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

PROGRESSIVE AMERICAN INSURANCE COMPANY,

Appellant,

v.

EMERGENCY PHYSICIANS OF CENTRAL FLORIDA, LLP, as assignee of Raymond Damus,

Appellee.
_____/

CASE NO.: 2014-CV-000003-A-O
Lower Case No.: 2012-SC-011965-O

Appeal from the County Court,
for Orange County, Florida,
Adam McGinnis, County Judge.

Douglas H. Stein, Esquire,
for Appellant.

Thomas Andrew Player, Esquire,
for Appellee.

Before DOHERTY, SCHREIBER, and LATIMORE, 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 Summary Judgment and Denying Defendant's Motion for Final Summary Judgment" entered December 9, 2013 in favor of Appellee, Emergency Physicians of Central Florida, LLP ("EPCF") as assignee of the insured, Raymond Damus ("Damus"). 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 August 8, 2012, Damus was injured in an automobile accident and received emergency care by EPCF. EPCF then obtained an assignment of benefits from Damus to present a claim under his automobile insurance with Progressive. Progressive provided Damus a personal injury protection ("PIP") insurance policy with a $1,000 deductible. On August 27, 2012, Progressive received a claim from EPCF for payment of medical expenses of $328.00. The record reveals that Progressive applied the deductible to: 1) Orlando Regional Healthcare's claim in the amount of $152.25 (received on August 20, 2012); 2) EPCF's claim of $328.00 (received on August 27, 2012); and 3) $519.75 of a $2,068.52 claim from chiropractor, Edward Monamara, DC (received on August 27, 2012). Thus, because Progressive applied EPCF's full claim to the deductible, it did not pay any amount of the claim to EPCF.

EPCF then served Progressive a pre-suit demand letter for payment of the claim. Progressive still did not pay the claim. Thereafter, EPCF filed its Complaint alleging that Progressive breached the policy by not paying the claim, and instead, applying it to the deductible. Progressive, in its Answer and Affirmative Defenses, alleged that it properly applied the claim to the policy's deductible.

Ultimately, EPCF moved for summary judgment and argued 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. Progressive also moved for summary judgment and argued that no payment was owed to EPCF for the subject claim because: 1) the deductible was not exceeded and 2) the issue was controlled by the unambiguous language of section 627.739(2), Florida Statutes, which states that 100% of the medical expenses must be applied to the deductible and only after the deductible is met should eligible PIP payments be issued. Progressive further asserted that the issue was not controlled by the reserve requirement in section 627.736(4)(c), Florida Statutes, which is silent as to the application of the deductible and thus, only applies to those claims which are eligible for payment once the deductible is met. On November 25, 2013, a hearing was held addressing both Motions for Summary Judgment and the trial court concurred with EPCF in finding 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. On December 9, 2013, the trial court entered the Final Judgment in favor of EPCF that Progressive now appeals.

Summary of Arguments on Appeal

Progressive argues that 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 because: 1) the plain language of the statute dictates that the deductible applies to EPCF's claim; 2) even if the statutes were ambiguous, they would still dictate that the deductible applies to EPCF's claims per statutory construction and per the rules of *expressio unius est exclusio alterius* (expression or inclusion of one thing implies the exclusion of the other) and *in pari materia* (construed together); 3) the trial court improperly engaged in judicial legislation; 4) the trial court's construction of the statutes leads to an unreasonable result; and 4) there is no binding authority that supports the trial court's ruling. Lastly, per Florida Rule of

Appellate Procedure 9.400(b), section 768.79(3), Florida Statutes, and *Frosti v. Creel*, 979 So. 2d 912 (Fla. 2008), Progressive seeks appellate attorney fees and costs pursuant to its proposal for settlement served on EPCF on June 24, 2013 and rejected by EPCF.

Conversely, EPCF argues that based on the legislative history and the plain meaning of section 627.736(4)(c), Florida Statutes, the trial court properly found that per the statute, EPCF was a member of a legislatively created and protected class of providers and not subject to the policy's $1,000.00 deductible; thus, EPCF was entitled to payment of its medical claims from the $5,000.00 in reserve for payment of claims as it properly submitted its claim within 30 days. Lastly, EPCF also seeks appellate attorney fees and costs pursuant to sections 627.736(8) and 627.428(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.400.

Standard of Review

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, 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*, 778 So. 2d at 491- 492, 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. *In re Guardianship of J.D.S.*, 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. Therefore, next, this Court must determine whether as a matter

of law the entry of summary judgment in favor of EPCF was proper in this case. Accordingly, the issue is 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.

As for deductible issue, 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.[1]

As the record reveals in the instant case, claims from non-priority providers were submitted on the same date that EPCF submitted the subject claim. Further, the amount of those non-priority claims exceeded the $1,000 deductible. Specifically, the remaining amount of the

[1] This Court notes a similar analysis discussed in 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).

claim from the non-priority provider, Dr. Monamara, exceeded the deductible and thus, it would have satisfied the deductible without applying EPCF's claim to the deductible. Therefore, Progressive should have applied Dr. Monamara's claim to satisfy the deductible in order to comply with the intent of the statute. In conclusion, based on the facts in this case, Progressive improperly applied EPCF's claim to the deductible. Accordingly, the trial court did not err in granting summary judgment in favor of EPCF.

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

1. The trial court's "Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Final Summary Judgment" entered December 9, 2013 is **AFFIRMED**.

2. Progressive's "Motion for Attorney's Fees Pursuant to Proposal for Settlement" filed June 16, 2014 is **DENIED**.

3. EPCF'S "Appellee's Motion to Tax Appellate Attorney's Fees" filed October 17, 2014 is **GRANTED** and the assessment of those fees is **REMANDED** to the trial court. Also, EPCF is entitled to have costs taxed in its favor by filing a proper motion with the trial court pursuant to 9.400(a), Fla. R. App. P.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 15th day of July, 2015.

/S/
PATRICIA A. DOHERTY
Presiding Circuit Judge

SCHREIBER and LATIMORE, 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; **Thomas Andrew Player, Esquire**, The Nation Law Firm, 570 Crown Oak Centre, Longwood, Florida 32750; **The Honorable Adam McGinnis,** (presiding Judge previously assigned to lower court case); and **The Honorable Tina L. Caraballo** (Judge currently assigned to lower court case), 425 N. Orange Avenue, Orlando, Florida 32801, on this 15th day of July, 2015.

/S/
Judicial Assistant