

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502016AP900269XXXXMB
L.T. NO.: 502014CC004978XXXXMB

PROGRESSIVE SELECT INSURANCE
COMPANY,

Appellant,

v.

LAMON WADE,
Appellee.

Opinion filed:

AUG 21 2018

Appeal from the Palm Beach County Court, Judge Frank Castor

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PER CURIAM.

We grant Appellant's Motion for Clarification, withdraw our previous opinion, filed on July 3, 2018, and replace it with the following. Appellant, Progressive Select Insurance Company ("Progressive"), appeals the trial court's final summary judgment entered in favor of Appellee, Lamont Wade ("Wade"). Wade was insured under one of Progressive's automobile insurance policies, which granted him personal injury protection ("PIP") benefits up to \$10,000.00 for an emergency medical condition and up to \$2,500.00 for a non-emergency medical condition. Wade originally filed a breach of contract claim against Progressive. The parties filed cross-motions for summary judgment, and the trial court determined that Wade did not meet the pre-suit demand letter requirements under section 627.736(10), Florida Statutes. Wade then sought leave to amend his original complaint to add the instant underlying action for declaratory relief. In his amended complaint, Wade specifically asked the trial court to determine the rights and obligations of the parties, including the amount of PIP benefits to which he was entitled by determining whether he had suffered from an emergency medical condition.

Progressive and Wade also filed cross motions for summary judgment on Wade's action for declaratory relief. The trial court entered final summary judgment in favor of Wade, determining that he was entitled to receive up to \$10,000.00 in PIP benefits as well as the remainder of available PIP benefits, totaling \$5,002.28. Progressive argues on appeal that Wade

did not have standing to properly bring the declaratory action because a justiciable controversy did not exist. Progressive also argues that the trial court improperly awarded Wade the remainder of PIP benefits because Wade never filed a proper pre-suit demand letter, a statutory condition precedent to filing any action for benefits.

Where the trial court grants one party's cross-motion for summary judgment on a declaratory judgment action based upon undisputed facts, the standard of review is *de novo*. *Liork, LLC v. BH 150 Second Avenue, LLC*, No. 3D-16-1881, 2018 WL 988294 at *2 (Fla. 3d DCA 2018) (citing to *Lee City Elec. Coop., Inc. v. City of Cape Coral*, 159 So. 3d 126, 127 (Fla. 2d DCA 2014)).

To bring an action for declaratory relief, the party must show that there is a bona fide, actual, present practical need for the declaration and that the declaration deals with a present controversy as to a state of facts. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 404 (Fla. 1996) (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991)). The test to activate jurisdiction under the Declaratory Judgments Act is "whether or not the moving party shows that he is in doubt as to the existence or nonexistence of some right, status, immunity, power or privilege and that he is entitled to have such doubt removed and if shown to be existent, seek such relief as the circumstances warrant." *Flagship Real Estate Corp. v. Flagship Banks, Inc.*, 274 So. 2d 1020, 1021 (Fla. 2d DCA 1979) (citing to *Caldwell v. North*, 24 So. 2d 806, 806 (Fla. 1946)); see § 86.011, Fla. Stat. (2015). An insured is entitled to bring a declaratory judgment action in order to determine whether coverage exists on the basis of the facts underlying a claim against an insurance policy. *Higgins v. State Farm Fire and Cas. Co.*, 894 So. 2d 5, 15 (Fla. 2004).

We find that the trial court properly denied Progressive's motion for summary judgment.

The trial court found that a justiciable controversy existed as to the amount of PIP benefits Wade was entitled to under his insurance policy with Progressive. Progressive's payment above the \$2,500.00 PIP benefit amount did not resolve the dispute of whether Wade had suffered from an emergency medical condition, but instead created a dispute as to the amount of PIP benefits Wade was entitled to under the policy. The Court agrees with the trial court's finding that Wade had standing to seek declaratory relief in this case because he was in doubt as to the amount of coverage he was entitled to, as evidenced by the fact that the parties disputed whether Wade had suffered from an emergency medical condition.

We find, however, that the trial court erred by granting Wade's motion for summary judgment insofar as it determined that Progressive owed \$5,002.28 to Wade, because Wade did not satisfy the pre-suit demand letter requirements under section 627.736(10), Florida Statutes.

