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

Progressive Select Insurance Company,

Appellant,

v.

Florida Hospital Medical Center,
a/a/o Jonathan Parent,

Appellee.
_____/

CASE NO.: 2015-CV-76-A-O
Lower Court Case No.:
2014-SC-7202-O

Appeal from the County Court,
for Orange County, Florida,
Andrew L. Cameron, County Judge.

Douglas H. Stein, Esq., for Appellant.

Chad A. Barr, Esq., for Appellee.

Before TYNAN, JORDAN, and MYERS, J.J.

PER CURIAM.

Appellant Progressive Select Insurance Company seeks review of the final summary judgment entered against it. We have jurisdiction and dispense with oral argument. § 26.012(1), Fla. Stat. (2015); Fla. R. App. P. 9.030(c)(1)(A). Because the unambiguous language in Florida Statute section 627.739(2) (the PIP deductible statute) precludes Progressive's argument that the deductible should be applied to the fee schedule reimbursement limitation under Florida Statute section 627.736(5)(a)1.b., rather than Florida Hospital's unreduced expenses, we affirm.

In 2014, Florida Hospital provided medical services to Jonathan Parent due to injuries he suffered in a car accident. Parent had a PIP policy with Progressive, under which Florida Hospital sought reimbursement as Parent's assignee. Parent had a $1,000 deductible. Progressive applied

the fee schedule reimbursement limitation found in Florida Statute section 627.736(5)(a)1.b. to Florida Hospital's charge, and then applied the deductible to that fee schedule reimbursement limitation amount. Florida Hospital filed suit against Progressive, arguing that it was owed two hundred dollars more than Progressive paid it, because the deductible should be applied to Florida Hospital's entire charge first, and then the fee schedule reimbursement limitation should be applied to that post-deductible amount. Below are the calculations Florida Hospital and Progressive used to determine the amount owed:

Florida Hospital's calculation:

2,781	Total charge
- 1,000	Deductible
= 1,781	
x 75%	Fee Schedule Reimbursement Limitation
= 1,335.75	
x 80%	Applying 20% Statutory Co-Pay
= 1,068.60	Benefits due

Progressive's calculation:

2,781	Total charge
x 75%	Fee Schedule Reimbursement Limitation
= 2,085.75	
- 1,000	Deductible
= 1,085.75	
x 80%	Applying 20% Statutory Co-Pay
= 868.60	Benefits due

Under Florida Hospital's calculation, Parent pays fifty dollars more as a copay than under Progressive's calculation (20% of $1,335.75 versus 20% of $1,085.75).

Both parties moved for summary judgment, and the trial court ruled in favor of Florida Hospital. Progressive then filed this appeal.

Standard of Review

"The standard of review of a trial court's entry of summary final judgment is de novo." *Evans v. McCabe 415, Inc.*, 168 So. 3d 238, 240 (Fla. 5th DCA 2015); *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 128 (Fla. 2000).

Discussion

Florida Statute section 627.739(2), regarding PIP deductibles, was amended in 2003 to state, "The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736." When a statute cross-references another statute, it incorporates that statute as it existed when the referencing statute was enacted, "unaffected by subsequent amendments." *Moore v. State, Dep't of Revenue*, 536 So. 2d 1050, 1051 (Fla. 1st DCA 1988). In 2003, section 627.736(1)(a) stated that every PIP insurance policy "shall provide personal injury protection to the named insured . . . as follows: . . . Eighty percent of all reasonable expenses for medically necessary medical . . . services, . . . and medically necessary . . . hospital . . . services." When section 627.739(2) was amended in 2003, section 627.736 did not contain the fee schedule reimbursement limitation now found at subsection (5)(a)1.b. § 627.736, Fla. Stat. (2003).

Progressive argues that the deductible should be applied to Florida Hospital's charge after the fee schedule reimbursement limitation in section 627.736(5)(a)1.b. of the 2014 version of the statute is applied to the total charge. There are several reasons why this position is unavailing.

First, in 2003, when section 627.739(2) was amended to include the language regarding to what the deductible applies, section 627.736 did not contain subsection (5)(a)1.b. Thus, the language "expenses and losses described in s. 627.736" to which the deductible is applied could not have been referring to an amount calculated under a nonexistent provision.

