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

CASE NO.: CVA1 08-53
Lower Court Case No.: 2007-SC-12476-O

PREZIOSI WEST/EAST ORLANDO CHIROPRACTIC CLINIC, P.A.,
As assignee of Joseph Lucero,

Appellant,

v.

PROGRESSIVE AMERICAN INSURANCE COMPANY,

Appellee.
_____/

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

Russel Lazega, Esquire,
for Appellant.

Heather Goodis, Esquire,
for Appellee.

Before GRINCEWICZ, KIRKWOOD, THORPE, J.J.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant Preziosi West/East Orlando Chiropractic Clinic, P.A. (Clinic/provider), as assignee of Joseph Lucero (Lucero/insured), timely appeals the trial court's Summary Final Judgment, entered on August 27, 2008, in favor of Appellee Progressive American Insurance Company (Progressive/insurer). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule

of Appellate Procedure 9.320.

In November 2006, Lucero was involved in an automobile accident and sustained bodily injuries. Prior to the accident, Progressive issued an insurance policy which provided for PIP coverage and/or medical expense coverage. This policy was in effect on the date of the accident. As a direct and approximate result of the injuries, Lucero incurred expenses for medical treatment. Pursuant to an agreement, Lucero assigned his rights against Progressive to Clinic and Clinic submitted bills to Progressive for services rendered to Lucero between December 5, 2006, and February 28, 2007, which were claimed to be medically necessary, reasonable, and related.

The Clinic subsequently filed an action for damages against Progressive in October 2007, for failure to issue payment of all sums due to Clinic as required by section 627.736, Florida Statutes.

Progressive denied that it refused to pay benefits in violation of section 627.736, Florida Statutes, and asserted the following affirmative defenses: (1) Clinic failed to comply with all statutory prerequisites by failing to provide written notice of a covered loss; (2) Clinic failed to comply with all policy prerequisites by failing to provide written notice of a covered loss; (3) Clinic's claim fails to satisfy the requirement imposed by section 627.736(1), Florida Statutes, specifically, the medical services provided and/or the charges were unreasonable; (4) Clinic failed to submit reasonable proof of a covered loss to Progressive; (5) Progressive's liability, if any, is limited by the terms, conditions, and limitations contained in its policy of insurance; (6) Clinic's charges were excessive or unreasonable as defined by section 627.736(5), Florida Statutes; (7) Clinic failed to supply information which was required to properly process the bills; and (8) Clinic failed to comply with the requirements of section 627.736(11), Florida Statutes.

In June 2008, Progressive filed a motion for summary judgment asserting that the subject claim was never overdue because Progressive was not placed on notice of a covered loss as a matter of law due to Clinic's failure to list or identify the services rendered on its disclosure and acknowledgment (D&A) form in violation of section 627.736(5), Florida Statutes. In response, Clinic argued that the form requirement only applied to the initial treatment or service; therefore, an improper or missing D&A form would only affect the first visit, not any subsequent visits.

The parties appeared before the trial court on August 15, 2008, for a hearing on Progressive's motion for summary judgment. The trial court entered an order granting summary judgment in favor of Progressive finding that Clinic failed to comply with the D&A form requirements of section 627.736(5)(e), Florida Statutes; therefore, it also failed to place Progressive on notice of a covered loss for purposes of section 627.736(4)(b), Florida Statutes. The trial court further found that if it were to accept Clinic's argument that failure to provide a properly completed D&A form only impacted the initial date of service and not the entire claim, it would render the statutory provision useless. Moreover, because Clinic failed to comply with a statutory condition precedent by not providing a properly completed D&A form, the trial court held that Clinic did not have standing to bring an action for declaratory relief. 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 a provider's failure to list services provided on the D&A form and an insurer's notice and partial payment of a covered loss.

On appeal, Clinic asserts that the trial court erred in applying the D&A form requirement to all dates of service because section 627.736(5)(e)(9), Florida Statutes, applies only to the initial treatment or service. Clinic also asserts that the trial court erred in failing to find that Progressive waived or was estopped from asserting the defective claim defense where Progressive failed to mention the defect in the explanation of benefits. Clinic further asserts that the trial court erred in granting summary final judgment because Clinic substantially complied with the requirements of section 627.736(5)(e), Florida Statutes, by attaching records to the form.

On the other hand, Progressive contends that Clinic's incomplete D&A form failed to furnish written notice of a covered loss pursuant to section 627.736(4)(b), Florida Statutes, and such failure to comply was fatal to the entire claim. Progressive also maintains that it did not waive and is not estopped from asserting the defense of a defective D&A form pursuant to section 627.736(4)(b), Florida Statutes, because a violation of section 627.736(5), Florida Statutes, can be asserted at any time. Lastly, Progressive asserts that substantial compliance does not operate to salvage Clinic's claim because the statute is silent as to substantial compliance.

Section 627.736(5)(e)(1), Florida Statutes (2006), provides:

> At the initial treatment or service provided, each physician, other licensed professional, clinic, or other medical institution providing medical services upon which a claim for personal injury protection benefits is based shall require an insured person, or his or her guardian, to execute a disclosure and acknowledgment form, which reflects at a minimum that:

a. The insured, or his or her guardian, must countersign the form attesting to the fact that the services set forth therein were actually rendered;
b. The insured, or his or her guardian, has both the right and affirmative duty to confirm that the services were actually rendered;
c. The insured, or his or her guardian, was not solicited by any person to seek any services from the medical provider;
d. That the physician, other licensed professional, clinic, or other medical institution rendering services for which payment is being claimed explained the services to the insured or his or her guardian; and
e. If the insured notifies the insurer in writing of a billing error, the insured may be entitled to a certain percentage of a reduction in the amounts paid by the insured's motor vehicle insurer.

