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

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502012AP000060XXXXMB
L.T. No.: 502011SC008363XXXXSB

TIMOTHY KEHRIG, D.C., P.A.,
Appellant,

v.

MERCURY INSURANCE CO. OF FLORIDA,
Appellee.
_____/

Opinion filed: MAY 30 2014

Appeal from the County Court in and for Palm Beach County, Judge Reginald Corlew.

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PER CURIAM.

This appeal seeks review of a county court order granting final summary judgment in favor of Defendant/Appellee Mercury Insurance Company of Florida ("Insurer"). The Plaintiff/Appellant Timothy M. Kehrig, D.C., P.A., a/a/o Maria Vega ("Dr. Kehrig"), argues on appeal that the trial court erred in finding that the Insurer's personal injury protection ("PIP") insurance policy (referred to herein as the "U85 Endorsement" or "the policy") clearly and unambiguously invokes the payment schedule in section 627.736(5)(a)(2)(f), Florida Statutes (2010) (referred to herein as the "permissive reimbursement schedule"). The permissive

reimbursement schedule, which is part of Florida's No-Fault Law, limits reimbursements paid by insurers on PIP claims. The Insurer reimbursed Dr. Kehrig pursuant to this schedule. Dr. Kehrig claims that the language of the policy is ambiguous, and as such, the Insurer should not have paid him pursuant to this schedule. Accordingly, he claims that the payment received is insufficient. We agree and reverse for further proceedings.

Factual Background

The facts here are not in dispute. The medical bills stem from a motor vehicle accident on September 23, 2010, involving the insured, Maria Vega ("Ms. Vega"). Ms. Vega sought treatment from Dr. Kehrig. Ms. Vega validly assigned Dr. Kehrig her rights to the proceeds of her insurance policy with the Insurer. Of the total amount billed by Dr. Kehrig, the Insurer paid a portion, in accordance with the permissive reimbursement schedule. Dr. Kehrig sued the Insurer for further reimbursement. The Insurer alleged, as its sole affirmative defense, that no further payment remained owing. The parties filed cross-motions for summary judgment on this issue. Following oral argument, the trial court granted the Insurer's motion and denied Dr. Kehrig's motion, finding that no further payment was owed. The trial court also found that the U85 Endorsement unambiguously invoked the permissive reimbursement schedule. Presently before the Court is Dr. Kehrig's appeal of the trial court's denial of his motion for summary judgment, which we review *de novo*.

Discussion

We find that the lower court erred by finding that the policy was unambiguous in invoking the permissive reimbursement schedule. In interpreting insurance policies, the Court is bound by the plain meaning of the text. *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569 (Fla. 2011). A provision is not ambiguous "simply because it is complex or requires analysis." *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) (quoting *Garcia v. Fed.*

Ins. Co., 969 So. 2d 288, 291 (Fla. 2007)). "Policy language is considered to be ambiguous . . . if the language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage." *PCR*, 889 So. 2d at 785 (citations omitted). In such cases, courts will generally "resolve the ambiguity in favor of the insured by adopting the reasonable interpretation of the policy's language that provides coverage as opposed to the reasonable interpretation that would limit coverage." *Id.* at 785–86.

1. PIP Mechanisms for Calculating Reimbursement

Florida's No-Fault statute requires every PIP insurer to reimburse eighty percent of all "reasonable expenses." § 627.736(1), Fla. Stat. (2010). In determining reasonableness, however, the statute provides two methods for calculation – a "default" and a "permissive" reimbursement schedule. The default method of calculating reasonableness is a fact-dependent inquiry, in which "consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community," as well as "various federal and state medical fee schedules" and "other information relevant to the reasonableness of the reimbursement." § 627.736(5)(a)(1), Fla. Stat. (2010).

The statute also provides an alternative, permissive schedule for determining reasonableness, which allows insurers to determine reasonableness by reference to the Medicare fee schedules. This permissive schedule provides that an insurer *may* limit reimbursement to "200 percent of the allowable amount under the participating physicians schedule of Medicare Part B." § 627.736(5)(a)(2)(f), Fla. Stat. (2010). The dispute in the present case centers around whether the Insurer adequately elected to calculate reimbursements using the permissive reimbursement schedule.

2. Electing the Permissive Reimbursement Schedule

"When the plain language of the PIP statute affords insurers two different mechanisms

for calculating reimbursements, the insurer must clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, No. SC12-905, 2013 WL 3332385, at *9 (Fla. Jul. 3, 2013). Accordingly, in order for the Insurer to apply the permissive reimbursement schedule in the present case, the U85 Endorsement must clearly and unambiguously give notice that it is electing to do so.

