NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

STATE FARM FIRE AND CASUALTY COMPANY,
Appellant,

v.

NU-BEST WHIPLASH INJURY CENTER, INC., a/a/o CATALINA THOMAS,
Appellee.

_____/

Case No.: 13-000025AP-88A
UCN: 522013AP000025XXXXCI

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

v.

NU-BEST WHIPLASH INJURY CENTER, INC., a/a/o LISA COLON,
Appellee.

_____/

Case No.: 13-000026AP-88A
UCN: 522013AP000026XXXXCI

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

v.

NU-BEST WHIPLASH INJURY CENTER, INC., a/a/o GALE BAUER,
Appellee.

_____/

Case No.: 13-000027AP-88A
UCN: 522013AP000027XXXXCI

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

Case No.: 13-000028AP-88A
UCN: 522013AP000028XXXXCI

v.

NU-BEST WHIPLASH INJURY CENTER, INC., a/a/o JAN AVERY,
Appellee.

_____/

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

Case No.: 13-000029AP-88A
UCN: 522013AP000029XXXXCI

v.

NU-BEST WHIPLASH INJURY CENTER, INC., a/a/o ROBERT MCANELLY,
Appellee.

_____/

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

Case No.: 13-000030AP-88A
UCN: 522013AP000030XXXXCI

v.

NU-BEST WHIPLASH INJURY CENTER, INC., a/a/o DORIAN DOMINGUE,
Appellee.

_____/

Opinion Filed _____

Appeal from Final Judgment
Pinellas County Court
Judge Edwin Jagger

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PER CURIAM.

In this consolidated appeal, Appellant/Defendant-below State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (hereinafter collectively "State Farm"), challenge the Final Judgments entered in favor of Appellee/Plaintiff-below, Nu-Best Whiplash Injury Center, Inc. as assignee of Catalina Thomas, Lisa Colon, Gale Bauer, Jan Avery, Robert McAnelly, and Dorian Dominigue (hereinafter "Nu-Best"). On August 30, 2012, the trial court entered a single, detailed order granting summary judgment in the underlying cases. On March 8, 2013, the trial court entered separate final judgments for Nu-Best for each assignor. Upon review of the briefs and the record on appeal, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We reverse and remand for further proceedings.

Statement of Cases

State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company v. Nu-Best Whiplash Injury Center, Inc. as assignee of Catalina Thomas, Lisa Colon, Gale Bauer, Jan Avery, Robert McAnelly, and Dorian Dominigue, Case Nos. 13-000025AP-88A; 13-000026AP-88A; 13-000027AP-88A; 13-000028AP-88A; 13-000029AP-88A; 13-000030AP-88A (Fla. 6th Cir. App. Ct.).

In the underlying actions, Nu-Best sought to recover from State Farm, as the insurer of Nu-Best's clients, the remaining sums due on accounts for diagnostic testing and interpretive services rendered.

The tests performed were identified in the complaints and on Nu-Best's billing statements as "cervical digital motion x-ray (CPT code 76499)" and/or "TMJ digital motion x-ray (CPT code 76499)," with interpretive services of the testing under "CPT Code 76499-26." State Farm paid a portion of the amount billed for these procedures which it claimed was the total due under the terms of the Personal Injury Protection coverage of the patients' automobile insurance policies and under the personal injury

protection benefits statute, section 627.736(5)(b)(2), Florida Statutes (2002-2003)(hereinafter "the PIP statute").[1] All references to section 627.736 in this opinion shall be to the 2002-2003 version of the statute, unless otherwise noted.

The American Medical Association ("AMA") has approved designated codes for diagnostic procedures and medical treatments known as the AMA Physician's Current Procedural Terminology (CPT) code. Section 627.736(5)(e) provides that all billings for services under the PIP statute, to the extent applicable, shall follow the CPT code guidelines. The CPT "is a common billing reference for insurers and providers, enabling both parties to classify, bill for, and pay [for] various medical services accurately and in compliance with the guidelines." Diblasio v. Progressive Express Ins. Co., 14 Fla. L. Weekly Supp. 1027a (Fla. 15th Cir. App. Ct. Aug. 13, 2007).

