

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

PROGRESSIVE AMERICAN
INSURANCE COMPANY,

CASE NO.: 2014-CV-000054-A-O
Lower Case No.: 2011-SC-008737-O

Appellant,

v.

EMERGENCY PHYSICIANS OF CENTRAL
FLORIDA, LLP, as assignee of Asmaa Karani,

Appellee.

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

Douglas H. Stein, Esquire
for Appellant.

Thomas Andrew Player, Esquire
for Appellee.

Before SCHREIBER, LATIMORE, and DOHERTY, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Progressive American Insurance Company (“Progressive”) timely appeals the trial court’s Final Judgment entered July 16, 2014, in favor of Appellee, Emergency Physicians of Central Florida, LLP (“EPCF”) as assignee of the insured, Asmaa Karani (“Karani”). This Court has jurisdiction pursuant to 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.

Summary of Facts and Procedural History

On August 15, 2011, Karani was injured in an automobile accident and received emergency care by EPCF. EPCF then obtained an assignment of benefits from Karani to present a claim under his personal injury protection (“PIP”) insurance policy with Progressive which included a \$1,000 deductible. Also on August 15, 2011, Progressive received notice of the accident. Thereafter, EPCF submitted a claim to Progressive for payment of medical expenses. The record reveals that Progressive applied the deductible to: 1) Orlando Health’s claim in the amount of \$527.25 (received on August 29, 2011, and original amount billed was \$703.00); 2) EPCF’s claim of \$446.00 (received on August 31, 2011, and original amount billed was same amount of \$446.00); and 3) \$26.75 of a \$1,006.02 claim from Altamonte Springs Diagnostic Imaging, Inc. (received on September 1, 2011, and original amount billed was \$1,296.86). Thus, because Progressive applied EPCF’s claim to the deductible and because the deductible was not exhausted, Progressive did not pay any amount of that claim to EPCF.

Thereafter, EPCF sought payment of the claim from Progressive and filed a Complaint on December 5, 2011, alleging that Progressive breached the policy by not paying the claim, and instead, applying it to the deductible. Progressive then filed its Answer and Affirmative Defenses alleging that it properly applied the claim to the policy’s deductible. The parties also filed a Joint Stipulation of Facts.

Ultimately, Progressive filed its Motion for Summary Final Judgment arguing that it properly applied the \$1,000 deductible to EPCF’s claim and thus, there were no amounts due

and owing and in support of the Motion included an affidavit from its adjuster. EPCF also filed a Motion for Summary Judgment arguing that it was a member of a special class of providers per section 627.736(4)(c), Florida Statutes, which requires an insurer to set aside \$5,000 in reserve for the payment of claims submitted by preferred providers and that per the statute, the Legislature's intent was to assure that providers for emergency services and care would be paid regardless of the existence of a deductible. EPCF also argued that Progressive improperly applied the deductible to 75% of a prior claim from the hospital, Orlando Health, rather than 100% of that claim. Thus, if Progressive had applied 100% of Orlando Health's claim to the deductible, the deductible would have been exhausted earlier and there would have been \$119.20 available to cover EPCF's claim.

On December 11, 2012, a hearing was held addressing both Motions for Summary Judgment. On January 30, 2013, the trial court granted EPCF's Motion finding that Progressive incorrectly applied the 75% permissive fee schedule instead of 100% of Orlando Health's claim to the deductible and that benefits paid from the \$5,000 reserve imposed by section 627.736(4)(c), Florida Statutes, were not subject to an otherwise applicable deductible. On July 16, 2014, the trial court entered the Final Judgment in favor of EPCF that Progressive now appeals.

Summary of Arguments on Appeal

Progressive argues that: 1) the trial court erred in finding that the deductible should have been applied before reducing Orlando Health's claim to the statutorily limited amount because when an insurer properly opts to apply the payment limitation, the expenses referred to section 627.739(2), Florida Statutes, are the limited amount and 2) the trial court erred in ruling that benefits paid from the \$5,000 reserve imposed by section 627.736(4)(c), Florida

Statutes, are not subject to an otherwise applicable deductible. Progressive seeks appellate attorney fees per Florida Rule of Appellate Procedure 9.400(b) and section 768.79(1), Florida Statutes, based on its Proposal for Settlement served on EPCF on July 16, 2012, and rejected.

Conversely, EPCF argues that: 1) based on the legislative history and the plain meaning of section 627.736(4)(c), Florida Statutes, the trial court properly found that per the statute, EPCF was a member of a legislatively created and protected class of providers and not subject to the policy's \$1,000.00 deductible; thus, EPCF was entitled to payment of its medical claims from the \$5,000.00 in reserve for payment of claims as it properly submitted its claim within 30 days and 2) EPCF had standing to challenge Progressive's improper application of Orlando Health's reduced claim to the deductible. EPCF also seeks appellate attorney fees and costs pursuant to sections 627.736(8) and 627.428(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.400.

