

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

PROGRESSIVE AMERICAN  
INSURANCE COMPANY,

CASE NO.: 2014-CV-000079-A-O  
Lower Case No.: 2012-SC-002127-O

Appellant,

v.

EMERGENCY PHYSICIANS OF CENTRAL  
FLORIDA, LLP, a/a/o Ebony Williams,

Appellee.

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Appeal from the County Court, for Orange County, Florida,  
A. James Craner, County Judge.

Douglas H. Stein, Esquire, for Appellant.

Dean A. Mitchell, Esquire, for Appellee.

Before LATIMORE, DOHERTY, and SCHREIBER, J.J.

**PER CURIAM.**

**FINAL ORDER AFFIRMING TRIAL COURT**

Appellant, Progressive American Insurance Company (“Progressive”), timely appeals the trial court’s “Order Granting Plaintiff’s Motion for Final Summary Judgment and Denying Defendant’s Motion for Summary Final Judgment” entered October 15, 2014, in favor of Appellee, Emergency Physicians of Central Florida, LLP (“EPCF”) as assignee of the insured, Ebony Williams (“Williams”). This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

### *Summary of Facts and Procedural History*

On October 7, 2011, Williams was injured in an automobile accident and received emergency care by EPCF. EPCF then obtained an assignment of benefits from Williams to present a claim under her personal injury protection (“PIP”) insurance policy with Progressive which included a \$1,000 deductible. Also, on October 7, 2011, Progressive received notice of the accident. Thereafter, EPCF submitted a claim to Progressive for payment of medical expenses in the amount of \$671. The record reveals that Progressive applied the deductible to: 1) the City of Orlando’s claim for ambulance services in the amount of \$765.72 (received on October 20, 2011, and original amount billed was \$793.63); 2) Medical Center Radiology Group’s claim in the amount of \$94 (received on October 24, 2011, and original amount billed was the same amount of \$94); 3) EPCF’s claim of \$671 (received on October 24, 2011, and \$140.28 of that claim amount was applied to the remaining balance of the deductible). Upon satisfying the deductible, Progressive then paid EPCF \$424.58 (80% of the remaining \$530.72 claim balance). Thereafter, Progressive paid a claim from Orlando Regional Healthcare in the amount of \$1,513 that was received on November 4, 2011, and paid on November 16, 2011.

EPCF then served Progressive a pre-suit demand letter for payment of \$112.22 that was 80% of the \$140.28 that was applied to the deductible. Progressive still did not pay the claim. On March 12, 2012, EPCF filed its Complaint alleging that Progressive breached the policy by not paying the claim, and instead, applying it to the deductible in violation of the reserve requirement in section 627.736(4)(c), Florida Statutes. On April 9, 2012, Progressive filed its Answer and Affirmative Defenses. On April 25, 2012, EPCF filed its Reply to Progressive’s Answer and Affirmative Defenses. Thereafter, discovery ensued.

Ultimately, on May 18, 2012, Progressive filed its Motion for Summary Final Judgment (and Motion for Protective Order) and argued that it correctly applied EPCF's claim to the deductible and correctly paid the remaining \$530.72 at 80%; thus, concluding that EPCF had no damages. EPCF also filed its Motion for Final Summary Judgment on February 26, 2014, arguing that it was a member of a special class of providers per section 627.736(4)(c), Florida Statutes, which requires an insurer to set aside \$5,000 in reserve for the payment of claims submitted by preferred providers. EPCF further argued that per the statute, the Legislature's intent was to assure that providers for emergency services and care would be paid regardless of the existence of a deductible. Thus, EPCF concluded that Progressive breached the statute by applying its protected emergency claim to the policy deductible in violation of the reserve hold and payment requirements of the law, particularly where more than sufficient unprotected claims existed to satisfy the policy deductible.

On June 2, 2014, a hearing was held addressing both Motions for Summary Judgment. The trial court reserved ruling and thereafter on October 15, 2014, the trial court entered the Order that granted EPCF's Motion, denied Progressive's Motion, and entered Final Judgment in favor of EPCF that Progressive now appeals.

### ***Summary of Arguments on Appeal***

Progressive argues that: 1) the trial court erred in ruling that benefits paid from the \$5,000 reserve imposed by section 627.736(4)(c), Florida Statutes, are not subject to an otherwise applicable deductible and 2) the trial court erred in entering summary judgment where EPCF failed to sustain its burden of proving that its charges were reasonable. Progressive seeks appellate attorney fees per Florida Rule of Appellate Procedure 9.400(b) and section 768.79(1),

Florida Statutes, based on its Proposal for Settlement served on EPCF on November 15, 2012, and rejected.