State Farm filed motions for summary judgment stating that Nu-Best's actions were brought to recover sums due on bills submitted for video fluoroscopy test procedures. Allegedly, State Farm paid the amount specified for videofloroscopy utilizing the CPT code for such a procedure, 76120, which is the designated code for "cineradiography/videoradiography, except where specifically included." The sum paid to Nu-Best was the maximum reimbursement allowance under the workers' compensation fee schedule as required by section 627.736(5)(b)(2). State Farm claimed that it had met its statutory obligation for payment of Nu-Best's bills under the PIP statute, there was no material issue of fact, and State Farm was entitled to judgment as a matter of law.

On June 19, 2008, the trial court entered an order granting summary judgment for State Farm. The trial court specifically found that in each case a video fluoroscopy test procedure had been performed. It found that State Farm paid the claims under the appropriate CPT Code designation (76120) and concluded that State Farm had met its statutory obligation under section 627.736(5)(a), the PIP statute.

On appeal, this Court concluded that, based on the evidence in the record and taking the evidence in the light most favorable to the non-movant, there was a genuine

[1] Nu-Best's clients allegedly were involved in automobile accidents on May 3, 2003 (13-000025AP-88A); November 11, 2003 (13-000026AP-88A); December 3, 2003 (13-000027AP-88A); June 9, 2003 (13-000028AP-88A); August 21, 2002 (13-000029AP-88A); and July 11, 2003 (13-000030AP-88A). There is no dispute that insurance policies with State Farm were in effect on those dates.

issue of material fact concerning which CPT code should be utilized for video fluoroscopy procedures and that State Farm was not entitled to judgment as a matter of law. In an opinion entered on October 4, 2010, the final summary judgment was reversed and the matter was remanded for further proceedings. Nu-Best Whiplash Injury Ctr., Inc. v State Farm Mutual Auto. Ins. Co., 17 Fla. L. Weekly Supp. 164a (Fla, 6th Cir. App. Ct. Oct. 4, 2010).

On remand, Nu-Best filed motions for summary judgment in the six cases on a new issue. On August 30, 2012, the trial court entered an order granting Plaintiff's motions for summary judgment. Final Judgments were entered in each case in favor of Nu-Best on March 8, 2013. The appeals filed in March 2013 subsequently were consolidated.

State Farm Mutual Insurance Company v. Nu-Best Whiplash Injury Center, Inc., Case No. 09-019125CI-07 (Fla. 6th Cir. Ct).

In October 2009, the original complaint in State Farm Mutual Insurance Company v. Nu-Best Whiplash Injury Center, Inc., Case No. 09-019125CI-07 was filed in the Sixth Judicial Circuit Court (hereinafter "the Circuit Court Case"). On March 30, 2012, State Farm filed its Second Amended Complaint seeking declaratory relief. On April 17, 2012, Nu-Best filed its Answer to the Second Amended Complaint with an amended "Counterclaim for Declaratory Judgment and Damages." Both State Farm and Nu-Best sought a declaration of their rights under section 627.736, Florida Statutes (2002-2011)[2] and under the specific terms of the insurance policies involving medical payments and medical expenses. The provisions in the policies involving medical payments and medical expenses that are the subject of the action in the Circuit Court case are substantially the same as the provisions in the policies that are the subject of these consolidated appeals.

A non-jury trial on the parties' requests for declaratory relief was conducted between September 15, 2014 and September 24, 2014, in the Circuit Court case. The

[2] The sixty-eight count Counterclaim filed by Nu-Best includes two counts seeking declaratory relief. The remaining counts seek damages for PIP claims that were denied or allegedly underpaid by State Farm. The counts in the complaint seeking damages were abated. Nu-Best's clients receiving the diagnostic services had been involved in automobile accidents that allegedly occurred during the time period between November 4, 2002, and May 4, 2011.

