IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

REGIONAL MRI OF ORLANDO, INC., as assignee of Lorraine Gerena,

Appellant,

v.

CASE NO.: CVA1 09-38
Lower Court Case No.: 2003-SC-598-O

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellee.
_______________________________________/

Appeal from the County Court,
for Orange County,
Antoinette Plogstedt, Judge.

Aaryn Fuller, Esquire,
for Appellant.

Kenneth P. Hazouri, Esquire, and
Matthew Corker, Esquire,
for Appellee.

Before APTE, RODRIGUEZ, and BRONSON, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Regional MRI of Orlando, Inc., as assignee of Lorraine Gerena ("Regional MRI"), timely appeals the trial court's "Final Judgment," entered on July 15, 2009, granting final summary judgment in favor of the Appellee, State Farm Mutual Automobile Insurance Company ("State Farm"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure

9.320.

Facts and Procedural History

Regional MRI sued State Farm for the payment of PIP benefits under an insurance policy issued to Lorraine Gerena ("Gerena"). Regional MRI alleged that State Farm failed to pay covered medical expenses resulting from a covered motor vehicle accident.

On October 21, 2002, Regional MRI provided healthcare services to Gerena. To pay for her treatment, Gerena assigned her PIP benefits under the State Farm insurance policy to Regional MRI. Therefore, Regional MRI submitted a Health Insurance Claim Form to State Farm, claiming that the treatment resulted from a covered motor vehicle accident. State Farm received the claim form on October 28, 2002.

At the time State Farm received Regional MRI's claim form, Gerena had $531.99 in remaining PIP benefits under the policy. However, on November 20, 2002, before State Farm had responded to Regional MRI's claim, State Farm received a claim from Gerena for lost wages. Either Regional MRI's claim or Gerena's lost wages claim, individually, would have exhausted the available benefits under the policy. On November 26, 2002, State Farm chose to pay the remaining benefits of $531.99 to Gerena in response to her lost wages claim.

After receiving no payment in satisfaction of its claim, Regional MRI submitted a pre-suit demand letter to State Farm. State Farm responded in a letter, indicating that Gerena's PIP and medical payment benefits had been exhausted, and therefore it would be unable to honor any further medical bills or lost wages claims resulting from the subject motor vehicle accident. Regional MRI filed suit, during which the trial court entered final summary judgment in favor of State Farm, based on the defense that Gerena's PIP benefits had been exhausted before payment of Regional MRI's claim was overdue. This appeal followed.

Discussion of Law

On appeal, Regional MRI argues that the trial court erred in granting final summary judgment in favor of State Farm because an insurer may be liable for benefits in excess of the policy limits when the insurer exhausts the benefits in bad faith, and Regional MRI asserts that State Farm exhausted Gerena's benefits in bad faith. On the contrary, State Farm argues that it did not act in bad faith, and therefore, the trial court did not err in granting final summary judgment in its favor.

The standard of review for an order granting summary judgment is de novo. Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 130 (Fla. 2000). The Court must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Krol v. City of Orlando, 778 So. 2d 490, 491-92 (Fla. 5th DCA 2001) (citing Fla. R. Civ. P. 1.510(c)).

Whether an insurer has acted in bad faith is generally a question of fact. Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000). Therefore, Regional MRI argues that there is a genuine issue of material fact as to whether State Farm acted in bad faith. However, a review of the parties' arguments demonstrates that it is not essentially facts that are disputed, but rather, the parties disagree upon the legal conclusion to be drawn from undisputed facts.

Regional MRI does not argue that State Farm intentionally acted in bad faith. Rather, Regional MRI contends that State Farm's undisputed actions constitute bad faith. Specifically, State Farm received Regional MRI's claim before it received Gerena's lost wages claim. State Farm's usual practice is to pay claims in the order in which they are received. By paying Gerena's lost wages claim ahead of Regional MRI's claim, State Farm did not follow its usual practice. State Farm does not argue that Regional MRI's claim was not compensable—but for

the exhaustion of benefits—and State Farm cannot explain why it paid Gerena's claim ahead of Regional MRI's claim. Therefore, Regional MRI argues, State Farm's failure to adhere to its own usual practice constitutes an exhaustion of benefits in bad faith, and thus Regional MRI seeks a judgment compelling State Farm to pay its claim, over and above the policy limits.

