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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

v.

WORLD HEALTH WELLNESS, INC.
a/a/o Glenda Pinero,
Appellee.
_____/

Case No.: 2015-CV-000118-A-O
Lower Case No.: 2014-CC-010843-O

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

Kenneth P. Hazouri, Esquire,
for Appellant.

Dave T. Sooklal, Esquire,
for Appellee.

Before HARRIS, DAWSON, and WHITE, J.J.

PER CURIAM.

In this PIP case, State Farm Mutual Auto Insurance Co. (State Farm), the Defendant below, timely appeals the trial court's order and final summary judgment, which was entered in favor of World Health Wellness, Inc. (World Health), the Plaintiff below.[1] We reverse.

Facts

The insured, Glenda Pinero, was injured in an automobile accident and received chiropractic treatments from World Health from December 10, 2010 to May 9, 2011. World

[1]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.

Health received an assignment from Pinero and billed State Farm a total of $7,815 for the treatments.

State Farm in its explanations of review (EOR) determined that the reasonable expenses for World Health's treatments did not exceed $5,809.92. Thus, State Farm paid World Health PIP benefits totaling $4,647.94 for the treatments, which represented 80% of $5,809.92. State Farm relied on the statutory fee schedule, *see* section 627.736(5)(a)2., Florida Statutes, in limiting the reimbursement to $5,809.92, as its EOR explained that the reimbursement was "based upon 200% of the Participating Level of Medicare Part B fee schedule for the region in which the services were rendered." However, the insurance policy did not state that State Farm would limit its PIP reimbursement to 200% of the Medicare Part B fee schedule. Rather, the policy stated that State Farm would pay "80% of the reasonable charges incurred for necessary" medical expenses.

World Health filed suit seeking to recover additional PIP benefits based on the full amount of its charges. State Farm sought discovery on the reasonableness of World Health's charges, and World Health countered by filing a motion for protective order to prevent State Farm from conducting any discovery on reasonableness. In that motion, World Health argued that discovery on the reasonableness of its charges would be improper because State Farm had already utilized the statutory fee schedule in section 627.736(5)(a)2., Florida Statutes to determine reasonableness. After conducting a hearing, the trial court granted World Health's motion and entered a protective order that barred discovery on reasonableness.

World Health then filed a motion for summary judgment. On October 9, 2015, the trial court conducted a hearing on World Health's motion. At the hearing, World Health argued that reasonableness was not an issue because State Farm had chosen to pay World Health pursuant to the statutory fee schedule, and cited to this Court's opinion in *Progressive American Insurance*

Co. v. Emergency Physicians of Central Fla. a/a/o Williams, No. 2014-CV-000079-A-O (Fla. 9th Cir. Ct. Sept. 24, 2015), *quashed on other grounds*, 186 So. 3d 1136 (Fla. 5th DCA 2016). State Farm countered by arguing that a factual issue remained with respect to reasonableness and that its ability to defend World Health's PIP claim was substantially prejudiced by the court's protective order, which denied State Farm discovery on reasonableness. At the end of the hearing, the trial court granted World Health's motion for summary judgment on authority of this Court's decision in *Progressive American*. According to *Progressive American*, the "insurer has already conceded reasonableness in paying pursuant to the fee schedule so it may not thereafter contest reasonableness." The trial court then entered its order and final summary judgment in favor of World Health for additional PIP benefits and interest, and cited to *Progressive American*.

Standard of Review

Because the material facts are not in dispute, and the instant case presents only questions of law, the standard of review governing the trial court's order and final summary judgment 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. First, State Farm argues that the trial court erred in entering final summary judgment in World Health's favor on the reasonableness issue. State Farm claims that notwithstanding its reliance on the statutory fee schedule, it was still entitled to challenge the reasonableness of World Health's charges. State Farm is correct, in light of *Progressive Select Insurance Co. v. Emergency Physicians of Central Fla.*, 202 So. 3d 437 (Fla. 5th DCA 2016), which was decided during this

pendency of this appeal but after this Court's decision in *Progressive American* and the trial court's ruling in reliance on *Progressive American*.