Section 627.736(4)(b), Florida Statutes (2006), provides in pertinent part:

> Personal injury protection benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer . . . When an insurer pays only a portion of a claim or rejects a claim, the insurer shall provide at the time of the partial payment or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay and any information that the insurer desires the claimant to consider related to the medical necessity of the denied treatment or to explain the reasonableness of the reduced charge . . This paragraph does not preclude or limit the ability of the insurer to assert that the claim was unrelated, was not medically necessary, or was unreasonable or that the amount of the charge was in excess of that permitted under, or in violation of, subsection (5). Such assertion by the insurer may be made at any time, including after payment of the claim or after the 30-day time period for payment set forth in this paragraph.

These issues and statute subsections have generated conflicting opinions in county and circuit courts across the state. Following the briefing phase in this appeal, the Fifth District Court of Appeal resolved these specific issues in Florida Medical & Injury Center, Inc. v.

Progressive Express Insurance Company, 29 So. 3d 329 (Fla. 5th DCA 2010). We find the Fifth District's decision to be dispositive of the instant case. Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978)(disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered).

In Florida Medical, the Fifth District addressed two separate petitions for writ of certiorari arising from conflicting decisions on the same issue from the same circuit court. 29 So. 3d at 331. In both cases, the insured assigned his or her rights to the provider after being treated for injuries sustained in an automobile accident. Id. at 334-36. Upon submitting the claim to the insurer, the provider failed to list the services rendered on the D&A form. Id. After being reimbursed at a reduced rate, the provider filed suit seeking payment of the unpaid portion and the insurer raised an affirmative defense as to defective D&A form. Id. at 334-37. The county court entered summary final judgment for the insurer concluding that it was relieved of its duty to pay because the D&A form was not in compliance with section 627.736(5)(e), Florida Statutes. Id. at 334-37. On appeal, both providers argued that: (1) although the D&A form did not contain a description of the services rendered, there was substantial compliance because records were attached to the D&A form; (2) insurer waived its right to argue that the D&A form was defective because it did not raise the deficiency in the explanation of benefits and it had partially paid the provider; and (3) even if the D&A form was legally insufficient, insurer could not bar payment of the entire claim because section 627.736(5)(e)(9), Florida Statutes, states that the D&A form requirement only applies to the initial treatment or service. Id. at 335-37. Alternatively, both insurers maintained that: (1) there was no written notice of a covered loss because provider failed to list the services rendered on the D&A form and (2) the defense of a

defective D&A form may be raised at any time according to the plain language of section 627.736(4)(b), Florida Statutes. Id. The circuit court reversed final summary judgment in one case but affirmed in the other. Id. at 335, 337. Upon reviewing the relevant portions of section 627.736. Florida Statutes, the Fifth District concluded that the (4)(b) requirement of notice and the (5)(e) requirement of a D&A form are two distinct statutory duties and while the attaching of records without describing the services rendered on the face of the D&A form is not substantial compliance, it is ample notice of the fact and amount of a loss. Id. at 337-38. It also concluded that "if the legislature intended to require a completed D & A form as a condition precedent to the payment of *all* medical bills, the statute would have explicitly said so." Id. at 339 (emphasis added). The Fifth District further concluded that "if the insurer fails to specify the defect in the form so that it can be rectified as contemplated by subsection (4), it [the insurer] will be deemed to have waived its objection to payment" because (4)(b) "does not allow the insurer unlimited time to assert that the claim was generally in violation of subsection (5); rather, this provision [(4)(b)] is limited to a claim that 'the amount of the charge was in excess of that permitted' in subsection (5)." Id. at 340-41. The district court found in favor of the provider in both cases. Id. at 341-42.

Based on the foregoing, this Court finds that the trial court erred in granting summary final judgment in favor of Progressive because although Clinic's D&A form did not meet the requirements of subsection (5)(e), it was sufficient to place Progressive on notice of a covered loss. Additionally, Progressive waived the defective form defense by not addressing it in the explanation of benefits and by paying the bills, albeit at a reduced rate. Lastly, the submission of a completed D&A form is not a condition to the right to enforce a claim to payment. Id. at 341.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the trial court's

"Summary Final Judgment," entered on August 27, 2008, is **REVERSED**; Appellant's Motion for Appellate Attorney's Fees and Costs is **GRANTED** as to costs and provisionally granted as to fees, the amount of which is remanded to the trial court; Appellee's Motion for Appellate Attorney's Fees and Costs is **DENIED**; and the matter is **REMANDED** for further proceedings consistent with this Final Order.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the _24____ day of _____June_____, 2010.

_____/s/_____
DONALD E. GRINCEWICZ
Circuit Judge

_____/s/_____
LAWRENCE R. KIRKWOOD
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 to: **Russel Lazega, Esquire,** 13499 Biscayne Blvd., Suite 107, North Miami, FL 33181 and **Heather Goodis, Esquire,** Post Office Box 90, St. Petersburg, FL 33731, on the ____24__ day of____June_____, 2010.

_____/s/_____
Judicial Assistant