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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

v.

NGUYEN WELLNESS CENTER, LLC., a/a/o LESLIE BELL,
Appellee.
_____/

CASE NO.: 2016-CV-000032-A-O
Lower Case No.: 2013-CC-8860-O

Appeal from the County Court,
for Orange County, Florida,
Steve Jewett, County Judge.

Kenneth P. Hazouri, Esquire,
for Appellant.

Heather M. Kolinksy, Esquire,
Chad A. Barr, Esquire,
for Appellee.

Before MUNYON, ADAMS, and TYNAN, J.J.

PER CURIAM.

In this PIP case, State Farm Mutual Automobile Insurance Co. ("State Farm"), the Defendant below, timely appeals the trial court's "Partial Final Judgment," entered on December 3, 2015, in favor of Nguyen Wellness Center, LLC, a/a/o Leslie Bell ("Nguyen"), the Plaintiff below. This Court has jurisdiction under 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. We reverse.

FACTS

Following a July 3, 2011, automobile accident, the insured, Leslie Bell, received chiropractic care from Nguyen at various times between April 23, 2012 and September 26, 2012. Pursuant to an assignment of benefits from Mr. Bell, Nguyen billed State Farm a total of $8,912. State Farm determined that under Mr. Bell's policy ("Policy") and Florida's PIP statute, section 627.736, Florida Statutes (2011), the reasonable expenses for the treatments did not exceed $7508.90 and reimbursed Nguyen $6,007.12 in personal injury protection ("PIP") benefits and $1,501.78 in medical payment ("MP") benefits.

Initially, Nguyen filed the lawsuit below seeking to recover additional PIP benefits for treatment dates of May 16, 2012, August 23, 2012, and August 28, 2012. Nguyen subsequently filed two amended complaints, the most recent of which sought reimbursements for approximately 30 additional dates of treatment.

State Farm sought to depose Nguyen's corporate representative and also sought discovery regarding the reasonableness of the treatment charges. In response, Nguyen filed for a protective order to bar State Farm from performing discovery on the reasonableness issue. Nguyen argued that State Farm could not challenge the reasonableness of the charges because State Farm had utilized the permissive payment in section 627.736(5)(a)2, Florida Statutes (2011) to calculate the reimbursements. On November 10, 2014, following a hearing on the matter, the trial court entered an order prohibiting State Farm from conducting any discovery on the reasonableness of the treatment charges.

On May 28, 2015, the trial court held a hearing on Nguyen's amended motion for partial summary judgment. Nguyen again argued that because State Farm had reimbursed the charges pursuant to the fee schedules of section 627.736(5)(a)2, Florida Statutes (2011) but did not

specifically elect those schedules in the Policy, State Farm could not contest the reasonableness of Nguyen's charges. During an October 26, 2015 hearing, the trial court, relying on its prior ruling in the first protective order and the decision of *Progressive Am. Ins. Co. v. Emergency Physicians of Cent. Fla.*, No. 2014-CV-000079-A-O (Fla. 9th Cir. Sept. 25, 2015), *quashed on other grounds*, 186 So. 3d 1136 (Fla. 5th DCA 2016), orally ruled that State Farm could not contest reasonableness of the charges because State Farm had reimbursed Nguyen pursuant to section 627.736(5)(a)2, Florida Statutes, without a policy election. However, the trial court allowed State Farm to amend its affirmative defenses in regard to three treatment dates: May 8, 2012, May 16, 2012, and August 29, 2012.[1]

On December 2, 2015, the trial court conducted a hearing and subsequently granted summary judgment in favor of Nguyen on the reasonableness issue of the charges. The trial court specifically found that pursuant to *Progressive*, there was no dispute as to the reasonableness of Nguyen's charges and granted summary judgment as to the causal relatedness and medical necessity of the entirety of the treatment. In addition, based upon State Farm's argument that the complaint failed to state a claim for MP benefits, the trial court entered an order finding that Nguyen's second amended complaint did in fact include claims for both PIP benefits and MP benefits.

On January 28, 2016, Nguyen filed a motion for entry of partial final judgment as to the uncontested dates of treatment. Prior to the court entering its order, State Farm again sought to depose Nguyen's corporate representative, this time regarding MP benefits charges. Nguyen sought another protective order. On March 21, 2016, the court granted the protective order,

[1] Nguyen subsequently withdrew the claim regarding the amount owed for the May 8, 2012 treatment.

providing that State Farm was not entitled to discovery regarding the PIP or MP benefits coverage because the reasonableness of the charges was not at issue.

