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

USAA CASUALTY INSURANCE CO.,

Appellant,

v.

FLORIDA INJURY KISSIMMEE, LLC
a/a/o Chinesa Keith,

Appellee.
_____/

CASE NO.: 2015-CV-000106-A-O
Lower Case No.: 2014-SC-4723-O

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

Douglas H. Stein, Esquire,
for Appellant.

Chad A. Barr, Esquire,
for Appellee.

Before SCHRIEBER, J. RODRIGUEZ, and CARSTEN, J.J.

PER CURIAM.

USAA Casualty insurance company (USAA), the defendant below, timely appeals the Plaintiff's Final Judgment, rendered on September 28, 2015, which was entered in favor of Florida Injury Kissimmee, LLC a/a/o Chinesa Keith (FIK), the plaintiff below.[1] On March 28, 2016, USAA filed its Motion for Attorney's Fees on appeal pursuant to section 768.79, Florida Statutes and Rule of Appellate Procedure 9.400; and on June 22, 2016, FIK filed its Motion for Award of Appellate Attorney's Fees pursuant to section 627.428, Florida Statutes and Rule of Appellate Procedure 9.400. We reverse.

[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.

Factual and Procedural Background

Chinesa Keith, the insured, was involved in a motor vehicle accident on August 16, 2013 and sustained bodily injuries. At the time of the accident, Keith was covered under an automobile insurance policy issued by USAA. The policy included a maximum of $10,000 in PIP coverage. FIK, Keith's assignee, treated Keith from August 19, 2013 to September 21, 2013 for her injuries.

FIK submitted PIP claims to USAA. FIK's PIP claims did not include a determination that Keith had an "emergency medical condition" (EMC). *See* § 627.736(1)(a)3.-4., Fla. Stat. (2012). USAA declined payment of FIK's PIP claims on the basis that a total of $2500 had already been paid to FIK and Keith's other medical providers, and explained that it was going to limit PIP benefits to $2500 until it received a "determination of the patient's [EMC] by a provider authorized in 627.736(1)(a)3 and 4."

FIK did not provide USAA with a determination of an EMC. Instead, on October 25, 2013, FIK sent USAA a pre-suit demand letter that sought payment for the unpaid claims. In response, USAA sent a letter to FIK December 6, 2013 stating that PIP benefits had been limited to $2500, and that no additional payments would be made "unless an authorized provider determines that the patient suffered an [EMC]." FIK sent USAA a second pre-suit demand letter on April 3, 2014. In response, USAA on April 21, 2014 reiterated that PIP benefits had been limited to $2500 and that no additional payments would be made "unless an authorized provider determines that the patient suffered an [EMC]."

FIK then filed suit against USAA on May 6, 2014, alleging that USAA failed to pay covered PIP benefits of $1109.95. USAA filed its answer and affirmative defenses. USAA in its affirmative defenses asserted among other things that (1) FIK's demand letters were premature, because they sought a payment that was not yet overdue in the absence of documentation that

Keith had an EMC, with the result that that FIK has failed to satisfy a condition precedent to filing its lawsuit; (2) FIK failed to supply documentation that Keith had an EMC though FIK had been requested to do so as authorized by section 627.736(6)(b), Florida Statutes; (3) PIP benefits were exhausted at $2500 in the absence of documentation that Keith had an EMC; and (4) no additional PIP benefits were due, and FIK's demand letters and lawsuit were premature, because FIK had failed to supply documentation that Keith had an EMC.

On October 23, 2014, USAA deposed Dr. Ralph Marino, who had conducted an evaluation of Keith. Dr. Marino testified that Keith had an EMC and he based his determination on the MRI results, which indicated four bulging discs, moderate bilateral neuroforaminal narrowing, and a herniated disc. According to Dr. Marino, his determination that Keith had an EMC was not included in his treatment note because he only received the MRI report after his evaluation of Keith had taken place. Shortly after Dr. Marino's deposition, USAA issued payment to FIK for the disputed PIP benefits on October 28, 2014.

On January 20, 2015, FIK filed a motion for entry of final judgment claiming that under Florida law, USAA's payment of the disputed PIP benefits constituted a confession of judgment. In response, USAA argued that its payment of the disputed medical benefits was not a confession of judgment because it issued payment only after it received "notice of the existence of an EMC." USAA also filed a motion for summary judgment in which it reasserted its arguments that it was entitled to limit PIP payments to $2500 until it received a determination that Keith had an EMC, that FIK's pre-suit demand letters were premature, and that it ultimately issued payment of the disputed amounts once there was a determination that Keith had suffered an EMC.

