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

EXPRESS CONSOLIDATION, INC.

Appellant,

APPELLATE DIVISION (CIVIL)
CASE NO.: 502007AP000019XXXXMB
L.T.: 502003CC28559XXXXMB
Division: 'AY'

DELRAY FUNDING CORP.
a/k/a DELRAY FUNDING, INC.,
a Florida Corporation and
JAMES ATWOOD, Individually,

Appellees.

Opinion filed: OCT 3 0 2007

**Appeal from the County Court in and for Palm Beach County, Florida**
**Judge Laura S. Johnson.**

For Appellant: Steven A. Smilack, Esq., 712 East McNab Road, Pompano Beach, Florida 33060.

For Appellee: George L. Sigalos, Esq., Simon, Sigalos & Spyredes, P.A., 3839 Northwest Boca Raton Boulevard, Suite 100, Boca Raton, Florida 33431.

Reversed and remanded.

Appellant Express Consolidation appeals (1) the trial court's Order dated December 30, 2006 granting Final Summary Judgment in favor of Appellee Atwood 'as to Count I—Breach of Contract and **(2)** the trial court's non-final Order dated November 4, 2005 dismissing with prejudice Count 11—Fraud in the Inducement and Count 111—Indemnification of Appellant's Amended.Third Party Complaint. For the reasons expressed below, we REVERSE.

Upon a Motion for Summary Judgment, the movant has the burden of conclusively demonstrating the non-existence of any genuine issue of material fact. Holl v. Talcott, 191 So.

2d 40, 43-44 (Fla. 1966). The burden of demonstrating the existence of genuine issues does not shift to the opposing party until the movant has successfully met its burden. *Sasson v. Rockwell Mfg. Co.,* 715 So. 2d 1066, 1067 (Fla. 3d DCA 1998). When considering a Motion for Summary Judgment, it is settled that a trial court is not permitted to weigh material conflicting evidence of pass upon the credibility of the witnesses. *Id.* at 1067. Further, the Court must draw every possible inference in favor of the party against whom a Summary Judgment is sought. *Gonzalez v. B & B Cash Grocery Stores,* 692 So. 2d 297 (Fla. 4th DCA 1997). If the record raises even the slightest doubt that an issue might exist, Summary Judgment is precluded. *Fatherly v. California Federal Bank, FSBO,* 703 So. 2d 1101 (Fla. 2d DCA 1997). Based upon the record, the Appellee failed to conclusively demonstrate that there were no genuine issues of material fact as to the nature and extent of undertakings by Appellee Atwood.

As to dismissal with prejudice as to Counts II and III, a claim should not be dismissed with prejudice "without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action." *Kairalla v. John D. and Catherine T. MacArthur Found.,* 534 So. 2d 774, 775 (Fla. 4th DCA 1988). In Florida, the opportunity to amend a complaint should be liberally given. *See Gamma Dev. Corp. v. Steinberg,* 621 So. 2d 718 (Fla. 4th DCA 1993); *Dryden Waterproofing, Inc. v. Bogard,* 488 So. 2d 672, 673 (Fla. 4th DCA 1986) ("[L]eave to amend a complaint should be freely granted when justice so requires and it should not be denied unless the privilege has been abused."). Based on our review of the record on appeal, it cannot be said that Appellant is unable to state a cause of action for Fraud in the Inducement and for Indemnification. Moreover, the record does not reflect that Appellant has abused the privilege of amending its Complaint.

Based upon the foregoing, the Final Summary Judgment in regard to Count I is hereby reversed. The trial court's Order dismissing with prejudice Counts II and III is hereby reversed with directions to the trial court to allow the Appellant to amend.

Appellant's Motion for Attorney's Fees filed pursuant to Fla. R. App. P. 9.400 and paragraph 1.F(c) of the parties' Global Settlement Agreement is granted should the Appellant ultimately prevail in this case.

