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., d/b/a WORLD HEALTH WELLNESS a/a/o DEATRY BING,
Appellee.
_____/

CASE NO.: 2016-CV-000036-A-O

Appeal from the County Court,
for Orange County, Florida,
Jeanette Bigney, County Judge.

Nancy W. Gregoire, Esquire,
James C. Rinaman, II, Esquire, and
Maria Pace, Esquire
for Appellant.

Dave T. Sooklal, Esquire,
for Appellee.

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

PER CURIAM.

AMENDED FINAL ORDER[1]

In this PIP case, State Farm Mutual Auto Insurance Co. ("State Farm"), the Defendant below, timely appeals the trial court's Order and Final Judgment, entered in favor of World Health Wellness, Inc., d/b/a/ World Health Wellness ("World Health"), the Plaintiff below. This Court

[1] Corrected as to County Judge and appellate counsel.

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

On or about December 1, 2010, Deatry Bing, the insured, was involved in a motor vehicle accident and sustained personal injuries. At the time of the accident, Bing was insured by State Farm. World Health treated Bing's injuries from January 5, 2011 to April 22, 2011. Bing assigned his automobile insurance benefits to World Health, which then billed State Farm for $5,952.00. State Farm subsequently paid PIP benefits to World Health in the amount of $3,079.39.

State Farm reimbursed World Health utilizing the Medicare Part B fee schedules and Workers' Compensation fee schedules set forth in section 627.736(5)(a)2, Florida Statutes (2010). Specifically, State Farm's explanations of review stated that the PIP reimbursements were either based upon the "allowable amount based upon 200% of the Participating Medicare Part B fee schedule" or that the "the maximum reimbursement . . . may not exceed the applicable fee schedule or other payment methodology established pursuant to the Workers Compensation Fee Schedule."

Although State Farm utilized section 627.736(5)(a)2, Florida Statutes, to determine its reimbursements to World Health, Bing's State Farm policy ("Policy") does not contain a specific election to use the aforementioned section, the Medicare Part B Fee Schedule, or the Workers' Compensation Fee Schedule to calculate PIP reimbursements. Instead, the Policy states that it will calculate PIP reimbursements based upon "80% of the reasonable charges incurred for necessary: medical, surgical, X-ray, dental, ambulance, hospital, professional nursing, and rehabilitative services…" The Policy further provides its definition of a reasonable charge.

> To determine whether a charge is reasonable we may consider usual and customary charges and payments accepted by the provider, reimbursement levels in the

> community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply. We will not pay any charge that exceeds the amount the No-Fault Act allows to be charged.

In December 2013, World Health filed suit seeking to recover additional benefits, alleging that State Farm had failed to pay the entire amount of PIP benefits World Health was entitled to under the Policy. State Farm's answer and affirmative defenses denied World Health was entitled to anything more than what had already been reimbursed, establishing a dispute over the reasonableness of World Health's charges.

Both parties moved for partial summary judgment. In its motion, World Health argued that the reasonableness of the charges was not at issue because State Farm had unilaterally determined reasonableness by utilizing section 627.736(5)(a)2, Florida Statutes, to calculate PIP reimbursements. State Farm's motion claimed that its Policy adopts the reasonableness methodology in section 627.7365(a)1, Florida Statutes, and argued that both the PIP statute and Policy authorize State Farm to reimburse only reasonable charges based upon consideration of a number of factors, including the schedules of maximum charges. State Farm further maintained that it could retroactively contest the reasonableness of World Health's charges.

The trial court subsequently entered summary judgment in favor of World Health, citing the Florida Supreme Court's holding in *GEICO Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147, 158, (Fla. 2013), for the proposition that there are two distinct methodologies for calculating PIP reimbursements, and the insurer must clearly and unambiguously elect the permissive payment methodology to utilize it. The trial court concluded that State Farm was precluded from paying PIP reimbursements, based on the Medicare fee schedules, because the Policy did not provide notice to the insured or World Health, that State Farm would utilize section

627.736(5)(a)(2)(a-f), Florida Statutes, to calculate PIP reimbursements. Thus, the trial court held that State Farm had improperly reduced the medical benefits owed by paying 80% of 200% of the Medicare fee schedule instead of 80% of the reasonable expenses for medically necessary treatment.

