

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

PROGRESSIVE SELECT
INSURANCE COMPANY,

CASE NO.: 2014-CV-000072-A-O
Lower Case No.: 2012-SC-007488-O

Appellant,

v.

FLORIDA EMERGENCY PHYSICIANS
KANG & ASSOCIATES, M.D., P.A.
a/a/o Kerry Taster,

Appellee.

Appeal from the County Court, for Orange County, Florida,
Andrew L. Cameron, 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 Select Insurance Company (“Progressive”), timely appeals the trial court’s “Order Granting Defendant’s Motion to Alter or Amend the Judgment and Certifying a Question of Great Public Importance” entered September 30, 2014, that incorporates the “Order Granting Plaintiff’s Motion for Final Summary Judgment and Denying Defendant’s Motion for Summary Final Judgment” entered March 26, 2014, in favor of Appellee, Florida Emergency Physicians Kang & Associates, M.D., P.A. (“FEP”) as assignee of the insured, Kerry Taster, (“Taster”). 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 May 13, 2012, Tastinger was injured in an automobile accident and received emergency care by FEP. FEP then obtained an assignment of benefits from Tastinger to present a claim under her personal injury protection (“PIP”) insurance policy with Progressive which included a \$250 deductible. On May 14, 2012, Progressive received notice of the accident. On June 1, 2012, Progressive received a claim from FEP in the amount of \$650 for payment of medical expenses. Progressive first applied the deductible to FEP’s claim and then on June 7, 2012, paid FEP \$320 (80% of the remaining \$400 balance). Thereafter, Progressive paid claims from other providers including a claim from Florida Hospital East in the amount of \$3,166.87 that was received on June 11, 2012 and paid on June 21, 2012.

FEP then served Progressive a pre-suit demand letter for payment of \$200 that was 80% of the \$250 that was applied to the deductible. Progressive still did not pay the claim. On August 27, 2012, FEP 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 October 1, 2012, Progressive filed its Answer and Affirmative Defense claiming that FEP failed to allege any outstanding damages in its complaint to maintain a cause of action. On October 9, 2012, FEP filed its Reply to the Affirmative Defense. Thereafter, discovery ensued.

Ultimately, on October 18, 2013, Progressive filed its Motion for Summary Final Judgment (and Motion for Protective Order) and argued that it correctly applied FEP’s claim to the deductible and correctly paid the remaining \$400 at 80%; thus, concluding that FEP had no

damages. FEP also filed its Motion for Final Summary Judgment on January 19, 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. FEP 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, FEP 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 February 19, 2014, a hearing was held addressing both Motions for Summary Judgment and the trial court concurred with FEP in finding that benefits paid from the \$5,000 reserve imposed by section 627.736(4)(c), Florida Statutes, were not subject to an otherwise applicable deductible. Also, at the hearing Progressive argued that FEP failed to meet its burden that the amount charged for its services was reasonable and the trial court found that argument not persuasive. Accordingly, on March 26, 2014, the trial court entered the Order that granted FEP's Motion, denied Progressive's Motion, and entered Final Judgment in favor of FEP. Thereafter, the trial court entered the Order Granting Defendant's Motion to Alter or Amend the Judgment and Certifying a Question of Great Public Importance to the Fifth District Court of Appeal. The Fifth District declined to accept jurisdiction and transferred jurisdiction back to this Court.

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 FEP 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 FEP on August 20, 2013, and rejected.

Conversely, FEP argues that: 1) the benefit that section 627.736(4)(c)(2008), Florida Statutes, provides is payment of the claim of the emergency provider; the statutory reserve is effective upon notice to the insurer of an accident, not the filing of a claim, negating the argument of processing of claims in the order received; the reserve must be held to be used only for payment of emergency provider claims; application of an emergency claim to a contractual deductible is a non-payment which violates the statute's mandate of payment; section §627.739(2) last amended in 2003, does not provide that claims must be applied to it in the order received; and the "English Rule" is inapplicable to PIP claims and 2) the reasonableness of FEP's charge does not present a genuine issue of a material fact; by treating the claim as reasonable at all times during the claim process, Progressive is equitably estopped to "mend its hold" by taking an inconsistent position as to the reasonableness of FEP's charge. FEP 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 a 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 FEP was proper in this case.

Issue in applying the deductible to FEP'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 FEP 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.¹

As the record reveals in the instant case, the remaining amount of the claim from the non-priority provider, Florida Hospital East, that Progressive received on June 11, 2012, and within the 30-day reserve period, would have satisfied the deductible without applying FEP'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 FEP's claim to the deductible.

Issue as to the reasonableness of FEP's charges: While FEP in its Complaint included general allegations as to reasonableness of the charges and Progressive included general denials as to those allegations, the parties' summary judgment motions do not address the reasonableness of FEP's charges. Only at the hearing addressing the summary judgment motions did Progressive argue about this issue and cited section 627.736(4)(b)6., Florida Statutes, that 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.²

¹ 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).

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

Progressive's reliance on this statute may have had some merit if Progressive, after applying the deductible, had paid 100% of FEP's claim. However, that did not happen in this case because Progressive after applying the deductible, applied a fee schedule by paying FEP 80% instead of 100% of the \$400 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).³ 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 FEP's charges because Progressive utilized the fee schedule per section 627.736(5)(a)2.c., Florida Statutes, that provided an alternative mechanism for determining reasonableness of the charges and thus, the trial court properly concluded that an additional fact-dependent inquiry was not necessary. Lastly, FEP did not challenge Progressive's formula in paying the remaining balance. Instead, FEP's cause of action only pertained to the application of the deductible as FEP only sought payment for \$200 (80% of the \$250 that was applied to the deductible).

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

Accordingly, at the hearing, the trial court correctly found that the only issue in the case was the application of the deductible to FEP's claim, a question of law, not fact. In the Order, the trial court explained that when Progressive applied the deductible to FEP's claim, it made a determination that the charged amount was reasonable. The trial court also pointed out that Progressive's medical claims adjuster, Anthony Imregi, admitted in his deposition that FEP's charges were related and necessary in regard to the subject accident and that the final decision to issue payment rested with him and he allowed the entire amount charged for the subject claim. The trial court also cited *Virtual III* in finding that there was no dispute because Progressive's policy utilized the fee schedule per section 627.736(5)(a)2.c., Florida Statutes, that provided an alternative mechanism for determining reasonableness of the charges. The trial court then correctly concluded that Progressive's attempt to propose that the trial court complete an additional fact-dependent inquiry on various factors after the conclusion of the competing summary judgments, lacked merit per the guidance provided by the Florida Supreme Court in *Virtual III*. From a review of the record and applicable statutes and case law, the trial court's ruling as to the issue addressing the reasonableness of FEP's charges was proper.

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

1. The trial court's "Order Granting Defendant's Motion to Alter or Amend the Judgment and Certifying a Question of Great Public Importance" entered September 30, 2014, and "Order Granting Plaintiff's Motion for Final Summary Judgment and Denying Defendant's Motion for Summary Final Judgment" entered March 26, 2014, are **AFFIRMED**.

2. FEP's Motion for Appellate Attorney's Fees filed February 9, 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 January 15, 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, and the **Honorable Andrew L. Cameron, Orange County Judge**, 425 N. Orange Avenue, Orlando, Florida 32801, on this 25th day of September, 2015.

/S/

Judicial Assistant