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

PROGRESSIVE EXPRESS INSURANCE COMPANY

Appellant,

vs.

GARY H. DIBLASIO, M.D. P.A. (Alisha Johnson)

Appellee.

APPELLATE DIVISION (CIVIL)
CASE NO.: 502006AP000041XXXXMB
502006AP000058XXXXMB
(Consolidated)
L.T.: 502004SC008765XXXXSB
502004SC011967XXXXSB
(Consolidated)
DIVISION: 'AY'

Opinion filed: JAN 2 4 2008

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

For Appellant: Heather Wallace, Esq., Williams, Leininger & Cosby, P.A., 1555 Palm Beach Lakes Boulevard, Suite 301, West Palm Beach, Florida 33401.
Nancy W. Gregoire, Esq., Bunnell, Woulfe, Kirschbaum Keller, McIntyre, Gregoire & Klein, P.A., One Financial Plaza, 9th Floor, 100 S.E. Third Avenue, Fort Lauderdale, Florida 33394.

For Appellee: Joseph R. Littman, Esq., Kane & Kane, 4800 N. Federal Highway, Suite 101E, Boca Raton, Florida 33431.

Reversed.

This is an appeal from an Order Granting Plaintiffs Motion for Final Summary Judgment and a Final Judgment on Plaintiffs Motion for Attorney's Fees and Costs entered in a personal injury protection dispute. By Order of the Court dated September 21, 2006, case number 502006AP000058XXXXMB (fee appeal) was consolidated with case number 502006AP000041XXXXMB (merits appeal). The order granting final summary judgment awards DiBlasio $654.40, plus statutory interest in the amount of $106.24. The fee judgment

awards DiBlasio $38,252.10 as prevailing party under § 627.428, Florida Statutes. We find there were disputed issues of material fact and reverse both judgments.

On March 19, 2004, Progressive's insured, Alisha Johnson was involved in an automobile accident. Ms. Johnson was treated by DiBlasio to whom she assigned her rights under her Progressive policy. DiBlasio's invoices at issue showed the following six treatment dates, service codes and amounts: 1) April 12, 2004, billed under CPT Code 99245 at $400.00; 2) April 26,2004, May 10,2004, May 24, 2004, June 21,2004 and July 19, 2004, billed under CPT Code 99213 at $220.00 for each date of service, and 3) April 26, 2004 where DiBlasio also billed a lumbar support under CPT Code L0900 at $30.00.

For the April 12 visit, Progressive adjusted the CPT Code to 99243, reduced the $400.00 charge to $252.00 as a reasonable amount for the visit in the community, and paid 80% of that amount. For each of the visits on April 26, May 10 and 24, June 21, and July 19, Progressive reduced the $220.00 per visit charge to $92.00 as the reasonable amount for each visit in the community, and paid 80% of that amount per visit. According to Progressive, each adjustment was done based on its claims adjustor's analysis of the invoices and an independent report of usual and customary charges prepared by Mitchell's Medical, Inc., an independent third-party analyst of medical billing.

For the April 26 visit, Progressive denied the $30.00 claim for the lumbar support in its entirety claiming it requested but received no supporting invoice from DiBlasio. DiBlasio alleged it is his standard office procedure to submit an invoice upon such a request.

The trial court granted Final Summary Judgment in favor of DiBlasio finding that DiBlasio satisfied his burdens to prove the amounts billed were reasonable, the coding was

correct, and that he satisfied the "mailbox rule" presumption for the $30.00 invoice, and furthermore, that Progressive failed to produce admissible evidence to the contrary.

The Florida Motor Vehicle No-Fault Law, § 627.736, Fla. Stat., mandates that a medical provider "may charge the insurer and injured party only a reasonable amount . . . for the services and supplies rendered . . . ." § 627.736(5)(a), Fla. Stat. (2004). The charge may not be in excess of the amount customarily charged by the provider for like services or supplies. Id. The law does not define how an insurer is to make the determination of a "reasonable" charge, but provides that consideration may be given to "evidence of usual and customary charges and payments accepted by the provider", reimbursement levels in the community, and various federal and state medical fee schedules, as well as other relevant information. Id. The burden to prove that charges are reasonable lies with the insured or the insured's assignee. State Farm Mut. Auto. Ins. Co. v. Sestile, 821 So. 2d 1244 (Fla. 2d DCA 2002); Derius v. Allstate Indem. Co., 723 So. 2d 271 (Fla. 4th DCA 1998).

In support of his Motion for Final Summary Judgment, DiBlasio filed his own affidavit as the treating physician. On the issue of the reasonableness of his charges, the DiBlasio Affidavit simply states "[t]he $220.00 charges [sic] amount is a reasonable charge for a Physical Medicine and Rehabilitation doctor within Palm Beach County." To contradict this conclusion, Progressive filed the Affidavit of Michael Zeide, M.D., a board certified orthopedic surgeon licensed to practice medicine in Florida. The Zeide Affidavit averred "the medical charges of Dr. Diblasio [sic] were in excess of the usual and customary charges for Palm Beach County, Florida." The trial court struck the Zeide Affidavit as legally insufficient because it failed to comply with Fla. R. Civ. P. 1.510(e) because documents to which it referred were not attached, it was irrelevant under Florida Statute 627.737(7)(a), it was conclusory, and it contained hearsay

within hearsay. We find the Zeide Affidavit was competent. See Progressive Amer. Ins. Co. v. Gary H. DiBlasio, M.D., P.A. a/a/o Mark Holland, case no. 502006AP000045 (15th Jud. Cir. Ct., Palm Beach County), __ Fla. L. Weekly Supp. __ (15th Jud. Cir. App. Ct., Oct. 31, 2007). We also find the Zeide Affidavit creates an issue of material fact.

