. 2d 342, 346 (Fla. 5th DCA 2005)(standard of review for summary judgment is de novo).

This appeal involves a declaratory judgment action under Chapter 86, Florida Statutes, and the demand letter requirement under section 627.736(11), Florida Statutes (2007). Section 627.736(11), Florida Statutes, provides in pertinent part:

> (a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
> (b) The notice required shall state that it is a demand letter under s.

> 627.736(11) and shall state with specificity:
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service or accommodation, and the type of benefit claimed to be due.

Acosta asserts that the trial court erred in denying her motion for summary judgment and granting a dismissal in favor of Mercury because a PIP demand letter was not required as a condition precedent to filing a suit for declaratory judgment. Acosta argues that she did not file an action for PIP benefits but rather an action for a declaration of coverage based on Mercury's failure to timely extend coverage. Alternatively, it is Acosta's position that even if she was seeking PIP benefits, she would not have standing because her benefits were previously assigned to various medical providers. Additionally, Acosta claims that Mercury abandoned any potential defenses to the lawsuit because Mercury confessed judgment by extending insurance coverage to Acosta after the lawsuit was filed.

On the other hand, Mercury contends that although the form of Acosta's suit was a declaratory judgment, the pleadings were actually seeking the recovery of PIP benefits; therefore, the trial court was correct in granting the dismissal because a demand letter was required pursuant to section 627.736(11), Florida Statutes. Moreover, Mercury asserts that Acosta could have drafted a demand letter in compliance with the PIP statute and executed reassignments for the right to recover medical benefits with the various medical providers.

The purpose of a demand letter is to put the insurer on notice of an intent to initiate litigation on a PIP claim. Progressive Express Ins. Co. v. Polynice, 12 Fla. L. Weekly Supp.

1015b (Fla. 9th Cir. Ct. July 18, 2005). By providing the insurer advance notice of the exact amount of the overdue claim, the demand letter requirements of section 627.736(11), Florida Statutes, "promote the legislative goal of reducing unnecessary litigation . . . to avoid the overburdening of the courts with actions that could be resolved before suit." Physical Therapy Group, LLC v. Mercury Ins. Co. of Fla., 13 Fla. L. Weekly Supp. 889c (Fla. 11th Cir. Ct. June 2, 2006). Therefore, it is of paramount importance that the demand letter requirements of section 627.736(11), Florida Statutes, be strictly adhered to. Chiro-Medical Rehab. Of Orlando, Inc. v. Progressive Express Ins. Co., 12 Fla. L. Weekly Supp. 162b (Fla. 17th Cir. Ct. Oct. 15, 2004).

It is undisputed that Acosta's letter to Mercury dated April 11, 2006 failed to meet the demand letter requirements of section 627.736(11), Florida Statutes.

Chapter 86, Florida Statutes, explains that the purpose of a declaratory judgment "is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed." § 86.101, Fla. Stat. (2007). There is almost no limit to the number and types of cases that may be heard under Chapter 86, if the following requirements are met: (1) there is a bona fide, actual, present need for the declaration; (2) the declaration deals with a present or ascertainable controversy; (3) there is a person who has or reasonably may have an actual, present, adverse interest in the subject matter; and (4) the relief sought is not merely the giving of legal advice by the court. May v. Holley, 59 So. 2d 636, 639 (Fla. 1952).

A bona fide dispute over PIP coverage is a proper subject for a petition for declaratory judgment relief. Tavares v. Allstate Ins. Co., 342 So. 2d 551 (Fla. 3d DCA 1977); see Nat'l Indem. Co. of the S. v. Consol. Ins. Serv., 778 So. 2d 404 (Fla. 4th DCA

2001)(holding that where no money damages or payment of money was requested, the real issue of the action was declaratory relief). "When a party seeks declaratory judgment as to coverage under an insurance policy, it is functionally seeking the court's construction as to the rights and liabilities of the parties under a contract." State Farm Mut. Auto. Ins. Co. v. Hinestrosa, 614 So. 2d 633, 635 (Fla. 4th DCA 1993)(trial court erred in dismissing insurance company's pleading seeking declaratory judgment because even if coverage did exist contrary to the insurance company's position, it was still entitled to a declaration by judgment on the coverage issue); see N.H. Indem. Ins. Co. v. Zaniboni, 13 Fla. L. Weekly Supp. 573a (Fla. 18th Cir. Ct. Nov. 18, 2005)(rejecting insurance company's argument that demand letter was required for declaratory relief action).

Acosta asserts that she filed an action for declaratory judgment because she was in doubt as to her rights and/or obligations under the insurance policy, particularly since Mercury had not extended coverage before the lawsuit was filed. Acosta's complaint requests relief in the form of a declaratory judgment requiring Mercury to extend coverage, not PIP benefits. Contrary to Mercury's position, Acosta's mere statements regarding unpaid PIP benefits do not automatically transform her declaratory judgment action under Chapter 86, Florida Statutes, into an action for PIP benefits under Chapter 627, Florida Statutes.

A demand letter was not required prior to initiating this action because Acosta did not file an action to recover PIP benefits, but rather an action for a declaration as to coverage. The trial court should have entered a judgment declaring that coverage either existed or did not exist, instead of entering a dismissal.