State Farm subsequently filed a motion requesting reconsideration of the trial court's summary judgment. Following a hearing on State's Farm motion and World Health's motion for final judgment, the trial court denied State Farm's motion, awarding $1,603.12 in benefits and $408.79 in prejudgment interest for a total of $2,038.91, to World Health.

STANDARD OF REVIEW

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a 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

The Court agrees with State Farm's argument that the trial court erred in holding that State Farm was not permitted to retroactively challenge the reasonableness of World Health's charges based on reimbursements to World Health under the Medicare Part B physician fee schedule. The Court need only address this point on appeal, as it is dispositive.

Progressive Select Insurance Co. v. Emergency Physicians of Central Fla., 202 So. 3d 437 (Fla. 5th DCA 2016), which was decided during the pendency of this appeal, 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, "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, the appellate court quashed "that part of the decision under review that prohibits Progressive from engaging in discovery and contesting the reasonableness of EPCF's bill." *Id*.

Therefore, if an insurer fails to elect the methodology of the fee limitation schedule, it is not later precluded from litigating the reasonableness of the provider's bill under section 627.736(5)(a)1, Florida Statutes. However, the insurer is then prohibited from availing itself of the fee schedule limitation under section 627.736(5)(a)2.

Based on *Progressive Select*, we conclude that the trial court erred in entering final summary judgment in favor of World Health. Instead, State Farm should have been allowed to litigate the reasonableness of World Health's charges, even though State Farm used a fee schedule and its Policy failed to clearly and unambiguously give notice of its election to do so. State Farm was merely precluded from availing itself of the "fee schedule limitation." *See Progressive Select,* 202 So. 3d at 438. Pursuant to *Progressive Select*, we reverse the trial court's Order and Final Judgment.

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

1. The Order and Final Judgment, rendered on March 30, 2016, is **REVERSED** and this matter is **REMANDED** to the trial court for further proceedings consistent with this opinion.

2. State Farm's Motion for Appellate Attorney's Fees, filed on October 6, 2016, is **GRANTED**, contingent on the trial court's determination that State Farm's proposal for settlement is valid and enforceable, and the assessment of those fees is **REMANDED** to the trial court.

3. World Health's Motion for an Award of Appellate Attorney's Fees and Costs, filed on March 8, 2017, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 19th day of October, 2017.

/S/_____
LISA T. MUNYON
Presiding Circuit Judge

ADAMS and TYNAN, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 19th day of October, 2017, a true and correct copy of the foregoing Order has been furnished to: **The Honorable Jeanette Bigney, Orange County Judge**, Orange County Courthouse, 425 N. Orange Avenue, Orlando, FL 32801; **Nancy W. Gregoire, Esq**., Birnbaum, Lippman & Gregoire, PLLC, 1301 East Broward Boulevard, Suite 230, Fort Lauderdale, FL 33301, gregoirecourt@kblglaw.com; **James C. Rinaman, II, Esq,** Dutton Law Group, P.A., 1054 Kings Avenue, Jacksonville, FL 32207, service.jr@duttonlawgroup.com; **Maria Pace, Esq**., Dutton Law Group, P.A., 3659 Maguire Boulevard, Suite 151, Orlando, FL, 32803, service.mp@duttonlawgroup.com; **Dave T. Sooklal, Esq**., Anthony-Smith Law, P.A., 5401 South Kirkman Road, Suite 610, Orlando, FL, 32819, dsooklal@anthony-smithlaw.com, services@anthony-smithlaw.com.

_____
Judicial Assistant