Standard of Review

The standard of review for summary judgment is de novo. Accordingly, an appellate court must determine if there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Krol v. City of Orlando*, 778 So. 2d 490, 491-92 (Fla. 5th DCA 2001) (citing Fla. R. Civ. P. 1.510(c)). Further, a trial court's interpretation of a statute involves a question of law and thus, is subject to de novo review. *J.D.S. v. Dep't of Children & Families*, 864 So. 2d 534, 537 (Fla. 5th DCA 2004). Lastly, a decision of a trial court comes to the appellate court with a "presumption of correctness" and the burden is on the appellant to demonstrate reversible error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

Analysis

From a review of the record and briefs in this case, this Court finds that there are no genuine issues of material fact. Therefore, next, this Court must determine whether as a matter of law the entry of summary judgment in favor of EPCF was proper in this case. Accordingly, the issue is whether section 627.736(4)(c), Florida Statutes, overrides section 627.739(2), Florida Statutes, by requiring that the claim that was properly submitted by EPCF as a protected class provider be paid by Progressive outside of the deductible.

This Court notes that at this time there is no controlling case law from the Florida Supreme Court or from the District Courts of Appeal that specifically addresses this issue. Section 627.736(4)(c), Florida Statutes, requires that upon receiving notice of an accident that is potentially covered by PIP benefits, the insurer must reserve \$5,000 of PIP benefits for payment to certain physicians and dentists who provide emergency services and care (“priority providers”). Further, the amount required to be held in reserve must be kept in reserve for a period of 30 days upon the insurer receiving notice of the accident. After the 30-day period, any amount of the reserve for which the insurer has not received notice of such claims may be used by the insurer to pay other claims.

As for the deductible issue, the applicable statutes lack language that exempts the priority claimants from a deductible nor is there language that dictates the method for applying the deductible that an insurance company must comply with when processing claims. Because such language is lacking in the statutes, the trial court was entitled to enforce

the legislative intent of the statutory scheme to enable full reimbursement to priority medical providers for their services rendered.¹

As the record reveals in the instant case, the remaining amount of the claim from the non-priority provider, Altamonte Springs Diagnostic Imaging, Inc., that Progressive received on September 1, 2011, and within the 30 day reserve period, would have satisfied the deductible without applying EPCF's claim to the deductible. Therefore, Progressive should have applied that non-priority provider's claim to satisfy the deductible in order to comply with the intent of the statute. In conclusion, based on the facts in this case, Progressive improperly applied EPCF's claim to the deductible. Accordingly, the trial court did not err in granting summary judgment in favor of EPCF. Lastly, this Court's findings discussed herein are dispositive; therefore, it is not necessary that the other arguments in this appeal be addressed.

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

1. The trial court's Final Judgment entered July 16, 2014, (that incorporates the "Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motion for Final Summary Judgment" entered January 30, 2013), is **AFFIRMED**.

2. EPCF's "Appellee's Motion to Tax Appellate Attorney's Fees" filed November 11, 2014, is **GRANTED**, and the assessment of those fees is **REMANDED** to the trial court. As for costs, EPCF must file a proper motion with the trial court pursuant to Florida Rule of Appellate Procedure 9.400(a).

¹ See this Circuit's recent decision in *Progressive American Insurance Co. v. Emergency Physicians of Central Florida, LLP*, No. 2014-CV-000003-A-O (Fla. 9th Cir. Ct. July 15, 2015), that applies a similar analysis; see also the circuit appellate opinion on rehearing in *USAA General Indemnity Co. v. Emergency Physicians of Central Florida, LLP, a/a/o Adriel Rodriguez*, 22 Fla. L. Weekly Supp. 686a (Fla. 18th Cir. Ct. February 17, 2015).

3. Progressive's "Motion for Attorney's Fees Pursuant to Proposal for Settlement" filed October 22, 2014, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 25th day of August, 2015.

/S/
MARGARET H. SCHREIBER
Presiding Circuit Judge

LATIMORE and DOHERTY, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Douglas H. Stein, Esquire**, Seipp, Flick & Hosley, LLP, Two Alhambra Plaza, Suite 800, Coral Gables, Florida 33134; **Thomas Andrew Player, Esquire**, The Nation Law Firm, 570 Crown Oak Centre, Longwood, Florida 32750; and **The Honorable Andrew L. Cameron**, 425 N. Orange Avenue, Orlando, Florida 32801, on this 25th day of August, 2015.

/S/
Judicial Assistant