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

PROGRESSIVE AUTO PRO INSURANCE COMPANY,

Appellant,

GARY H. DIBLASIO, M.D., P.A.,

Appellee.

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APPELLATE DIVISION (CIVIL)
Case No.: 502006AP000009XXXXMB
L.T.: 502004SC010476XXXXSBRD
Division: 'AY'

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Appeal from the County Court in and for Palm Beach County, Florida, Judge Debra Moses Stephens.

For Appellant: Douglas H. Stein, Esq., 4300 Bank of America Tower, 100 Southeast Second St., Miami, FL 33131.

For Appellee: Joseph Littman, Esq., 4800 North Federal Highway, Ste. 101E, Boca Raton, FL 33431.

PER CURIAM.

Appellant, Progressive Auto Pro Insurance Company, seeks review of the trial court's Final Summary Judgment entered in favor of Appellee, Gary H. DiBlasio, M.D., P.A. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.110(a)(1).

Kenya Parrish-Dixon was insured by Progressive under a Personal Injury Protection policy. On February 3, 2004, Ms. Parrish-Dixon was injured in an automobile accident. Dr. DiBlasio began providing medical care to Ms. Parrish-Dixon on June 7, 2004. After Ms. Parrish-Dixon assigned her policy benefits to Dr. DiBlasio, he submitted his claims for treatment rendered through August 13, 2004.

On September 16, 2004, benefits under the policy were exhausted. On October 15, 2004, Dr. DiBlasio sued Progressive for damages arising from partial payment of his claims. Progressive filed a Motion for Summary Judgment, arguing that benefits were exhausted prior to service of the Complaint and that it was only required to pay to policy limits. After the trial court denied Progressive's Motion for Summary Judgment, Dr. DiBlasio filed a Motion for Partial Summary Judgment and a later Motion for Summary Judgment. On January 17, 2006, the trial court entered Final Summary Judgment for Dr. DiBlasio, which included interest pursuant to Fla. Stat. § 627.736(4)(c), and reserved jurisdiction to award attorney's fees and costs for Dr. DiBlasio.

On appeal, Progressive argues that because benefits were exhausted prior to the time Dr. DiBlasio served the complaint, summary judgment should have been entered in its favor. In response, Dr. DiBlasio contends that the pertinent issue on appeal is not when he sued Progressive, but when Progressive received notice pursuant to Fla. Stat. § 627.736(11). At the time the trial court entered Final Judgment for Dr. DiBlasio, there were no appellate court cases that addressed this issue.

After the trial court's ruling below, the Fourth District Court of Appeal addressed the exhaustion of benefits issue in *Simon v. Progressive Exp. Ins. Co*, 904 So. 2d 449 (Fla. 4th DCA 2005). In *Simon*, a medical provider accepted a partial payment from an insurer for services rendered. *Id.* The provider resubmitted the claims at a later date, however, by that time the funds were already committed to another provider. *Id.* The court held that absent a showing of bad faith, a provider could not be held liable for reductions after benefits were exhausted. *Id.*

There is no record evidence that Dr. DiBlasio contested reductions before the suit was filed. Although Dr. DiBlasio states that Progressive received notice on September 20, 2004,

there is no record evidence of the statutorily required demand letter. As benefits were clearly exhausted before Dr. DiBlasio filed suit and before Progressive was alleged to have received notice, the trial court erred when it entered Final Judgment for Dr. DiBlasio.

Dr. DiBlasio further argues on appeal that even if Progressive is not liable for the reduced claims, he is entitled to statutory interest because benefits were available when he first submitted the claims. Contrary to Dr. DiBlasio's argument, an insurance company is permitted to deny or contest a claim without the automatic imposition of statutory penalties. In *AIU Ins. Co. v. Daidone,* 760 So. 2d 1110, 1112 (Fla. 4th DCA 2000), the Fourth District Court of Appeal stated that if benefits are not due to a provider, they cannot be overdue within the statute's meaning. It is only when an insurer is ultimately liable for a contested claim that statutory interest and attorney's fees shall be awarded. *United Auto Ins. Co. v. Rodriguez,* 808 So. 2d 82, 88-89 (Fla. 2001).

Additionally, we note that Dr. DiBlasio's contention regarding the lack of transcript in this appeal is not dispositive of this Court's ability to review the proceedings below. It is not always necessary to procure a transcript of a summary judgment hearing as such hearings consist largely of legal argument by counsel and review of record evidence. *Seal Products v. Mansfeld*, 705 So. 2d 973, 975 (Fla. 3d DCA 1998). Any argument regarding notice that Dr. DiBlasio may have made at the hearing on his Motion for Summary Judgment is not record evidence. Therefore, it is not dispositive of this appeal as it does not preclude this Court's ability to direct the trial court to enter Final Summary Judgment in favor of Progressive.

This case is REVERSED AND REMANDED to the trial court with directions to enter Final Summary Judgment for Progressive. Additionally, Appellant's Motion for Attorney's Fees

pursuant to Florida Rule of Appellate Procedure 9.400, and Fla. Stat. § 768.79(3), is GRANTED, and the issue is remanded to the trial court to determine the amount thereof.

FINE, MCCARTHY, and GERBER, JJ., concur.