The trial court conducted a hearing on the pending motions. At the conclusion of the hearing, the court announced that it was granting FIK's motion for entry of final judgment. The

court then entered final judgment in favor of FIK in its Plaintiff's Final Judgment, finding that there did not exist a genuine issue of material fact over whether any additional amounts were due, that USAA's payment of the disputed PIP benefits constituted a confession of judgment, and that FIK was entitled to entry of final judgment as a matter of law. The Plaintiff's Final Judgment cited to *Tampa Chiropractic Center, Inc. v. State Farm Mutual Automobile Insurance Co*., 141 So. 3d 1256 (Fla. 5th DCA 2014).

Arguments on Appeal

On appeal, USAA raises two points. USAA in its first point argues that the trial court erred in ruling that its payment of the disputed PIP benefits to FIK, after FIK had filed suit, constituted a confession of judgment. USAA points out that nothing in the record suggests that it "wrongfully" or "unreasonably" withheld PIP benefits to warrant application of the confession of judgment rule, *see Tampa Chiropractic Center,* 141 So. 3d at 1258, and urges that its obligation to pay the disputed PIP benefits pursuant to section 627.736(1)(a)3., Florida Statutes did not arise until FIK provided it with the determination of an EMC after the lawsuit had commenced. For USAA, the fact that its obligation to pay arose after the litigation had begun is "irrelevant."

FIK counters by urging that USAA confessed judgment when it "created" the dispute by "improperly limiting" the PIP medical benefits to $2,500 and then later issued payment for the disputed PIP benefits. In FIK's view, USAA's interpretation of section 627.736(1)(a)4., Florida Statutes was "incorrect" because it is undisputed that there was no determination from a provider that Keith did not have an EMC as is required under the statute before USAA may properly limit medical benefits under PIP to $2,500.

USAA in its second point argues that this Court, upon reversing the trial court, should also direct that the trial court on remand enter final judgment in favor of USAA.[2] For support, USAA sets forth three bases. One, USAA was not obliged to pay in excess of $2500 of PIP benefits until it received a determination that Keith had sustained an EMC. Two, its payment of the disputed PIP benefits was tolled and not overdue because FIK had failed to respond to USAA's request for documentation or information that Keith had an EMC in violation of section 627.736(6)(b), Florida Statutes. Three, its payment of the disputed PIP benefits was not overdue because FIK had failed to comply with section 627.736(10) by sending premature demand letters.

FIK counters by arguing that entry of final judgment in USAA's favor on remand would be "entirely inappropriate," and takes issue with the three bases advanced by USAA. One, in FIK's view, PIP benefits under section 627.736(1)(a)4., Florida Statutes do not default to $2,500. Rather, there must be a determination from an authorized provider that an injured person did not have an EMC in order to limit PIP benefits to $2,500 under the statute. Two, the scope of section 627.736(6)(b), Florida Statutes is "limited" and does not provide for pre-suit discovery of an EMC. Three, FIK's pre-suit demand letters were not premature because the bills were overdue once USAA failed to pay them within 30 days of receipt.

Standard of Review

Because the material facts are not in dispute, and the instant case presents only questions of law, our review of the Plaintiff's Final Judgment entered by the trial court 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).

[2]USAA also suggests that the Court should "reverse" the trial court's order denying USAA's motion for summary judgment. However, the record reflects that while the trial court gave USAA an opportunity to argue its motion for summary judgment "for the record" after granting FIK's motion for entry of final judgment, the trial court did not enter a written order denying USAA's motion for summary judgment.

Analysis

Under the confession of judgment rule, an insurer may not avoid the payment of attorney's fees under section 627.428, Florida Statutes to an insured who has filed suit by paying a claim before the entry of judgment. *See Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217 (Fla. 1983) (establishing confession of judgment rule in Florida law). Recently, in *Johnson v. Omega Insurance Co.*, 200 So. 3d 1207, 1219 (Fla. 2016), the Florida Supreme Court clarified that under Florida law, for the confession of judgment rule to apply, a "recovery for attorney's fees under section 627.428 requires an *incorrect* denial of benefits by the insurance company, not a bad faith denial." (Italics in original.) Thus, under *Johnson*, for the confession of judgment rule to apply in the instant case, USAA must have incorrectly denied PIP benefits to FIK.