The facts upon which Regional MRI relies to demonstrate that State Farm acted in bad faith are not in dispute. Rather, the parties disagree as to whether the undisputed, underlying facts concerning State Farms actions constitute bad faith. When the underlying facts, those which a party argues constitute bad faith, are undisputed, the question of whether those undisputed facts constitute bad faith is a question of law. See Town of Palm Beach v. Palm Beach Cty., 460 So. 2d 879, 881-82 (Fla. 1984) (holding that, where facts are undisputed, the legal effect of those facts is a question of law). Therefore, there are no genuine issues of material fact, and we must answer the legal question of whether the undisputed material facts concerning State Farm's actions constitute bad faith. In doing so, we must determine whether State Farm is entitled to a judgment as a matter of law.

Bad Faith As a Matter of Law

A claim for PIP benefits is overdue if it is not paid "within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same." § 627.736(4)(b), Fla. Stat. (2002). An insurer is considered to be "furnished" with written notice of the fact of a covered loss when the insurer *receives* the written notice. See Ivey v. Allstate Ins. Co., 774 So. 2d 679, 684 (Fla. 2000) (using the concept of "furnishing" an insurer with written notice interchangeably with the insurer "receiving" written notice). However, absent a showing of bad faith, a PIP insurer is not liable to pay benefits once the benefits under the policy have been exhausted. Progressive Am. Ins. Co. v. Stand-Up MRI of Orlando, 990 So. 3d 3, 4 (Fla. 5th

DCA 2008).

State Farm received Regional MRI's claim on October 28, 2002. Therefore, Regional MRI's claim would have been overdue on November 27, 2002. However, State Farm received Gerena's lost wages claim on November 20, 2002, before it responded to Regional MRI's claim. State Farm paid Gerena's lost wages claim on November 26, 2002, exhausting Gerena's PIP benefits. Therefore, Gerena's PIP benefits were exhausted before Regional MRI's claim became overdue.

Regional MRI has failed to produce any legal authority to support its argument that State Farm's actions constitute bad faith. All of the case law offered by Regional MRI is significantly distinguishable from the instant matter. In Coral Imaging Servs. v. Geico Indem. Ins. Co., 955 So. 2d 11 (Fla. 3d DCA 2006), the insurer was forced to pay benefits over and above the policy limits because it had paid *untimely* bills ahead of the complaining provider's claim. Id. at 12. The court held that the PIP statutes prohibit an insurer from applying PIP benefits to pay untimely claims. Id. at 16. Therefore, the payments made pursuant to the untimely bills were deemed "gratuitous" and not made against the limits of the policy. Id.

Unlike Coral Imaging, Gerena's lost wages claim was not untimely, and Regional MRI does not argue that any other claims paid ahead of its own were untimely. Furthermore, the insurer in Coral Imaging was not found to have acted in bad faith, and relief was granted pursuant to a theory other than bad faith. Therefore, Coral Imaging is both factually and legally distinct from the instant matter, and its holding does not apply.