Conversely, EPCF argues that: 1) Progressive wrongfully applied part of EPCF's protected claim to its policy deductible because: a) section 627.736(4)(c), Florida Statutes, takes effect immediately upon notice to the insurer of a potentially covered accident and requires PIP insurers to "reserve" and "hold" claims which come under its protection and limits the use of reserve funds to be "used only to pay" the emergency service claimant; b) Progressive concedes it did not reserve EPCF's claim for payment or hold the benefits due EPCF and instead, utilized the inapplicable "English Rule," to EPCF's protected claim to the deductible in the order received without regard to its statutorily protected status; and c) Progressive's argument that section 627.736(4)(c), Florida Statutes, does not operate until after the deductible is met is unsupported by case law or a correct reading of the statute and 2) the trial court correctly found that EPCF's charge was treated as reasonable by Progressive at all times during the processing of the claims; thus, Progressive is estopped to "mend its hold" by taking a position inconsistent with its pre-litigation conduct. EPCF also seeks appellate attorney fees pursuant to sections 627.428(1), 627.736(8) and 59.46, Florida Statutes, and Florida Rule of Appellate Procedure 9.400(b).

### ***Standard of Review***

The standard of review for summary judgment is de novo. Accordingly, an appellate 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. *Krol v. City of Orlando*, 778 So. 2d 490, 491-92 (Fla. 5th DCA 2001) (citing Fla. R. Civ. P. 1.510(c)). Further, a trial court's interpretation of a statute involves a question of law and thus, is subject to de novo review. *J.D.S. v. Dep't of Children &*

*Families*, 864 So. 2d 534, 537 (Fla. 5th DCA 2004). Lastly, a decision of a trial court comes to the appellate court with a “presumption of correctness” and the burden is on the appellant to demonstrate reversible error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

### ***Analysis***

From review of the record and briefs in this case, this Court finds that there are no genuine issues of material fact and as a matter of law the entry of summary judgment in favor of EPCF was proper as discussed below.

***Issue in applying the deductible to EPCF’s claim:*** This issue hinges on whether section 627.736(4)(c), Florida Statutes, overrides section 627.739(2), Florida Statutes, by requiring that the claim that was properly submitted by EPCF as a protected class provider be paid by Progressive outside of the deductible.

This Court notes that at this time there is no controlling case law from the Florida Supreme Court or from the District Courts of Appeal that specifically addresses this issue. Section 627.736(4)(c), Florida Statutes, requires that upon receiving notice of an accident that is potentially covered by PIP benefits, the insurer must reserve \$5,000 of PIP benefits for payment to certain physicians and dentists who provide emergency services and care (“priority providers”). Further, the amount required to be held in reserve must be kept in reserve for a period of 30 days upon the insurer receiving notice of the accident. After the 30-day period, any amount of the reserve for which the insurer has not received notice of such claims may be used by the insurer to pay other claims.

The applicable statutes lack language that exempts the priority claimants from a deductible nor is there language that dictates the method for applying the deductible that an

insurance company must comply with when processing claims. Because such language is lacking in the statutes, the trial court was entitled to enforce the legislative intent of the statutory scheme to enable full reimbursement to priority medical providers for their services rendered.<sup>1</sup>

As the record reveals in the instant case, the remaining amount of the claim from the non-priority provider, Orlando Regional Healthcare that Progressive received on November 4, 2011, and within the 30-day reserve period, would have satisfied the deductible without applying EPCF's claim to the deductible. Therefore, Progressive should have applied that non-priority provider's claim to satisfy the deductible in order to comply with the intent of the statute. Accordingly, based on the facts in this case, the trial court was correct in finding that Progressive improperly applied EPCF's claim to the deductible.

***Issue as to the reasonableness of EPCF's charges:*** EPCF in its Complaint included general allegations as to reasonableness of the charges and Progressive included general denials and Affirmative Defenses as to those allegations. EPCF also argued in its Motion for Final Summary Judgment that it was undisputed that its charges were reasonable and in support of this argument cited a portion of the deposition of Progressive's litigation representative. Progressive did not file a response in opposition to EPCF's Motion nor did it address the issue of the reasonableness of EPCF's charges in its own Motion for Summary Final Judgment. At the June 2, 2014 hearing that addressed both Motions, Progressive's counsel did argue that the issue of reasonableness of EPCF's charges could not be resolved in summary judgment because EPCF had not proved that its charges were reasonable.