Second, the plain language of section 627.739(2) states that the deductible is to be applied to "expenses and losses described in s. 627.736." Subsection (5)(a)1.b. refers to the reimbursement level for emergency services and care that a hospital charges.[1] Nowhere in section 627.736 is this referred to as an "expense." Instead, it is a reimbursement limitation, which is not an expense. If the Legislature wanted the deductible to be applied to a reimbursement limitation, then it would have used those words in section 627.739(2); instead, the Legislature chose "expenses."

Third, the Legislature included the phrase "100 percent" before "of the expenses and losses" in section 627.739(2). This indicates that it intended the deductible to apply to the entire expense, rather than to the eighty percent of all reasonable expenses for medically necessary medical services that section 627.736(1)(a) mandates PIP insurance cover. As Florida Hospital argues, it does not make sense for the Legislature to include the phrase "100 percent," before "expenses," but intend for the deductible to be applied to a different percentage of the expenses, as it would be if Progressive's calculation method is used.

Thus, under the plain language of section 627.739(2), which the parties agree is unambiguous, the trial court did not err in applying the deductible to Florida Hospital's expenses

[1] Section 627.736(5) (2014) is titled "Charges for treatment of injured persons." Subsection (a) states that a hospital may charge the insurer only a reasonable amount for its services, and sets forth several factors for determining whether a charge is reasonable. § 627.736(5)(a). Subsection (5)(a)1.b. states, "The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges: . . . For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges."

and then, after doing so, reducing that amount by the fee schedule reimbursement limitation in section 627.736(5)(a)1.b.

Progressive argues that the deductible should be applied to the reasonable expense, and the reasonable expense is the amount that a provider is entitled to be paid. Progressive contends that section 627.736 provides two potential alternative amounts to which a hospital is entitled to be paid, one of which is the reimbursement limitation in subsection (5)(a)1.b. A payment by an insurer under section 627.736(5)(a)1.b. is payment of reasonable expenses under the PIP statute. Thus, Progressive's reasoning is that "reasonable expense" is the amount that a provider is entitled to be paid, regardless of what the provider charged. Progressive also argues that the plain language of the PIP statute restricts the medical provider to charging only a reasonable amount, but the trial court applied the deductible to Florida Hospital's actual charge.

These arguments rely on applying the deductible to payments or charges, but section 627.739(2) says that deductibles are applied to "expenses." Section 627.739(2) specifically states that the deductible is to be applied to "100 percent of the expenses and losses described in s. 627.736." It does not state that the deductible is to be applied to the amount that a provider is entitled to be paid from a PIP insurer, and "expenses" does not have the same meaning as the amount a provider is entitled to be paid. If the Legislature had meant payments or charges, it would have used those terms instead of "expenses."

Progressive relies on *General Star Indemnity Co. v. West Florida Village Inn, Inc.*, 874 So. 2d 26 (Fla. 2d DCA 2004), for its contention that a deductible only applies to covered expenses. *General Star* involved application of a deductible under a casualty insurance policy, and only the policy language was used to determine how to apply the deductible; no statutory language was relevant. *Id.* at 28, 29-35. Here, the Florida PIP statute dictates to what the deductible is to be

applied. Although *General Star* does state that a deductible by definition can only be applied to a loss that the policy covers, *id.* at 33, in this case, unlike *General Star*, there is a statute that specifically states to what the deductible is applied. Because *General Star* did not involve a statute directing how the deductible is to be applied, it is inapplicable to this case.

Progressive points out that its policy with the insured states, "When a deductible applies, the deductible will be applied to 100% of the expenses and losses covered under Personal Injury Protection Coverage." (Initial Br. 15.) But to the extent that its insurance policy conflicts with the statute, then the statute prevails. *See Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 896 (Fla. 2003) (policy provision "inconsistent with the purposes of the PIP statute . . . would have to be construed and applied to be in full compliance with the code.").

Progressive contends that if the deductible is applied to the medical provider's charge, then the reasonableness of that charge would have to be determined in every case. But because the PIP statute restricts charges to a reasonable amount, reasonableness is already an issue in every case. § 627.736(5)(a) (2014) (hospital may charge "only a reasonable amount . . . ."). Additionally, Progressive has not pointed to anything that prevents the insured himself from contesting the provider's charge as unreasonable if the deductible applies to the entire charge resulting in a lack of PIP coverage.