STERN, CROW, and HOY, JJ., concur

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

PROGRESSIVE AMERICAN INSURANCE COMPANY,

Appellant,

GARY H. DIBLASIO, M.D., P.A. a/a/o Mark Holland,

Appellee:

_____/

APPELLATE DIVISION (CIVIL)
Case No.: 502006AP000045XXXXMB
L.T.: 502005SC007324XXXXSBRD
Division: 'AY'

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Opinion file

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-Payment

Appeal fro **County, Florida,**
**Judge Deb!**

For Appella k of America Tower, 100 Southeast

For Appelle Federal Highway, Ste. 101E, Boca

(MAASS, J.)

Appellant, Progressive American Insurance Company, appeals the trial court's summary judgment for Appellee, Gary H. DiBlasio, M.D., P.A., which found it was undisputed that Progressive breached its personal injury protection policy by failing to pay a reasonable fee for a needle electromyography procedure. We find that there was a disputed issue of material fact, and reverse.

Mark Holland had no-fault insurance with Progressive when he was injured in a February 7, 2004 car accident. He treated with Gary H. DiBlasio, M.D., P.A., to which he assigned his, PIP benefits.

Dr. DiBlasio performed a needle electromyography ("needle emg") procedure, billing Progressive $600.00. Progressive did not dispute the necessity of the test, but reduced the allowable amount to $280.49, asserting in its explanation of benefits that DiBlasio was limited to the 2001 Medicare Part B schedule under "Ch. 2001-271 SB 1092." Presumably, Progressive was referring to section 6 of the cited chapter, which amended Florida Statute §627.736(5)(a) to permit consideration of usual and customary charges and payments made by and to the provider, prevailing community charges, and federal and state medical fee schedules for insurance purposes, as well as other relevant information, in setting a reasonable fee.

DiBlasio moved for summary judgment, arguing that Progressive could not rely on the Medicare schedule to reduce the allowable amount for the needle emg procedure, filing its principal's affidavit. Progressive filed affidavits from Michael Zeide, an orthopedic surgeon, and Michelle Buck, a litigation specialist.[1] Diblasio's affidavit averred that "(t)he $600.00 charge for the needle emg procedure is reasonable in amount based on my knowledge and experience." Zeide's affidavit averred that ". . . the $600.00 charge for [the needle emg procedure] was not reasonable."

The trial court framed the motion as addressing two issues: first, whether Florida Statute §627.736 caps the fee for a needle emg procedure; and second, if not, whether an insurer may rely on the Medicare reimbursement schedule to set a reasonable fee. It answered both questions in the negative.

[1] Michelle Buck's affidavit averred that "Progressive utilized a method, in accordance with Florida Statutes, that determined the $600.00 charged by [Diblasio] for [the needle emg procedure] was not reasonable based upon the area where the service was provided, as well as the date of the service." Buck's opinion that Progressive complied with Florida Statutes in computing a reasonable fee is not competent or relevant: the affidavit did not qualify her as an expert in determining fees and, even if it had, "(e)xpert testimony is not admissible concerning a question of law. Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of expert opinion." Lee *County v. Barnett Banks, Inc.*, 711 So. 2d 34 (Fla. 2d DCA 1997) (citations omitted)).

We agree with the trial court that Florida Statute §627.736(5) (b) 3. and 4. address fees for nerve conduction studies, not needle emg procedures. We disagree with the trial court's statement of the second issue, though. Once Progressive disputed the charge's reasonableness, DiBlasio bore the burden of proving its charge was reasonable. ***See Derius*** v. *Allstate* ***Indemnity Co.,*** 723 So. 2d 271 (Fla. 4th DCA 1998). In opposing DiBlasio's reasonableness contention, Progressive was not limited to the grounds included in its explanation of benefits. ***See*** §627.736(4)(b), Fla. Stat. (insurer may give insured explanation of benefits, but "this shall not limit the introduction of evidence at trial; . . . (t)his paragraph does not preclude or limit the ability of the insurer to assert that the claim was . . . unreasonable . . . Such assertion by the insurer may be made at any time, including after payment of the claim or after the 30-day time period for payment . . ."); ***United Automobile Insurance Co.*** v. ***Rodriguez,*** 808 So. 2d 82 (Fla. 2001).

