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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant,

v.

PAN AM DIAGNOSTIC SERVICES, INC., d/b/a PAN AM DIAGNOSTIC OF ORLANDO a/a/o Jimmy Celestin,

Appellee.
_____/

Case No. 2015-CV-000110-A-O
Lower Case No.: 2013-SC-5921-O

Appeal from the County Court,
for Orange County, Florida,
Tina Caraballo, County Judge.

Kenneth P. Hazouri, Esquire,
for Appellant.

Robert W. Morris, Esquire, and
Crystal L. Eiffert, Esquire,
for Appellee.

Before EGAN, BLACKWELL, and THORPE, 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 Final Judgment in Favor of Plaintiff rendered on October 2, 2015, which was entered pursuant to a directed verdict in favor of Pan Am Diagnostic (Pan Am), the Plaintiff below.[1] 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.

Jimmy Celestin, the insured, was involved in an automobile accident. At the time of the accident, Celestin was covered under an automobile insurance policy issued by State Farm. He received a lumbar MRI from Pan Am, and assigned his automobile insurance benefits to Pan Am, which then billed State Farm $2,150 for the MRI.

State Farm in its explanation of review (EOR) determined that the reasonable expense for Pan Am's MRI did not exceed $1,066.28, and paid Pan Am PIP benefits of $853.02, which is 80% of $1,066.28. State Farm relied on the statutory fee schedule, *see* section 627.736(5)(a)2., Florida Statutes, in limiting the reimbursement to $1,066.28, as its EOR further explained that the reimbursement was "based upon 200% of the 2007 Participating Level of Medicare physician fee schedule." 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.

Pan Am filed suit seeking to recover additional PIP benefits based on its full $2,150 charge for the MRI. State Farm answered the complaint and claimed as an affirmative defense that Pan Am's $2,150 charge for the MRI was unreasonable.

The instant case proceeded to a jury trial. Among other things, Pan Am's owner, Roberta Kahana, testified at trial that she set the $2150 price for a lumbar MRI, and that this price had remained consistent for the three years prior to the date of service at issue. Kahana derived the price by calling other providers and hospitals, and referencing the cost breakdowns for the Orlando area as listed in the Ingenix database. The charges ranged from $1500 to $6000, and she chose a rate in the middle.

Pan Am then moved for a directed verdict on the factual issue of the reasonableness of its charge. The trial court heard argument and reserved ruling to allow the parties to file written

submissions briefing the issue. The jury entered a verdict for State Farm, specifically finding that Pan Am's $2,150 charge was not reasonable, and that a reasonable charge was $1,066.28.

After trial, Pan Am filed its written Motion for Directed Verdict as to Reasonableness of Price. The trial court in its Order on Plaintiff's Motion for Directed Verdict as to Reasonableness of Price and Other Post-Trial Motions noted that there was "no dispute" that State Farm used a fee schedule in making payment for the MRI, and that State Farm's insurance policy improperly failed to give notice of its election to use the fee schedule. The trial court also found that in view of the testimony adduced at trial, "there was [a] sufficient basis that the jury might find the charge unreasonable."

However, the trial court ultimately concluded it was required to grant Pan Am's motion for directed verdict based on *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*, *Progressive American Insurance Co. v. Emergency Physicians of Central Fla*., 186 So. 3d 1136 (Fla. 5th DCA 2016), since under *Progressive American* "the insurer has already conceded reasonableness in paying pursuant to the fee schedule so it may not thereafter contest reasonableness." Pursuant to the directed verdict, the trial court entered final judgment in favor of Pan Am in its Final Judgment in Favor of Plaintiff, awarding $972.54 and $161.24 in prejudgment interest, for a total sum of $1,028.22.

On appeal, State Farm argues that the trial court reversibly erred in directing a verdict in favor of Pan Am.[2] State Farm claims that the jury was entitled to find that Pan Am's charge for the MRI charge was not reasonable in view of Kahana's testimony. State Farm also claims that the trial court erred in following *Progressive American Insurance Co. v. Emergency Physicians of*

[2]As this point on appeal is dispositive, we need not address State Farm's other points on appeal.