"Order Granting State Farm Mutual Automobile Insurance Company's Declaratory Action and Denying Nu-Best Whiplash Injury Center, Inc.'s Declaratory Action" was entered by the Circuit Court on December 2, 2014.

In Circuit Court case number 09-019125CI-07 with regard to State Farm's request for declaratory judgment, in part, the Circuit Court found as follows:

> Since 2003, (and as early as 2000) the AMA, through the Department of CPT Education, the CPT Editorial Panel, and the Executive Committee of the CPT Editorial Panel, has advised that the proper CPT code to be used when billing for a video fluoroscopic procedure is 76120. The AMA has specifically referenced that video fluoroscopic procedures performed under the trade name Digital Motion X-Ray or by the procedural technology being described or utilized in the performance of a digital motion x-ray should be billed under CPT code 76120.
>
> The Court finds that any distinction urged by Nu-Best does not exist and that the CPT Editorial Panel, through the AMA, has advised that the proper CPT Code used to describe video fluoroscopy (referred to by Nu-Best as "Digital Motion X-Ray" or "DMX") is CPT Code 76120.
>
> As such, in response to State Farm's First Declaratory Request, it is hereby **ORDERED AND ADJUDGED** that **CPT Code 76120 is the proper American Medical Association CPT Code used to describe video fluoroscopy** (referred to by Nu-Best as "Digital Motion X-Ray" or "DMX").

The trial court denied Nu-Best's requests for declaratory relief.[3]

An appeal of the non-final order was filed with the Second District Court of Appeal by Nu-Best in Nu-Best Whiplash Injury Center, Inc. v. State Farm Mutual Insurance Company, Case No. 2D15-626. The appeal from the non-final, non-appealable order was dismissed by the Second District Court of Appeal on April 9, 2015, with citations to Universal Underwriters Ins. Co. v. Stathopoulous, 113 So. 3d 957, 959-60 (Fla. 2d DCA 2013); and Workmen's Auto Ins. Co. v. Franz, 24 So. 3d 638, 640 (Fla. 2d DCA 2009).

[3] The declaratory relief issues raised by Nu-Best relate to (Count I) the reasonable reimbursement of claims filed on or after January 1, 2008; and (Count II) the insurance company's duties when presented with a charge involving alleged "upcoding" by a medical provider. These issues are not relevant to the instant appeals.

Standard of Review

Summary judgment is not a substitute for trial. A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Technical Packaging, Inc. v. Hanchett, 992 So. 2d 309, 311 (Fla. 2d DCA 2008). The appellate court reviews an order granting summary judgment and the resultant final judgment using a de novo standard of review. Poe v. IMC Phosphates MP, Inc., 885 So. 2d 397, 400 (Fla. 2d DCA 2004).

Analysis

In the present case in the Order Granting Plaintiff's Motions for Summary Judgment, the trial court in part stated:

> The Defendant paid the bills at a reduced rate pursuant to certain reimbursement limitations set forth in the PIP statute (2002). The issue presented here is identical in each case: whether the Defendant was permitted to limit such reimbursement under the PIP statute. The Plaintiff contends that the adjustments were not authorized under the insurance policy.
>
> This Court agrees with the Plaintiff and finds that the reimbursement limitations set forth in the PIP statute are not applicable to the Plaintiff's claims. The Defendant was instead required to pay the Plaintiff's claims at 80% according to the terms of the insurance policy. To support its use of the statutory fee schedule, the Defendant points to the policy language which generally incorporates the provisions of the PIP statute. The courts, however, that have most recently addressed that issue have come to the conclusion that such insurers, without specific reference in the policy to the methodology of payment referenced in the statute, are required to reimburse in accordance with the greater amount of coverage stated in the policy: 80% of reasonable medical expenses. *See Kingsway Amigo Insurance Company v. Ocean Health, Inc.*, 63 So. 3d 63 (Fla. 4th DCA 2011)(when the insurance company provides greater coverage than the amount required by statute, the terms of the policy will control); *See also DCI MRI, Inc. v. GEICO*, 79 So. 3d 840 (Fla. 4th DCA 2012); *GEICO Indemnity Company v. Virtual Imaging Services, Inc.*, 79 So. 3d 55 (Fla. 3d DCA 2011).

