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

Flagler Hospital, Inc.,
a/a/o Johnnie Cole,

Appellant,

v.

Southern-Owners
Insurance Company,

Appellee.
_____/

CASE NO.: 2015-CV-67-A-O
Lower Court Case No.: 2012-SC-12268-O

Appeal from the County Court,
for Orange County, Florida,
Faye L. Allen, County Judge.

Russel Lazega, Esq., and David Hwalek, Esq.,
for Appellant.

Rhaman M. Love-Lane, Esq., for Appellee.

Before UNDERWOOD, MURPHY, and O'KANE, J.J.

PER CURIAM.

FINAL ORDER REVERSING FINAL SUMMARY JUDGMENT

Appellant Flagler Hospital seeks review of the final summary judgment entered against it. We have jurisdiction. § 26.012(1), Fla. Stat. (2015); Fla. R. App. P. 9.030(c)(1)(A). Because the order imposing discovery sanctions on Florida Hospital was tantamount to a dismissal, but the trial court did not set forth findings supporting the sanction, and the summary judgment burden was improperly placed on Flagler Hospital, we reverse.

On December 17, 2012, Flagler Hospital filed this PIP action against Auto-Owners Insurance Company. Southern-Owners Insurance Company was later substituted as the correct

party. Flagler Hospital alleged that it provided medical services to Southern-Owners' insured, that the insured assigned its benefits to Flagler Hospital, that Flagler Hospital submitted its bill to Southern-Owners, and that Southern-Owners did not pay Flagler Hospital the amount owed.

On May 3, 2013, Southern-Owners served its "First Request to Produce and First Set of Interrogatories." Flagler Hospital did not respond to the discovery requests, so Southern-Owners filed a motion to compel. The trial court granted the motion and ordered Flagler Hospital to respond to the discovery in October 2013. When Flagler Hospital missed this deadline, Southern-Owners moved for sanctions. The day before the hearing on the motion, Flagler Hospital responded to the interrogatories. At the hearing, Flagler Hospital's attorney cited *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1994), to argue that dismissal would not be appropriate. The trial court granted the motion for sanctions and ordered that Flagler Hospital "is prohibited from utilizing any information sought through Defendant's First Set of Interrogatories and any documents requested in Defendant's Request for Production as evidence in support and/or defense of its case-in-chief." (R. 106.) One of the interrogatories asked Flagler Hospital to state the legal and factual bases for its claim.

Southern-Owners then moved for summary judgment. At the hearing, in addition to making arguments on the merits and regarding a lack of notice, Flagler Hospital asked the judge to reconsider her order imposing discovery sanctions, arguing that the sanction was harsher than warranted, "particularly where the defendant wasn't prejudiced." (R. 569.) Also at the hearing, the trial judge stated that Flagler Hospital had the burden to prove that its charges were reasonable. Finding that Flagler Hospital did not meet its burden, the trial court granted Southern-Owners' motion for summary judgment. Flagler Hospital now appeals.

A. Standard of Review

"The standard of review of a trial court's entry of summary final judgment is de novo." *Evans v. McCabe 415, Inc.*, 168 So. 3d 238, 240 (Fla. 5th DCA 2015); *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 128 (Fla. 2000). Sanctions imposed due to discovery violations are reviewed under an abuse of discretion standard. *Ham v. Dunmire*, 891 So. 2d 492, 495 (Fla. 2004).

B. Discussion

Two issues warrant reversing the summary judgment in favor of Southern-Owners: the discovery sanction and the burden imposed on Flagler Hospital on Southern-Owners' motion for summary judgment. Additionally, Flagler Hospital moves for an award of appellate attorney's fees.

1. Discovery sanction

Flagler Hospital argues that the trial court erred in precluding it from using any information that would be responsive to Southern-Owners' discovery requests. It asserts that this was an extreme sanction for filing untimely discovery responses and equal to dismissing its case.

Flagler Hospital also argues that the trial court did not set forth explicit findings of fact regarding factors it should have considered in imposing the sanctions. In support of this argument, Flagler Hospital cites three cases: *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1994); *Buroz-Henriquez ex rel. Buroz-Arismendi v. De Buroz*, 19 So. 3d 1140 (Fla. 3d DCA 2009); and *Coconut Grove Playhouse, Inc. v. Knight-Ridder, Inc.*, 935 So. 2d 597 (Fla. 3d DCA 2006). All three of these cases required the trial court to set forth its findings regarding the factors when the sanction was either a dismissal or equal to a default judgment. *Kozel*, 629 So. 2d at 818; *Buroz-Henriquez*, 19 So. 3d at 1141-42; *Coconut Grove Playhouse*, 935 So. 2d at 598.

In this case, the sanction is equal to a dismissal of Flagler Hospital's complaint. The order imposing the sanctions states, "Plaintiff is prohibited from utilizing any information sought through Defendant's First Set of Interrogatories and any documents requested in Defendant's Request for Production as evidence in support and/or defense of its case-in-chief." (R. 106.) One of the interrogatories asks Flagler Hospital to state the amount it billed, the amount it alleges is still due, and to "state in detail the legal grounds and factual basis upon which Plaintiff bases the claim that Plaintiff is entitled to additional payment(s) . . . ." (R. 102.) The trial court's order precludes Flagler Hospital from using any information sought by this interrogatory, but this interrogatory asks for the entire factual and legal basis of Flagler Hospital's claim. Precluding Flagler Hospital from using information responsive to this interrogatory thus precludes Flagler Hospital from proving its claim.