In *Progressive Select*, the provider EPCF billed Progressive Select for medical services it had rendered to the insureds. The reimbursements were reduced to 80% of 200% of the allowable amount under the Medicare Part B fee schedule. EPCF then brought suit for additional payment. The trial court granted summary judgment in favor of EPCF, finding that Progressive Select had improperly used the fee schedule in paying the billed amounts. On appeal, the circuit court found that Progressive Select should have "clearly and unambiguously" selected the fee schedule limitation under section 627.736(5)(a)2., Florida Statutes, if it wanted to limit its payments in accordance with the Medicare fee schedule. The circuit court further determined that Progressive Select was precluded from engaging in discovery and arguing the reasonableness of the billed amounts.

On certiorari review, the Fifth District in *Progressive Select* determined that because Progressive Select had "failed to elect specifically to limit payments based on the fee schedule," it "may not avail itself of the fee schedule limitation" according to *Geico General Insurance Co. v. Virtual Imaging Services, Inc*., 141 So. 3d 147 (Fla. 2013). *Progressive Select*, 202 So. 3d at 438. However, *Progressive Select* also determined, "Nonetheless, despite [Progressive Select'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. . . ." *Id*. Thus, *Progressive Select* quashed "that part of the decision under review that prohibits Progressive [Select] from engaging in discovery and contesting the reasonableness of EPCF's bill." *Id*.

In short, according to *Progressive Select*, even if an insurer fails to elect to use the fee schedule limitation in its policy, it is not later precluded from litigating the reasonableness of the

provider's bill under section 627.736(5)(a)1., Florida Statutes. Rather, the insurer is merely precluded from availing itself of the fee schedule limitation in section 627.736(5)(a)2. As a result of the Fifth District's opinion in *Progressive Select*, this Court's ruling in *Progressive American*, that "there is no need to have a fact-dependent inquiry on reasonableness of the charge" when the insurer "applies a fee schedule," is no longer good law, as we recently concluded in *State Farm Mutual Automobile Insurance Co. v. Pan Am Diagnostic Services, Inc. a/a/o Celestin*, No. 2015-CV-000110-A-O (Fla. 9th Cir. Ct. Mar. 14, 2017).

Applying *Progressive Select* to the instant case, we conclude that the trial court erred in following *Progressive American* and entering a summary final judgment in favor of World Health. Instead, State Farm should have been allowed to litigate the reasonableness of World Health's PIP charges, even though it used a fee schedule, and its insurance policy failed to give notice of its election to use the fee schedule. According to *Progressive Select*, under these circumstances, State Farm was merely precluded from availing itself of the "fee schedule limitation." *See* 202 So. 3d at 438. Pursuant to *Progressive Select*, we reverse the trial court's order and final summary judgment.

Second, State Farm argues that the trial court erred by entering a protective order that barred discovery on reasonableness. We agree. Under *Progressive Select*, State Farm was entitled to engage in discovery on reasonableness. Therefore, we reverse the trial court's protective order.

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

1. The order and final summary judgment, rendered on October 26, 2015, and the protective order, rendered on July 17, 2015, are **REVERSED** and this matter is **REMANDED** to the trial court for further proceedings consistent with this opinion.

2. World Health's motion for an award of appellate attorney's fees and costs, filed on November 10, 2016, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 3rd day of April, 2017.

/S/
JENIFER M. HARRIS
Presiding Circuit Judge

DAWSON and WHITE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Honorable Steve Jewett, Orange County Judge, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; the Honorable Faye L. Allen, Orange County Judge, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; Kenneth P. Hazouri, Esq., de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, 332 N. Magnolia Ave., Orlando, FL 32801; Dave T. Sooklal, Esq., Anthony-Smith Law, P.A., 5401 S. Kirkman Rd., Suite 610, Orlando, Florida 32819; and Chad A. Barr, Esq., Law Office of Chad A. Barr, P.A., 986 Douglas Ave., Suite 100, Altamonte Springs, FL 32714, on this 3rd day of April, 2017.

/S/
Judicial Assistant