DiBlasio's Affidavit presents no meaningful evidence regarding his typical charges for the service, the usual and customary charges accepted by the provider, reimbursement levels in the community, nor does it contain any reference to federal or state medical fee schedules. Such assertions that the charges were reasonable do not constitute conclusive proof thereof, and are not sufficient to support summary judgment. See Holl v. Talcott, 191 So. 2d 40, 45, Craven v. TRG-Boynton Beach, Ltd., 925 So. 2d 476,480 (Fla. 4th DCA 2006), Spradley v. Stick, 622 So. 2d 610, 612 (Fla. 1st DCA 1993). Furthermore, it is for the fact-finder to construe the word "reasonable" and make a case-by-case determination of whether a charge is in fact reasonable. Sestile at 1246. Therefore, summary judgment on this issue was not proper.

The trial court also erred in holding that DiBlasio carried his summary judgment burden in the correctness of coding his April 12 office visit as CPT 99245, and rejecting Progressive's contrary proof. The DiBlasio Affidavit provides sufficient detail to support coding the initial examination of Ms. Johnson as CPT 99245, which involves a comprehensive history, comprehensive examination, and medical decision making of high complexity. However, the DiBlasio Affidavit simply disputes the prior testimony of Progressive's claims adjustor, Barry Denson. Denson testified that, based upon his review of Dr. DiBlasio's notes, he decided to downcode the visit to CPT 99243, which involves a detailed history, a detailed examination and medical decision making of low complexity.

The Zeide Affidavit supports the Denson testimony on the coding issue. The Zeide Affidavit provides that Dr. DiBlasio "did not comply with the AMA CPT coding guidelines when billing Progressive for services," that the level of complexity did not correspond to the level at which DiBlasio billed, and further that "[CPT 99245] is a consultation code which should not be billed when treatment is rendered."

As there is contrary evidence as to whether the initial visit should have been coded as CPT 99245 or CPT 99243, Summary Judgment on this issue was not appropriate.

On the third and final issue, we agree with the trial court that DiBlasio satisfied the "mailbox rule" presumption that the $30.00 invoice for the lumbar support was in fact mailed to Progressive. We find, however, the trial court erred in entering Summary Judgment on this ground as well as an issue of material fact remains to be determined by the trial court.

The mailbox rule is a rebuttable presumption stating that "when something is mailed by a business, it is presumed that the ordinary course of business was followed in mailing it and that the mail was received by the addressee." Camerota v. Kaufinan, 666 So. 2d 1042, 1044 (Fla. 4th DCA 1996). Progressive noted on its Explanation of Benefits for the lumbar support "[p]lease submit an invoice from the supplier to determine the proper payment for medical appliances/equipment." The DiBlasio Affidavit states that the patient chart contained a copy of the invoice for the lumbar support indicating that "their standard procedure and normal course of business" had been followed, and the invoice had been sent to Progressive after receiving the request to do so.

Barry Denson's deposition testimony established Progressive's standard procedure in receiving such records, that the invoice was not in the claim file, and therefore, that the invoice was never received by Progressive. "While a sworn affidavit stating that the filing was not

received will not automatically overcome the presumption, such an affidavit will create an issue of fact which must be resolved by the trial court." Camerota, 666 So. 2d at 1044. Since Denson's sworn testimony provides contrary evidence as to whether the invoice was mailed, an issue of material fact exists requiring the trial court to conduct an evidentiary hearing on the issue. See Richardson v. Dept of Revenue, 742 So. 2d 445 (Fla. 4th DCA 1999), Camerota, 666 So. 2d 1042, Abrams v. Paul, 453 So. 2d 826 (Fla. 2d DCA 1984).

Because there was competing evidence in the record on every issue, the trial court was faced with genuine issues of material fact and could not validly enter the Summary Judgment. Therefore, this case is REVERSED AND REMANDED to the trial court with directions to vacate the final summary judgment and deny Plaintiffs Motion for Final Summary Judgment.

Moreover, we find that the judgment for attorney's fees and costs should be reversed based on our reversal of the main judgment. See Amorello v. Tauck, 824 So. 2d 244 (Fla. 4th DCA 2002). The final judgment on attorney's fees and costs is REVERSED AND REMANDED to the trial court with directions to vacate the Final Judgment on Plaintiffs Motion for Attorney's Fees and Costs.

Additionally, Progressive's Motion for Appellate Attorney's Fees pursuant to the Offer of Judgment Statute is DENIED as it fails to meet the requirements set forth in § 768.79, Fla. Stat. (2007). DiBlasio's Motion for Appellate Attomey's Fees is also DENIED pursuant to §§ 627.428(1), 627.736(8), Fla. Stat. (2007).

ROSENBERG, MCCARTHY and WINIKOFF, JJ., concur.