Section 627.736(1)(a)3.-4., Florida Statutes (2012) provides as follows:

> 3. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. up to $10,000 if a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or an advanced registered nurse practitioner licensed under chapter 464 has determined that the injured person had an emergency medical condition.
>
> 4. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. is limited to $2,500 if a provider listed in subparagraph 1. or subparagraph 2. determines that the injured person did not have an emergency medical condition.

In short, section 627.736(1)(a)3.-4. provides that PIP benefits up to $10,000 are available if a provider "has determined that the injured person had" an EMC, but PIP benefits are limited to $2,500 if a provider "determines that the injured person did not have" an EMC.

As indicated, the record reflects that USAA initially declined to pay PIP benefits over $2500 to FIK in the absence of a determination from an authorized provider that Keith had an EMC. However, the record also reflects that USAA promptly paid the PIP benefits in dispute after

USAA had received a determination from an authorized provider (in the form of Dr. Marino's deposition testimony) that Keith did in fact have an EMC. The issue then becomes whether USAA's conduct in declining to pay PIP benefits over $2500 until it first received a determination of an EMC from an authorized provider constituted an incorrect denial of benefits under *Johnson*, thereby warranting application of the confession of judgment rule.

We conclude that USAA's conduct did not constitute an incorrect denial of benefits under *Johnson* in light of the recent opinion of the Fourth District Court of Appeal in *Medical Center of the Palm Beaches v. USAA Casualty Insurance Co*., 202 So. 3d 88 (Fla. 4th DCA 2016), which USAA cites in its reply brief. In *Medical Center*, the insured was injured in a motor vehicle accident. Due to pain in her cervical region and right shoulder, she went to an urgent care center, which then referred her to a physical therapist for treatment. When the physical therapist submitted bills for payment to the insurer, the insurer would not provide any additional payment for PIP benefits, explaining that under section 627.736(1)(a)4., Florida Statutes, $2,500 had already been reimbursed. The insurer also requested that the physical therapist provide "the determination of the patient's emergency medical condition by a provider authorized" so that the insurer could make any additional reimbursement decisions. *Medical Center*, 202 So. 3d at 89.

The physical therapist sued the insurer for breaching the insurance contract by failing to issue full payment for the medical treatment that had been provided. Thereafter, the physical therapist sent the insurer a note from the insured's treating physician, which stated that he considered the insured to have an EMC. Upon receipt of this note, the insurer paid all of the outstanding charges up to the policy limits.

The insurer moved for summary judgment, which the trial court granted, finding that the provisions of section 627.736(1)(a)3.-4., Florida Statutes limit medical benefits to $2,500 until

there is a determination that the insured had an EMC. The trial court also determined that the insurer properly requested that the physical therapist provide information regarding the insured's medical condition, pursuant to section 627.736(6)(b), to justify additional reimbursement. The trial court disagreed with the physical therapist's contention that the insurer waived any defenses because it paid the medical reimbursement after the suit was filed, and determined there was no confession of judgment because the insurer did not wrongfully withhold payment, and certified a question of great public importance to the Fourth District.

On appeal, *Medical Center*, in reviewing section 627.736(1)(a)3.-4., Florida Statutes, found that its provisions were ambiguous:

> The statute addresses the situation where there has been an affirmative determination of an emergency medical condition, authorizing up to $10,000. § 627.736(1)(a)(3), Fla. Stat. The statute also addresses the situation where there has been an affirmative determination of no emergency medical condition, authorizing up to only $2,500. § 627.736(1)(a)(4), Fla. Stat. However, nowhere in the statute does it address the situation where no determination of emergency medical condition has been made. We therefore find the statute to be ambiguous, compelling us to resort to other methods to determine the intent of the legislature.

Medical Center, 202 So. 3d at 91 (citation omitted). As a result, *Medical Center* deemed it necessary to resort to rules of statutory construction to construe sections 627.736(1)(a)3. and 627.736(1)(a)4. and determined that the two provisions of the statute should be read in *para materia*. *Id*. For additional support, *Medical Center* looked to the opinion of the Eleventh Circuit in *Robbins v. Garrison Property & Casualty Insurance Co*., 809 F.3d 583 (11th Cir. 2015), agreeing with *Robbins*[3] that section 627.736, Florida Statutes "'limits an insurer's obligation to

[3]Notably, *Robbins* summarized the legislative history of the PIP statute as follows: "The legislative history clearly shows that the Florida legislature sought to reduce fraudulent claims by making the full $10,000 amount of benefits available only to those insureds who suffered severe injuries, a restriction defined into the term "emergency medical condition." Allowing an insured to escape that restriction on the higher limit would defeat the legislative intent and policy behind the amendments, which we are bound to honor." *Robbins*, 809 F.3d at 587-88 (internal citation omitted).

provide personal injury protection benefits to $2,500, unless one of the medical providers listed in subparagraph (1)(a)(3) has determined that the injured person had an emergency medical condition.'" *Medical Center*, 202 So. 3d at 92 (quoting *Robbins*, 809 F.3d at 588).