Because the order imposing sanctions does prevent Florida Hospital from proving its claim, and thus was, in effect, a dismissal, the trial court was required to apply the factors in *Kozel* and set forth its findings. *Coconut Grove Playhouse*, 935 So. 2d at 598 (quashing trial court's order sanctioning defendant for failing to comply with a discovery subpoena that was "tantamount to a default judgment" where the trial court's order did not contain explicit findings regarding the *Kozel* factors). Not making any findings regarding the *Kozel* factors was an abuse of discretion.

Southern-Owners argues that Flagler Hospital did not raise this issue at the summary judgment hearing, but the transcript shows that Flagler Hospital did raise the issue of the sanctions being too harsh. Flagler Hospital's counsel stated, "[S]ince that is an interlocutory order, as we think that is overly—that's a more harsh order than the sanction would merit for an untimely response, particularly where the defendant wasn't prejudiced." (R. 569.) One of the *Kozel* factors is whether the delay in providing the discovery prejudiced the opposing party. *Kozel*, 629 So. 2d at 818. Southern-Owners admits in its Answer Brief that Flagler Hospital argued that dismissal was

not appropriate and relied on *Kozel* for support at the summary judgment hearing. Additionally, at the hearing on the motion for sanctions, Flagler Hospital's attorney cited the *Kozel* case and argued that dismissal was not appropriate. He listed the *Kozel* factors and contended that the failure to produce discovery was not willful, and instead was neglect by the attorneys, and not Flagler Hospital's fault. Thus, the issue was sufficiently raised before the trial court to permit appellate review.[1]

Because Flagler Hospital only contested the severity of the sanctions, and not their imposition, this proceeding is remanded to the trial court to determine an appropriate sanction, and, if dismissal is warranted, to apply the *Kozel* factors and set forth its findings regarding those factors.

2. Summary judgment burden

Flagler Hospital asserts that the trial court incorrectly placed the burden on it during the summary judgment hearing, rather than on Southern-Owners, which was the moving party.

During the hearing, the trial court made several references to Flagler Hospital having the burden of establishing that its charge was reasonable. The judge stated:

> [I]t's clear that the plaintiff has to meet their initial burden, as required by law. That's the plaintiff's burden. . . . Plaintiff has the burden to prove the charge is reasonable.
> . . . .
> I can't hold the defendant to the requirement of putting into the record what the plaintiff needs to—I guess put forth that there are materially disputed facts. There is nothing in the record at this point from the plaintiff that . . . would allow this Court to come to a conclusion that the plaintiff has met the plaintiff's burden.
> . . . .
> [A]s to this motion, my ruling is that there's nothing in the record, you did not respond. The defendant does not have the burden of proof, the plaintiff does.

[1] Although the issue was sufficiently preserved here for appellate review, the Court notes that attorneys have an obligation to make their objections clear for the record so that opposing counsel and judges have an opportunity to respond at that point in time.

(R. 574-75, 583.)

In a PIP action, the insured "bears the burden of establishing that the charges are . . . reasonable." *State Farm Mut. Auto. Ins. Co. v. Sestile*, 821 So. 2d 1244, 1246 (Fla. 2d DCA 2002). Even if the party has the burden of proof at trial, however, the summary judgment movant has the burden at the summary judgment stage. *Alpha Elec. Supply, Inc. v. Drake Contracting, Inc.*, 407 So. 2d 363, 365 (Fla. 5th DCA 1981); *Nowicki v. Cessna Aircraft Co.*, 69 So. 3d 406, 409 (Fla. 4th DCA 2011). The burden to prove "the complete absence of a triable issue of material fact is on the movant and the proof must be such as to overcome all reasonable inferences which could be drawn in favor of the opposing party." *Alpha Elec. Supply*, 407 So. 2d at 365. "When the defendant moves for summary judgment, neither the trial court nor this court determines whether the plaintiff can prove her case; our function solely is to determine whether the pleadings, depositions, and affidavits conclusively show that the plaintiff cannot prove her case." *Crandall ex rel. Crandall v. Sw. Fla. Blood Bank, Inc.*, 581 So. 2d 593, 595 (Fla. 2d DCA 1991).

Because it was Southern-Owners' motion for summary judgment, it had the burden, even though Flagler Hospital has the burden at trial to prove its charges are reasonable. The trial court did not find that Southern-Owners met its burden before it imposed the burden on Flagler Hospital to demonstrate the reasonableness of its charges. Therefore, the trial court erred.

3. Flagler Hospital's motion for appellate attorney's fees

Flagler Hospital filed a motion seeking appellate attorney's fees under Florida Statute section 627.428, which provides for an award of attorney's fees to an insured that prevails against an insurance company on appeal. The Court grants Flagler Hospital's motion contingent upon it

ultimately prevailing under the insurance policy.

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

1. The "Final Summary Judgment in Favor of Defendant," filed on October 23, 2014, is **REVERSED** and this matter is **REMANDED** for proceedings consistent with this opinion.

2. Flagler Hospital's motion for appellate attorney's fees, filed on December 24, 2015, is **GRANTED** contingent upon Flagler Hospital prevailing under the insurance policy, and the assessment of those fees is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 15th day of March, 2016.

/S/
CHRISTI L. UNDERWOOD
Presiding Circuit Judge

MURPHY and O'KANE, 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 Faye L. Allen, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **Russel Lazega, Esq., and David Hwalek, Esq.,** Florida Advocates, 45 E. Sheridan St., Dania Beach, FL 33004; and **Rhaman M. Love-Lane, Esq.**, Smith, Rolfes & Skavdahl Company, L.P.A., 110 E. Broward Blvd., Suite 1700, Ft. Lauderdale, FL 33301, on this 15th day of March, 2016.

/S/
Judicial Assistant