Regional MRI also relies upon Oakland Park MRI, Inc. v. USAA Cas. Ins. Co., 17 Fla. L. Weekly Supp. 477a (Fla. Broward Cty. Ct. Feb. 22, 2010), a county court decision that is not binding upon this Court. Irrespective of its weight of authority, its holding could not apply

because its material facts are substantially distinct from the instant matter. In Oakland Park MRI, the insured had $10,000 in available PIP benefits when the insurer received the complaining provider's claim. Id. The published opinion is unclear as to whether the PIP benefits were exhausted before the claim became *overdue*, as is the case in the instant matter, or after the claim became *overdue*. Therefore, the holding in Oakland Park MRI could not be dispositive in the instant matter.[1]

There is no published appellate case law establishing whether an insurer acts in bad faith when it pays an insured's claim ahead of an assignee's claim, and thereby exhausts the insured's PIP benefits, when the assignee's claim was received first but had not yet become overdue. Furthermore, this Court is not aware of, nor could we find, any case law holding that an insurer's failure to abide by its own usual practice constitutes bad faith. Thus, in the absence of binding authority, we find that an insurer's failure to follow its own typical or usual practice is immaterial, absent an allegation that the insurer intentionally sought to benefit itself or harm a plaintiff in bad faith.

Though there is no binding precedent dispositive of the specific material facts in the instant matter, we find the following language to be instructive:

> The [insurer] did nothing wrong here. [It was] under a contract to the insured for a limited amount. [It] paid that amount in toto. [It is] not responsible for the insured's over-use of [the] policy. The [insurer] did not gain anything out of [its] actions. [It] fully performed [its] contract with the insured. It is to the insured that the assignees should look for any additional payments.
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> . . . .
>
> There is no logical basis for any allegation of bad faith involved here, on the part of the [insurer].

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[1] Furthermore, Regional MRI's reliance upon the Broward County Court's application of the English Rule in Oakland Park MRI could not avail in the instant matter because the English Rule only applies to claims of competing *assignees*. See Boulevard Nat'l Bank of Miami v. Air Metal Indus., Inc., 176 So. 2d 94 (Fla. 1965).

Stand-Up MRI, 990 So. 3d at 6-7 (quoting, with approval, Neuro-Imaging Assocs., P.A. v. Nationwide Ins. Co. of Fla., 10 Fla. L. Weekly Supp. 738a (Fla. Palm Beach Cty. Ct. Jan. 7, 2002)).

Whether State Farm decided to pay Regional MRI's claim or Gerena's lost wages claim, it would have only been responsible to pay $531.99. State Farm elected to pay the remainder of the insured's PIP benefits directly to the insured. The insured's PIP benefits were exhausted before Regional MRI's claim became overdue. State Farm fully performed its duties under the policy contract, and it gained nothing out of its decision to pay Gerena's lost wages claim ahead of Regional MRI's claim. Therefore, we find that State Farm did not act in bad faith, and it is entitled to a judgment as a matter of law.

Attorney's Fees

State Farm served an offer of settlement on Regional MRI in October 2003. Regional MRI rejected the offer, and State Farm subsequently obtained a judgment of no liability from the trial court. In the instant appeal, State Farm filed a motion for appellate attorney's fees pursuant to Florida Rule of Appellate Procedure 9.400(b), and State Farm has prevailed in this matter, as we affirm the trial court's judgment in favor of State Farm. Therefore, we find that State Farm is entitled to an award of appellate attorney's fees pursuant to section 768.79, Florida Statutes.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Judgment," entered on July 15, 2009, is **AFFIRMED**; and the "Appellee's Motion for Appellate Attorney's Fees is **GRANTED**, the assessment of which is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the _____23_____ day of ___February_________________, 2011.

__/S/__________________________
ALAN S. APTE
Circuit Judge

_/S/___________________________
JOSE R. RODRIGUEZ
Circuit Judge

_/S/___________________________
THEOTIS BRONSON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Aaryn Fuller, Esq., Bogin, Munns & Munns, P.A.**, 2601 Technology Drive, Orlando, Florida 32802-2807; **Kenneth P. Hazouri, Esq., deBeaubien, Knight, Simmons, Mantzaris & Neal, LLP,** 332 North Magnolia Avenue, Orlando, Florida 32801; and **Matthew Corker, Esq., Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A.,** 2 South Orange Avenue, Suite 300, Orlando, Florida 32801 on the _____23_____ day of ______February______________, 2011.

_/S/___________________________
Judicial Assistant