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<sup>1</sup> See this Circuit's recent decision in *Progressive American Insurance Co. v. Emergency Physicians of Central Florida, LLP*, No. 2014-CV-000003-A-O (Fla. 9th Cir. Ct. July 15, 2015), that applies a similar analysis; see also the circuit appellate opinion on rehearing in *USAA General Indemnity Co. v. Emergency Physicians of Central Florida, LLP, a/a/o Adriel Rodriguez*, 22 Fla. L. Weekly Supp. 686a (Fla. 18th Cir. Ct. February 17, 2015).

Progressive also argued that section 627.736(4)(b)6., Florida Statutes, allows insurers to assert at any time, including after payment of the claim or after the 30-day period for payment, that a claim was unrelated, was not medically necessary, was unreasonable, or that the amount of the charge was in excess of that permitted under, or in violation of, subsection (5) of the statute.<sup>2</sup> Progressive's reliance on this statute may have had some merit if Progressive, after applying the deductible, had paid 100% of EPCF's claim. However, that did not happen in this case because Progressive after applying the deductible, applied a fee schedule by paying EPCF 80% instead of 100% of the \$530.72 balance as authorized per section 627.736(5)(a)2.c., Florida Statutes, (allowing insurers to limit reimbursement to 80% of the maximum usual and customary charges in the community for the emergency services and care).<sup>3</sup> See *Geico General Insurance Co. v. Virtual Imaging Services, Inc., (Virtual III)*, 141 So. 3d 147, 155-56 (Fla. 2013), where the Florida Supreme Court provided guidance in reconciling the provisions under the statute by explaining that fee schedules are a calculation mechanism for satisfying the PIP statute's mandate that every PIP insurer shall reimburse 80% of reasonable expenses for medically necessary services. Further, the Court in *Virtual III* clarified that insurers do not choose between paying reasonable expenses or paying fee schedule amounts because the election to limit reimbursement per the statutory fee schedules satisfies the reasonable expenses mandate. Thus, if an insurer applies a fee schedule per the statute, then there is no need to have a fact-dependent inquiry on reasonableness of the charge.

Accordingly, the trial court also cited *Virtual III* and properly found that there was no dispute as to the reasonableness of EPCF's charges because Progressive utilized the fee schedule per section 627.736(5)(a)2.c., Florida Statutes, that provided an alternative mechanism for

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<sup>2</sup> In 2012, this section of the statute was renumbered from 627.736(4)(b) to 627.736(4)(b)6.

<sup>3</sup> In 2012, this section of the statute was renumbered from 627.736(5)(a)2.c. to 627.736(5)(a)1.c.

determining reasonableness of the charges and thus, the trial court properly concluded that an additional fact-dependent inquiry was not necessary. Lastly, EPCF did not challenge Progressive's formula in paying the remaining balance. Instead, EPCF's cause of action only pertained to the application of the deductible as EPCF only sought payment for \$112.22 (80% of the \$140.28 that was applied to the deductible).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED**:

1. The trial court's "Order Granting Plaintiff's Motion for Final Summary Judgment and Denying Defendant's Motion for Summary Final Judgment" entered October 15, 2014, is **AFFIRMED**.

2. EPCF's Motion for Appellate Attorney's Fees filed April 17, 2015, is **GRANTED**, and the assessment of those fees is **REMANDED** to the trial court.

3. Progressive's "Motion for Attorney's Fees Pursuant to Proposal for Settlement" filed February 17, 2015, is **DENIED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida, on this 24th day of September, 2015.

/S/  
**ALICIA L. LATIMORE**  
**Presiding Circuit Judge**

DOHERTY and SCHREIBER, J.J., concur.



**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Douglas H. Stein, Esquire**, Seipp, Flick & Hosley, LLP, Two Alhambra Plaza, Suite 800, Coral Gables, Florida 33134; **Dean A. Mitchell, Esquire**, 4939 N.W. 115th Avenue, Ocala, Florida 34482; **The Honorable A. James Craner**, (Judge previously assigned to lower court case), Two Courthouse Square, Kissimmee, Florida 34741; and **The Honorable Steve Jewett** (Judge currently assigned to lower court case), 425 N. Orange Avenue, Orlando, Florida 32801, on this 25th day of September, 2015.

/S/ \_\_\_\_\_  
Judicial Assistant