In *Virtual*, the Florida Supreme Court considered whether the following policy language clearly and unambiguously elected the permissive fee schedule:

> Under Personal Injury Protection, the Company will pay, in accordance with, and subject to the terms, conditions, and exclusions of the Florida Motor Vehicle No–Fault Law, as amended, to or for the benefit of the injured person: (a) 80% of medical expenses; and (b) 60% of work loss; and (c) Replacement services expenses; and (d) Death benefits. The above benefits will be provided for injuries incurred as a result of bodily injury, caused by an accident arising out of the ownership, maintenance or use of a motor vehicle and sustained by: (1) You or any relative while occupying a motor vehicle or, while a pedestrian through being struck by a motor vehicle; or (2) Any other person while occupying the insured motor vehicle or, while a pedestrian, through being struck by the insured motor vehicle.

Virtual, 2013 WL 3332385, at *2. The *Virtual* policy also defined the term "medical expenses" as "reasonable expenses for medically necessary medical, surgical, x-ray, dental, ambulance, hospital, professional nursing and rehabilitative services for prosthetic devices and for necessary remedial treatment and services recognized and permitted under the laws of the state for an injured person." *Id.* The Court, citing the Fourth District Court of Appeal's reasoning in *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.*, 63 So. 3d 63, 67-68 (Fla. 4th DCA 2011), rejected the argument that the policy's references to the No-Fault law incorporated the permissive schedule. *Virtual*, 2013 WL 3332385 at *9. The Court further found that the policy did not specifically refer to the permissive schedule, and therefore failed to clearly and unambiguously invoke it.

In *Kingsway*, the Fourth District Court of Appeal found that a policy does not

unambiguously invoke the permissive reimbursement schedule where the policy requires payment in accordance with the default reimbursement schedule:

> The applicable policy made no reference to [permissive reimbursement schedule]. The policy cites the No–Fault Act, states it will pay "80% of medical expenses," and defines medical expenses as those that it is required to pay "that are reasonable expenses for medically necessary . . . services." That is the language of [the default reimbursement schedule]. The policy does not say it will pay 80% of 200% of Medicare Part B Schedule as provided in [the permissive schedule].
>
> We reject [the insurer's] argument that, because the PIP statute is incorporated into the policy, it had the unilateral right to ignore the only payment methodology referenced in the policy.

63 So. 3d at 67. Pursuant to *Virtual* and *Kingsway*, mere reference to the statute is insufficient to elect the permissive reimbursement schedule, especially where the policy language specifically cites the default reimbursement schedule. Additionally, a policy must be specific in invoking the permissive reimbursement schedule in order to clearly and unambiguously put the insured on notice that the permissive reimbursement schedule will be applied.

3. Interpreting the U85 Endorsement

In the present case, the U85 Endorsement states, in pertinent part, that the Insurer will only pay medical benefits "[f]or medically necessary services, supplies, treatment and care that do not exceed the maximum reimbursement allowance as set forth in the applicable fee schedules and payment limitations, and other payment guidelines, in the No-Fault Law, and any schedules and limitations under federal or state law for medical expenses." The policy defines "medical benefits" as "80% of all reasonable expenses allowed by the No-Fault Law, subject to the applicable fee schedules and payment limitations."

The policy does not make any reference to the permissive reimbursement schedule, much less make an election between the default and permissive schedules. The policy's reference to "applicable fee schedules and payment limitations" in the No-Fault law does not shed any light as to which reimbursement schedule the Insurer was attempting to invoke; it could be interpreted

as referring to either. Both reimbursement schedules incorporate external "fee schedules" – the default schedule references "various federal and state medical fee schedules applicable to automobile and other insurance coverages," § 627.736(5)(1)(a), Fla. Stat. (2010), while the permissive schedule invokes Medicare fee schedules, § 627.736(5)(2)(f), Fla. Stat. (2010). Both of the reimbursement schedules function as "payment limitations." Moreover, the general reference to the No-Fault law does not clarify the matter, *see Virtual*, 2013 WL 3332385 at *9, and the alternative nature of the two schedules logically prevents them from operating concurrently, *see Kingsway*, 63 So. 3d at 67 (the language of the statute "anticipates that an insurer will make a choice"). Essentially, the policy could be interpreted as electing either the permissive or the default schedule. The policy therefore fails to clearly and unambiguously elect the permissive schedule, and as such, is insufficient to notify the insured that payments will be made in accordance with such.