Medical Center then turned to the facts before it, noting that when the insurer requested a written report of the insured's medical condition to determine whether the physical therapist was entitled to a payment exceeding the $2,500 statutory limit, the physical therapist initially failed to respond to this request, and instead submitted a demand letter for the PIP benefits. Only after the physical therapist filed suit did the physical therapist submit a determination from the insured's doctor that the insured had an EMC. Upon receiving that determination, the insurer paid all outstanding charges until reaching the policy limits.

On those facts, *Medical Center* determined that the insurer had the right to request a written report of the insured's condition under section 627.736(6)(b), Florida Statutes, which allows for the discovery of information regarding the treatment of the injured person. According to *Medical Center*, the insurer "appropriately" requested a report on the insured's medical condition, as it "could likely have impacted" the insurer's evaluation of whether a qualified provider had determined that the insured's injury constituted an EMC. *Medical Center*, 202 So. 3d at 93. Thus, the physical therapist's demand letter was premature. Though the physical therapist had filed a demand letter, the demand letter was otherwise "premature" since the physical therapist failed to respond to USAA's discovery request. *Id*. *Medical Center* ultimately held:

> [B]enefits above $2,500 are available only where a medical provider determines an emergency medical condition exists. Where a medical provider does not make a determination that there is an emergency medical condition, benefits above $2,500 are not available.

Id.

We conclude that *Medical Center* is controlling. Similar to the fact pattern in *Medical Center*, in the instant case FIK's submissions to USAA for PIP payments did not include a determination that Keith had an EMC, and USAA stated that it was going to limit PIP benefits to $2500 until it received a determination of Keith's EMC by an authorized provider. Moreover, FIK did not initially provide USAA with a determination of an EMC, but rather sent demand letters before filing suit against USAA. Finally, after suit had been filed, USAA issued payment to FIK for the disputed PIP benefits shortly after Dr. Marino testified at his deposition with respect to his determination that Keith did in fact have an EMC.

Under *Medical Center*, it is evident that USAA was fully entitled to request from FIK a determination from an authorized provider that Keith had an EMC, and to condition its payment of PIP benefits over $2,500 to its receipt of such determination. *See Medical Center*, 202 So. 3d at 92-93. Since USAA was fully entitled to handle FIK's PIP claim as it did pursuant to *Medical Center*, it necessarily follows that USAA's handling of FIK's PIP claim could not have been incorrect for purposes of the confession of judgment rule. *See Johnson*, 200 So. 3d at 1219. Accordingly, with respect to USAA's first point on appeal, we are compelled to reverse the Plaintiff's Final Judgment on authority of *Medical Center*, as the trial court's application of the confession of judgment rule was erroneous. *See also Fulmore & Associates Chiropractic & Spinal Injury Centers, P.A. v. Enterprise Leasing Co. of Orlando, LLC*, Case No. 2015-CV-000095-A-O (Fla. 9th Cir. Ct. July 21, 2016) (when insurer did not wrongfully or incorrectly deny benefits to assignee, insurer's post-suit payment of additional benefits did not constitute a confessed judgment and did not entitle assignee to attorney's fees under section 627.428, Florida Statutes).

USAA's second point on appeal is that this Court, upon reversing the trial court, should also direct that the trial court on remand enter final judgment in favor of USAA. We agree with

USAA's three supporting contentions. One, as discussed, USAA was not obliged to pay in excess of $2500 of PIP benefits until it received a determination that Keith had sustained an EMC. *See Medical Center*, 202 So. 3d at 93.