On March 24, 2016, the trial court entered final judgment on the uncontested dates of service and ordered that Nguyen shall recover from State Farm the total sum of $605.16 which shall bear interest at the statutory rate of 4.75%. Nguyen subsequently withdrew its claims for reimbursement regarding the remaining contested dates of service. On April 22, 2016, State Farm timely appealed.

STANDARD OF REVIEW

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Because the instant case presents only questions of law and the material facts are not in dispute, our standard of review is *de novo*. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

ANALYSIS

On appeal, State Farm raises several issues. Two merit discussion and warrant a reversal. State Farm contends that pursuant to *Progressive Select Insurance Co. v. Emergency Physicians of Central Fla.*, 202 So. 3d 437 (Fla. 5th DCA 2016), the trial court's Partial Final Judgment, Partial Summary Judgment, and first and second protective orders constitute reversible error because the trial court had determined that State Farm was barred from contesting the reasonableness of charges due to the reimbursements being paid pursuant to the fee-scheduled amounts set forth in section 627.736(5)(a)2, Florida Statutes (2011), without a policy election to apply those schedules.

Progressive Select determined that because Progressive had "failed to elect specifically to limit payments based on the fee schedule" it could "not avail itself of the fee schedule limitation." *Id.* at 438. However, the appellate court also held that "despite Progressive's failure to elect to use the fee schedule limitation in its policy, it is not precluded from having an opportunity to litigate the reasonableness of EPCF's bill under section 627.736(5)(a)1 Florida Statutes, (2008)." *Id*. Thus, "that part of the decision under review that prohibits Progressive from engaging in discovery and contesting the reasonableness of EPCF's bill" was quashed. *Id*. Consequently, if an insurer fails to elect the methodology of the fee limitation schedule, the insurer is not later precluded from litigating the reasonableness of a provider's bill under section 627.736(5)(a)1, Florida Statutes, though the insurer may not avail itself of the fee schedule limitation under section 627.736(5)(a)2, Florida Statutes.

Based on *Progressive Select*, the trial court erred in entering partial final judgment in favor of Nguyen. Instead, State Farm should have been allowed to litigate the reasonableness of Nguyen's charges, even though State Farm used a fee schedule and the Policy failed to clearly and unambiguously give notice of its election to do so. State Farm is precluded from availing itself of the "fee schedule limitation." *Id*. at 438. Pursuant to *Progressive Select*, we reverse the trial court's Partial Final Judgment.

Second, State Farm argues that the trial court erred by entering protective orders that barred discovery on the issue of reasonableness. We agree. Under *Progressive Select*, State Farm is entitled to engage in discovery regarding the reasonableness of Nguyen's charges. Therefore, we reverse both of the trial court's protective orders.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The "Partial Final Judgment," rendered on March 24, 2016, is **REVERSED** and this matter is **REMANDED** to the trial court for further proceedings consistent with this opinion.

2. The "Order on Plaintiff's Motion for Protective Order," entered on November 12, 2014, and the "Order Regarding Plaintiff's Motion for Protective Order Regarding Med Pay Discovery," entered on March 21, 2016, are **REVERSED** and **REMANDED** to the trial court for further proceedings consistent with this opinion.

3. Nguyen's Motion for an Award of Appellate Attorney's Fees and Costs, filed on March 24, 2017, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this _____ day of _____, 2018.

/S/_____
LISA T. MUNYON
Presiding Circuit Judge

ADAMS and TYNAN, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this _____ day of _____, 2018, a true and correct copy of the foregoing Order has been furnished to: **The Honorable Steve Jewett, Orange County Judge**, Orange County Courthouse, 425 N. Orange Avenue, Orlando, FL 32801; The Honorable Faye L. Allen, Orange County Judge, Orange County Courthouse, 425 N. Orange Avenue, Orlando, FL 32801; Kenneth P. Hazouri, Esq., deBeaubien, Knight, Simmons, Mantzaris & Neal, LLP, 332 North Magnolia Avenue, Orlando, FL 32801; and Chad A. Barr, Esq. and Heather Kolinsky, Esq., Law Office of Chad A. Barr. P.A., 986 Douglas Avenue, Suite 100, Altamonte Springs, FL 32714.

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Judicial Assistant