This interpretation of the U85 Endorsement is in line with the vast majority of case law. Similar policies have been held ambiguous by the Eleventh Circuit Court. *See, e.g., Gables Ins. Recovery, Inc. v. Progressive Express Ins. Co.*, 2014 WL 222088, at *3-*4 (Fla. 11th Cir. Ct. Jan. 21, 2014); *Maldonado-Garcia v. Mercury Indemnity Co. of America*, 2013 WL 6646823, at *1-*3 (Fla. 11th Cir. Ct. Dec. 16, 2013). Additionally, Dr. Kehrig cited numerous Florida county court orders finding that the U85 Endorsement does not invoke the section 627.736(5)(a)(2)(f) fee schedule clearly and unambiguously.[1] Although not binding, the

[1] *See, e.g., Gables MRA (a/a/o Maria Quiroz) v. Mercury Ins. Co. of Fla.*, Case 12-15925 SP (1) (Fla. Miami-Dade Cty. Ct. May 30, 2013); *ISOT Medical Center Corp. (a/a/o Jacqueline Olivia) v. Mercury Ins. Co. of Fla.*, Case No. 12-03616 SP 26 (03) (Fla. Miami-Dade Cty. Ct. May 20, 2013); *Gables Ins. Recovery, Inc. (a/a/o Mayelin Imas) v. Mercury Ins. Co. of Fla.*, Case No. 12-5758 SP 25 (01) (Fla. Miami-Dade Cty. Ct. May 15, 2013); *Tri-County Accident Clinic, LLC (a/a/o Jonathan Zaretsky) v. Mercury Ins. Co. of Fla.*, Case No. 12-8745 COCE (53) (Fla. Broward Cty. Ct. May 9, 2013); *Bruce M Glech, D.C., P.A. (a/a/o Raul Arbelaez) v. Mercury Ins. Co. of Fla.*, Case No. 12-008375 CONO 72 (Fla. Broward Cty. Ct. April 1, 2013); *Oakland Park MRI, Inc. (a/a/o Chad Terpstra) v. Mercury Ins. Co. of Fla.*, Case No. 12-8283 COCE 53 (Fla. Broward Cty. Ct. Feb. 21, 2013); *Rivero Diagn. Center, Inc. (a/a/o Maria Viscarra) v. Mercury Ins. Co. of Fla.*, Case No. 12-17077 SP 25 (Fla. Miami-Dade Cty. Ct.

uniformity of the county court decisions is persuasive. As such, based on the relevant case law and a plain-language interpretation of the policy, the trial court incorrectly found that the U85 Endorsement was unambiguous.

Appellate Attorney's Fees

Both Dr. Kehrig and the Insurer have filed motions for appellate attorney's fees. Dr. Kehrig claims that he is entitled to attorney fees as a prevailing insured against an insurer pursuant to section 627.428(1), Florida Statutes (2013). As the lower court's decision is reversed, Dr. Kehrig is entitled to appellate attorney's fees as the prevailing party on appeal.

As the language of the U85 Endorsement is ambiguous in invoking the section 627.736(5)(a)(2)(f) fee schedule, the trial court's ruling is **REVERSED** and **REMANDED** to the trial court for proceedings in accordance with this Opinion. Dr. Kehrig's Motion for Appellate Attorney's Fees is **GRANTED** and **REMANDED** to the trial court to determine a reasonable amount thereof.

BRUNSON, BARKDULL, and SMALL, JJ., concur.

Feb. 7, 2013); *Hallandale Open MRI, LLC (a/a/o Gustavo Matienzo & Harriet Daphnis) v. Mercury Ins. Co. of Fla.*, Case No. 12-01821 CONO 70 (Fla. Broward Cty. Ct. Oct. 12, 2012); *Pro Imaging, Inc. (a/a/o Samuel James) v. Mercury Ins. Co. of Fla.*, Case No. 12-09035 CONE 51 (Fla. Broward Cty. Ct. May 7, 2013); *Sports Imgng. Centers LLC, d/b/a/ Windsor Imaging (a/a/o Maggie St. Louis) v. Mercury Ins. Co. of Fla.*, Case No. 12-08596 CONO 73 (Fla. Broward Cty. Ct. Oct. 22, 2013); *South Fla. Pain & Rehab of West Dade, LLC (a/a/o Rodolfo Mayorga) v. Mercury Ins. Co. of Fla.*, Case No. 12-02291 CONO 73 (Fla. Broward Cty. Ct. Oct. 24, 2013).