Two, USAA's payment of the disputed PIP benefits was tolled and not overdue because FIK had failed to respond to USAA's requests for documentation that Keith had an EMC in violation of section 627.736(6)(b), Florida Statutes (2012). *See Medical Center, id*. at 92-93. To be sure, FIK claims that USAA's requests did not constitute requests for discovery pursuant to section 627.736(6)(b), since in its view the scope of the statute is "limited and does not include pre-suit discovery regarding whether an insured has an EMC."[4] However, contrary to FIK's position, *Medical Center* determined that under similar circumstances the insurer was fully entitled to discovery of information relating to whether the insured had an EMC pursuant to section 627.736(6)(b). *See id.*

Three, FIK failed to comply with section 627.736(10), Florida Statutes (2012) by sending premature demand letters. Under section 627.736(10), a demand letter may only be sent when a payment is overdue. However, under *Medical Center* USAA was not obliged to pay the disputed PIP benefits until it received a determination that Keith had sustained an EMC. Under similar circumstances, *Medical Center* determined that a demand letter was premature. *See id.* at 93. In short, we agree that USAA is entitled to an entry of final judgment in its favor on remand.

[4]FIK makes the additional contention that Dr. Marino's deposition testimony, which served as the basis for USAA ultimately paying the disputed PIP benefits, could not serve as a valid response to a discovery request under section 627.736(6)(b). In FIK's view, USAA's issuance of payment supplied proof that it had not made a valid discovery "request, or that that it no longer sought to defend on this basis." We do not agree. First, the statute itself references a "written request for documentation *or information*." (Emphasis supplied.) Surely USAA was entitled to rely on Dr. Marino's deposition testimony that Keith had an EMC instead of additionally requiring from Dr. Marino a written report that Keith had an EMC. Second, section 627.736(1)(a)3. merely requires a determination from an authorized provider that the insured had an EMC. Dr. Marino's deposition testimony clearly suffices as a section 627.736(1)(a)3. determination. Upon obtaining Dr. Marino's deposition testimony that Keith had an EMC, USAA paid the disputed PIP benefits, it did so not because "it no longer sought to defend on this basis" (and be subject to application of the confession of judgment rule) but simply because it obtained a determination of an EMC.

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

1. The Plaintiff's Final Judgment, rendered on September 28, 2015, is **REVERSED** and this matter is **REMANDED** to the trial court with directions to enter final judgment in favor of USAA and for further proceedings consistent with this opinion.

2. USAA's Motion for Attorney's Fees on appeal, filed on March 28, 2016, is **GRANTED**, and the assessment of those fees is **REMANDED** to the trial court.

3. FIK's Motion for Award of Appellate Attorney's Fees, filed on June 22, 2016, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 18th day of January, 2017.

/S/
MARGARET H. SCHREIBER
Presiding Circuit Judge

J. RODRIGUEZ and CARSTEN, 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 Jeanette Dejuras Bigney, 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, Esquire, Law Office of Chad A. Barr, P.A., 698 N. Maitland Ave., Suite 300, Maitland, FL 32751, on this 19th day of January, 2017.

/S/
Judicial Assistant

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

USAA CASUALTY INSURANCE CO.,

Appellant,

v.

FLORIDA INJURY KISSIMMEE, LLC
a/a/o Chinesa Keith,

Appellee.
_____/

CASE NO.: 2015-CV-000106-A-O
Lower Case No.: 2014-SC-004723-O

ORDER ON APPELLEE'S MOTION FOR REHEARING AND MOTION FOR CLARIFICATION

THIS MATTER is before the Court on Appellee's Motion for Rehearing and Motion for Clarification, filed on February 2, 2017. On review of the Motion for Rehearing and Motion for Clarification, Appellant's Response filed on February 9, 2017, the Court's Opinion rendered on January 20, 2017, the court file, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Court's ruling in its Opinion with respect to Appellant USAA's entitlement to attorney's fees is **CLARIFIED** to read as follows: "USAA's Motion for Attorney's Fees on appeal, filed on March 28, 2016, is **GRANTED**, contingent upon the trial court determining that USAA is entitled to attorney's fees pursuant to the Proposal for Settlement, and the assessment of those fees is **REMANDED** to the trial court."

2. The Motion for Rehearing and Motion for Clarification is otherwise **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 28th day of February, 2017.

/S/
MARGARET H. SCHREIBER
Presiding Circuit Judge

J. RODRIGUEZ and CARSTEN, 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 Jeanette Dejuras Bigney, Orange County Judge, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; the Honorable Eric H. DuBois, 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, Esquire, Law Office of Chad A. Barr, P.A., 986 Douglas Ave., Suite 100, Altamonte Springs, FL 32714, on this 28th day of February, 2017.

/S/
Judicial Assistant