Progressive relies on the PIP statute's purpose of reducing costs to the insured in arguing that the trial court's interpretation of section 627.739(2) frustrates that purpose. Although it is true that in this case applying the deductible before applying the fee schedule reimbursement limitation results in the insured paying fifty dollars more than if the deductible is applied to the fee schedule amount, this may not be true in every situation. In its Answer Brief, Florida Hospital puts forth a hypothetical scenario in which the insured pays more for the medical service under Progressive's

formula. Because applying the statute as written does not result in the insured paying more costs in every instance, and could result in the insured paying less in at least some circumstances, the Court rejects Progressive's argument.

Progressive relies on two Florida circuit court appellate opinions, both from the Eighteenth Circuit, that upheld the insurer's application of the deductible to the fee schedule reimbursement limitation. In *Garrison Property & Casualty Insurance Co. v. New Smyrna Imaging, LLC*, No. 13-03-AP (Fla. 18th Cir. Ct. Feb. 9, 2015), the court determined that "[s]ection 627.736 contains several references to expenses, almost all of which are described as or used in the context of reasonable expenses or expenses 'covered by the policy.'" The court then concluded that reading sections 627.739 and 627.736 together "require[s] that a PIP deductible be applied to 100 percent of the reasonable and necessary medical expenses, or those expenses covered by the policy." *Id.* at 4. Because the fee schedule reimbursement limitation provides one method for determining a reasonable medical expense, "if the insurer has clearly stated its intention to use the fee schedule, the deductible can be applied to 100 percent of the reasonable expenses found in the fee schedule . . . ." *Id.* at 4-5. *See also Progressive Am. Ins. Co. v. Munroe Reg'l Health Sys.*, No. 14-11-AP (Fla. 18th Cir. Ct. Apr. 17, 2015).

The Eighteenth Circuit's analysis adds language to an unambiguous statute. Section 627.739(2) states that the deductible is to be applied to "100 percent of the expenses and losses described in s. 627.736." It does not state that the deductible is to be applied to "expenses covered by the policy." It does not state that the deductible is to be applied to the fee schedule reimbursement limitation (because the fee schedule reimbursement limitation did not exist in section 627.736 when section 627.739(2) was amended to include the "expenses and losses described in s. 627.736" language). It does not state that the deductible is to be applied to

reasonable expenses as determined by what the insurer is willing to pay the hospital under whatever method the insurer chooses. The statute states simply that the deductible is to be applied to "100 percent of the expenses and losses described in s. 627.736." The court is not permitted to add language to a clear and unambiguous statute. *B.C. v. Fla. Dep't of Children & Families*, 887 So. 2d 1046, 1052 (Fla. 2004) (court not permitted to add words to unambiguous statute that Legislature did not include), *superseded on other grounds by statute as recognized in B.K. v. Dep't of Children & Families*, 166 So. 3d 866, 873 (Fla. 4th DCA 2015); *see also United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82, 85 (Fla. 2001) ("Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law."). Therefore, the Court declines to follow *Garrison*.

Progressive fails to demonstrate that applying the deductible to Florida Hospital's expenses before applying the scheduled fee reimbursement limitation was contrary to section 627.739(2). The unambiguous language in section 627.739(2) states that the deductible is applied to "100 percent of the expenses and losses described in s. 627.736." It does not state that the deductible is applied to charges, or payments, or reimbursement levels. Therefore, the trial court did not err in entering summary judgment for Florida Hospital.

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

1. The "Order Granting Plaintiff's Motion for Final Summary Judgment and Denying Defendant[']s Motion for Final Summary Judgment," entered on June 5, 2015, is **AFFIRMED**.

2. Florida Hospital's motion for appellate attorney's fees, filed on January 23, 2016, is

GRANTED and the assessment of those fees is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 10th day of June, 2016.

/S/
GREG A. TYNAN
Presiding Circuit Judge

JORDAN and MYERS, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Andrew L. Cameron, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **Douglas H. Stein, Esq.,** Bowman and Brooke, LLP, Two Alhambra Plaza, Suite 800, Coral Gables, FL 33134; and **Chad A. Barr, Esq.**, Law Office of Chad A. Barr, P.A., Suite 300, Maitland, FL 32751, on this 13th day of June, 2016.

/S/
Judicial Assistant