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) in directing a verdict, 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 well after this Court's decision in *Progressive American* and the trial court's ruling pursuant to *Progressive American*. State Farm is correct.

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 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*.

Thus, 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.

In light of *Progressive Select*, it is clear that the trial court reversibly erred in following *Progressive American* and granting a directed verdict in favor of Pan Am on the reasonableness issue. Under *Progressive Select* it is of no consequence that State Farm used a fee schedule in paying for the MRI, and that its insurance policy failed to give notice of its election to use the fee schedule. Rather, under *Progressive Select*, State Farm was merely precluded from availing itself of the fee schedule limitation. Otherwise, State Farm remained free to litigate the reasonableness of Pan Am's bill for the MRI. *See Progressive Select*, 202 So. 3d at 438.

As indicated, State Farm was indeed afforded the opportunity to litigate the reasonableness of Pan Am's bill for the MRI in a jury trial. Notably, the jury verdict specifically found that Pan Am's $2,150 bill for the MRI was not reasonable, and that a reasonable amount was $1066.28. Also notably, the trial court, in reviewing Kahana's testimony, found that "there was [a] sufficient basis that the jury might find the charge unreasonable." The court explained:

> At trial, [Pan Am's] evidence as to reasonableness was that [Kahana], in 2009, called other MRI providers and selected a price roughly in the middle using the highest and lowest amounts charged in the community. [Kahana] also stated the charge was in the middle

> of the prices reported on the Ingenix database. [Kahana] further testified that the price had not increased from 2009 and that she believed that the price to be reasonable.
>
> [Kahana] did not testify as to the cost of actually providing the MRI, the cost to run the facility, what the profit margin of the facility is or any other fact that might demonstrate the charge was reasonable. [Pan Am] offered no other providers in the area to testify a charge of $2150.00 was reasonable. Just because [Pan Am's] charge was in the middle of what other providers charge does not make it *ipso facto* reasonable.

The trial court's finding and explanation with respect to Kahana's trial testimony are consistent with Florida law. *See, e.g.*, *Sanders v. ERP Operating Ltd. Partnership*, 157 So. 3d 273, 277 (Fla. 2015) ("In order for a court to remove the case from the trier of fact and grant a directed verdict, there must only be one reasonable inference from the plaintiff's evidence.").

We conclude that the jury was fully entitled to find, as it did, that Pan Am's charge for the MRI was not reasonable, and that the trial court reversibly erred in directing a verdict for Pan Am in light of the Fifth District's decision in *Progressive Select*. Accordingly, pursuant to *Progressive Select*, we reverse the Order on Plaintiff's Motion for Directed Verdict as to Reasonableness of Price and Other Post-Trial Motions and Final Judgment in Favor of Plaintiff.

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

1. The Order on Plaintiff's Motion for Directed Verdict as to Reasonableness of Price and Other Post-Trial Motions and Final Judgment in Favor of Plaintiff, both rendered on October 2, 2015, are **REVERSED** and this matter is **REMANDED** to the trial court with directions to enter final judgment in favor of State Farm and for further proceedings consistent with this opinion.

2. Pan Am's Motion for Entitlement to Attorneys' Fees pursuant to section 627.428, Florida Statutes, section 627.736(8), Florida Statutes, and Rule of Appellate Procedure 9.400(b), filed on August 4, 2016, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 13th day of March, 2017.

/S/
ROBERT J. EGAN
Presiding Circuit Judge

BLACKWELL and THORPE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the **Honorable Tina Caraballo**, Orange County Judge, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; the **Honorable David P. Johnson**, 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; **Robert W. Morris, Esq.**, Eiffert & Associates, P.A., 1199 N. Orange Ave., Orlando, FL 32804; and **Crystal L. Eiffert, Esq.**, Eiffert & Associates, P.A., 1199 N. Orange Ave., Orlando, FL 32804, on this 13th day of March, 2017.

/S/
Judicial Assistant