Acosta also seeks an award of attorney's fees under sections 627.736 and 627.428, Florida Statutes (2007). Rule 9.400(b), Florida Rules of Appellate Procedure, provides that a motion for attorney's fees "shall state the grounds on which recovery is sought." This rule requires a party to provide "substance and specify the particular contractual, statutory, or other substantive basis for an award of fees on appeal." United Services Auto. Ass'n v. Phillips, 775 So. 2d 921, 922 (Fla. 2000); see also State Farm Fire & Cas. Co. v. Ray, 556 So. 2d 811, 813 (Fla. 5th DCA 1990)(where party does not provide legal reason for recovery, appellate motion for attorney's fees must be denied). Acosta is not entitled to an award of attorney's fees under section 627.736 and 627.428, Florida Statutes, as this appeal was decided under Chapter 86, Florida Statutes, and there is no statutory authority for an award of fees in a declaratory judgment action. Acosta did not specify any other grounds for an award of attorney's fees; therefore, the motion is denied.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Agreed Order on Plaintiff's Amended Motion for Final Summary Judgment and Defendant's Motion for Summary Judgment" entered on December 4, 2006 is **REVERSED**; "Appellant's Motion for Attorney's Fees" is **DENIED**; and this case is **REMANDED** to the trial court for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___7_ day of ___May_____, 2008.

___/S/_____
MAURA T. SMITH
Circuit Judge

___/S/_____
LISA T. MUNYON
Circuit Judge

_/S/_____
BOB WATTLES
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: **Peter A. Shapiro, Esquire**, 211 East Livingston Street, Orlando, Florida 32801 and **Louis D. Kaye, Esquire,** Post Office Box 1330, Winter Park, Florida 32789 on the _____7____ day of _May_____, 2008.

____**/S/**_____
Judicial Assistant

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

JACQUELINE ACOSTA,

Appellant,

CASE NO.: CVA1 06-87
Lower Court Case No.: 06-CC-6108

v.

MERCURY INSURANCE COMPANY OF FLORIDA,

Appellee.

_____/

ORDER GRANTING APPELLANT'S MOTION FOR REHEARING AND DENYING APPELLEE'S MOTION FOR REHEARING

THIS MATTER came before the Court for consideration of the Appellant's "Motion for Rehearing, Reconsideration and/or Clarification," filed on May 16, 2008; the Appellee's "Motion for Rehearing, Reconsideration and/or Clarification" filed on May 23, 2008; and Appellant's "Amended Motion for Rehearing, Reconsideration and/or Clarification" filed on June 13, 2008. In addition, on May 29, 2008, the Appellant filed a "Notice of Filing Supplemental Authority" and on June 6, 2008, the Appellee filed a "Motion to Strike Appellant's Motion of Filing Supplemental Authority." This Court having reviewed the motions, the court file, and being otherwise fully advised in the premises, finds as follows:

1. The prime function of a motion for rehearing is to present to the court some point that it overlooked or misapprehended, which renders the decision erroneous. Hollywood, Inc. v. Clark, 15 So. 2d 175, 180 (Fla. 1943); Fla. R. App. P. 9.330. Motions for rehearing that reargue the merits of the case are inappropriate. Seslow v. Seslow, 625 So. 2d 1248 (Fla. 4th DCA 1993).

2. The Appellant asserts that this Court overlooked and misapprehended its authority to award attorneys' fees. Specifically, the Appellant states that reasonable attorney's fees should be awarded pursuant to section 627.428(1), Florida Statutes, which provides that if an insured must resort to litigation to enforce rights under a contract and a judgment is rendered against the insurer, the insurer is required to pay attorney's fees to the insured. Bassette v. Standard Fire Ins. Co., 803 So. 2d 744, 746 (Fla. 2d DCA 2001). This section is incorporated into every Florida issued insurance policy and applies regardless of whether the dispute results in a monetary or declaratory judgment. State Farm Fire and Casualty Co. v. One Stop Medical, Inc., 14 Fla. L. Weekly Supp. 1101b (Fla. 17th Cir. Ct. Sept. 20, 2007). The Appellant is entitled to reasonable attorney's fees pursuant to section 627.428(1), Florida Statutes.

3. The Appellee asserts that this Court erred in reversing the trial court's opinion because the purpose of Appellant's suit was the recovery PIP benefits. The Appellee has failed to present to this Court any new point or issue that the Court failed to consider or misapprehended in rendering its Final Order. It is improper to simply reargue the merits of the case.

4. Rule 9.225, Florida Rules of Appellate Procedure, provides in pertinent part that "[n]otices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions . . . or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause." The Appellant's Notice of Filing Supplemental Authority is improper because it was filed after this Court rendered the Final Order.

5. The Appellant's "Amended Motion for Rehearing, Reconsideration and/or Clarification" contains citations to the two cases filed as supplemental authority. Rule 9.330(b),

Florida Rules of Appellate Procedure, states that "[a] party shall not file more than 1 motion for rehearing or for clarification of decision." The Appellant's amended motion shall not be considered because it is a second motion for rehearing and contains new arguments which were dismissed above as being improper.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that

1. Appellant's Motion for Rehearing is **GRANTED** and the assessment of reasonable attorney's fees is **REMANDED** to the trial court;
2. Appellee's Motion for Rehearing is **DENIED**;
3. Appellee's Motion to Strike Appellant's Notice of Filing Supplemental Authority is **GRANTED**;
4. Appellant's Amended Motion for Rehearing is **STRICKEN.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the __23_ day of _____July_____, 2008.

__/S/_____
MAURA T. SMITH
Circuit Judge

__/S/_____
LISA T. MUNYON
Circuit Judge

___/S_____
BOB WATTLES
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: **Peter A. Shapiro, Esquire,** 211 East Livingston Street, Orlando, Florida 32801 and **Louis D. Kaye, Esquire,** Post Office Box 1330, Winter Park, Florida 32789 on the ____23___ day of __July_____, 2008.

___/S/_____
Judicial Assistant