"As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b). The notice must state that it is a 'demand letter under s. 627.736' and state with specificity: (1) The name of the insured . . .; (2) The claim number . . . upon which such claim was originally submitted to the insurer; (3) to the extent applicable, the name of any medical provider who rendered to an insured the treatment services, accommodations, or supplies that form the basis of such a claim; and (4) an itemized statement specifying each exact amount, the date of treatment, service or accommodation, and the type of benefit claimed to be due." § 627.736(10), Fla. Stat. (2013) (emphasis added).

"The statutory requirements surrounding a demand letter are significant, substantive preconditions to bringing a cause of action for PIP benefits." *MRI Associates of America, LLC v.*

State Farm Fire and Casualty Company, 61 So. 3d 462 (Fla. 4th DCA 2011). However, a pre-suit demand letter under section 627.736(10) is not a condition precedent to filing a declaratory judgment action if the complaint seeks declaratory judgment only as to coverage and does not seek money damages for PIP benefits. *See MG Ins. Co. v. Steven Keith Massage*, 19 Fla. L. Weekly Supp. 1055a (Fla. 18th Jud. Cir. App. Jun. 7, 2012).

In its order granting Progressive's first motion for summary judgment on the original breach of contract action, the trial court previously determined that Wade's pre-suit demand letter to Progressive did not satisfy the statutory requirements of section 627.736(10) because "an itemized statement specifying each exact amount" was not included. Although Wade did not seek money damages in his Amended Complaint for Declaratory Relief, Wade sought money damages from the trial court in his motion for summary judgment. This was improper. The Court finds that satisfaction of the pre-suit demand letter requirements under section 627.736(10) was a condition precedent to any request for monetary relief made by Wade because such a request qualifies as "an action for benefits" as defined under section 627.736(10). Wade's request for money damages in his motion for summary judgment thus created "an action for benefits," mandating compliance the pre-suit demand letter requirements of section 627.736(10). If Wade had requested monetary relief in his Amended Complaint for Declaratory Relief, he would have brought "an action for benefits" as provided under section 627.736(10), mandating compliance with section 627.736(10)'s pre-suit demand letter requirements. Therefore, the Court finds that the trial court erred by awarding monetary damages to Wade in its final summary judgment because Wade not only improperly requested such monetary relief in his motion for summary judgment but also failed to satisfy the pre-suit demand letter requirements of section 627.736(10).

Accordingly, we AFFIRM in part and REVERSE in part the trial court's final summary

judgment in favor of Wade. We AFFIRM the trial court's factual findings regarding the parties' rights and obligations, whether Wade had suffered from an EMC, and the amount of coverage Wade was entitled to as a result. However, we REVERSE the portion of the final summary judgment in which the trial court determined that Wade was entitled to \$5,002.28 and awarded same, and REMAND for further proceedings.

We also DENY Progressive's Motion for Appellate Attorney's Fees under section 768.79, Florida Statutes, because the trial court must first make a determination as to whether Progressive was entitled to receive attorney's fees under section 768.79, Florida Statutes by considering the factors set forth in the statute. We GRANT Wade's Motion for Appellate Attorney's Fees because Wade "recovered" fees under section 627.428, Florida Statutes, by obtaining a declaratory judgment from the trial court in its favor. *See Old Republic Ins. Co. v. Monsees*, 188 So. 2d 893, 895 (Fla. 4th DCA 1966) ("The application of the statute is not limited to suits for the recovery of money") (citing to *Continental Casualty Co. v. Giller Concrete Co.*, 116 F. 2d 431, 432 (Fla. 5th DCA 1940)).

HAFELE, ROWE, and NUTT, JJ., concur.

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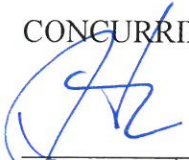
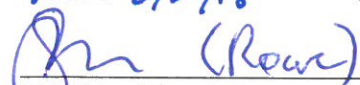
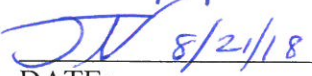
Date of Appeal: November 7, 2016

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DATE OF PANEL: APRIL 16, 2018

PANEL JUDGES: HAFELE, ROWE, NUTT

AFFIRMED/REVERSED/OTHER: OTHER

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:	)
	)	With/Without Opinion	)	With/Without Opinion	)
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