The proper second issue, then, was not whether Progressive's explanation of benefits was sufficient to raise a disputed issue of material fact as to the reasonableness of the charge, but whether there was ***any*** record evidence disputing reasonableness. Progressive submitted Zeide's affidavit. Zeide averred that he was a board certified orthopedic surgeon practicing in Palm Beach County; that he was familiar with reasonable and customary medical treatment and billing in Palm Beach County; that his practice routinely performed and billed for needle emg procedures in Palm Beach County; and that in his opinion the $600 charge was not reasonable for a needle emg procedure in Palm Beach County on March 18,2005. The trial court struck Dr. Zeide's affidavit, for three reasons: it was irrelevant under Florida Statute §627.737(7)(a); it was conclusory; and it contained hearsay within hearsay.

Florida Statute §627.736(7) governs withdrawal of benefits. The trial court found that it applied to the reduction of benefits. It does not. See Derius. Consequently, it does not preclude consideration of Zeide's affidavit.

The trial court ruled that Zeide's affidavit should be stricken as conclusory, citing to Frasher v. Fox Distributing of S.W. Florida, *Inc.*, 813 So. 2d 1017 (Fla. 2d DCA 2002). There, the Second District ruled that a pre-judgment writ of attachment was improperly issued based on an affidavit which was predicated on "information and belief', and not personal knowledge, and expressed a "belief' that the defendant might abscond with the property sought to be attached. The Second District noted that both the attachment statute and the Due Process clause permit a prejudgment writ of attachment to issue only in specific circumstances. A lay person's belief or, stated differently, his opinion that such a circumstance exists is insufficient. A lay person, in general, may not testify to opinion. §90.701(2), Fla. Stat. **An** expert witness may. $90.702, Fla. Stat. Zeide's affidavit testimony that the charge was unreasonable is an appropriate expert opinion, as is DiBlasio's opinion that it was. It is not an impermissible conclusion. See *Castro* v. *Brazeau*, 873 So. 2d 516, 517 (Fla. 4th DCA 2004) (on summary judgment, "(t)he conclusion of one passenger that [defendant] had to be speeding based upon the crash damage caused to [plaintiffs] vehicle was not competent evidence because the passenger was not qualified as an expert." (citation omitted)).

Finally, Zeide's opinion is not invalid because the peer review referred to is not attached. An expert's affidavit is the functional equivalent of his direct testimony. The facts and data underlying his opinion need not be disclosed. See Fla. Stat. §90.705(1). *McElroy* v. Perry, 753 So. 2d 121 (Fla. 2d DCA 2000), relied on by the trial court, does not dictate a different result. That case holds that a compulsory medical examiner's written report does not meet the business

record exception to the hearsay rule. We agree that Zeide's peer review, if it exists in written form, would not qualify as a business record for hearsay purposes. It was not required as a predicate for his expert opinion, though. See *Holl* v. *Talcott*, 191 So. 2d 40 (Fla. 1966) (affidavits in opposition to summary judgment should be liberally read; opponent of motion is not obligated to have his expert witness cover all predicates that would be required at trial; expert affidavit in opposition to defendants' motion for summary judgment in medical malpractice action not insufficient because it did not offer medical explanation for affiant's opinion that health care providers departed from requisite standards of care). Assuming without deciding that Rule 1.510(e), Fla. R. Civ. P. required it be attached to support the averments in paragraph 6 of the affidavit, that paragraph only should have been stricken. See Verdino v. Charcoal *Pitt,* Inc., 898 So. 2d 246 (Fla. 4th DCA 2005).

We conclude that Progressive was not confined to its explanation of benefits in refuting DiBlasio's assertion that the charge was reasonable, and that Zeide's affidavit created a disputed issue of material fact concerning the reasonableness of the charge.

This case is REVERSED AND REMANDED to the trial court with directions to vacate the final judgment and deny Plaintiff's Motion for Partial Summary Judgment Regarding CPT Code 95861.

FRENCH and FINE, JJ., concur.