The trial court was persuaded by the arguments of counsel for Nu-Best that the Kingsway, DCI MRI, and Virtual Imaging cases are controlling in the present case. However, the trial court was misinformed as those cases are distinguishable because they are governed by the post-2008 PIP statute. The cited cases specifically deal with

the post-2008 version of section 627.736(5)(a) rather than the 2002 and 2003 version of section 627.736(b)(2) that is applicable in the present case.

The DCI MRI and Virtual Imaging cases rely upon the reasoning in Kingsway in which the appellate court found that the language in the 2008 version of section 627.736(5)(a) allows an insurer to choose between two different payment calculation methodology options. The Kingsway court noted that the language in the 2008 version of section 627.736(5)(a)(1) provides that the insurer "may limit reimbursement" to eighty percent of the enumerated maximum charges. The appellate court held that this wording indicates that the optional choice is not mandatory, but anticipates that the insurer will make a choice. Kingsway, 63 So. 3d at 67.

The insurance policy involved in Kingsway made a specific election of the manner in which the insurer was to pay medical expenses. Under the facts of the Kingsway case, and the non-mandatory provisions of section 627.736(5)(a), "when the insurance policy provides greater coverage than the amount required by [the non-mandatory, permissive] statute, the terms of the policy will control." Id. at 68.

However, this statement in Kingsway, that was presented to the trial court as binding law by counsel for Nu-Best, is not applicable in the current case which involves the mandatory requirements of the 2002 and 2003 version of section 627.736(5)(b)(2), as discussed below. Nu-Best's reliance on Sturgis v. Fortune Insurance Company, 475 So. 2d 1272 (Fla. 2d DCA 1985), is equally misplaced as the case is distinguishable on its facts.

"[T]he statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." Hassen v. State Farm Mut. Auto. Ins. Co., 674 So. 2d 106, 108 (Fla. 1996). The date of the claim for services rendered is irrelevant when determining which version of a statute should be utilized. The 2002-2003 version of section 627.736(5)(b)(2), applicable in the present case states:

> Charges for medically necessary cephalic thermograms, peripheral thermograms, spinal ultrasounds, extremity ultrasounds, video fluoroscopy, and surface electromyography shall not exceed the maximum reimbursement allowance for such procedures as set forth in the applicable [Florida Workers' Compensation] fee schedule or other payment methodology established pursuant to s. 440.13.

(Emphasis added). Section 627.736(5)(b)(2) was revised effective January 1, 2008, to strike this paragraph in its entirety. See Ch. 2007-324, § 20, Laws of Fla.

On its face, section 627.736(5)(b)(2) in effect in 2002 and 2003 unambiguously uses the mandatory phrase "shall" rather than the permissive "may" when setting the maximum reimbursement allowance for video fluoroscopy. As the First District Court of Appeal explained:

> It is well settled that where the language of a statute is clear and unambiguous, courts may not resort to rules of statutory construction. Rather, the statute must be given its plain and ordinary meaning. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Further, courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications." American Bankers Life Assurance Co. of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968). It is also an accepted principle that the use of the term "shall" in a statute normally has a mandatory connotation. S.R. v. State, 346 So. 2d 1018 (Fla. 1977); White v. Means, 280 So. 2d 20 (Fla. 1st DCA 1973).

Steinbrecher v. Better Constr. Co., 587 So. 2d 492, 493-94 (Fla. 1st DCA 1991).

This Court concludes that it was error for the trial court to rely on the holdings in the Kingsway, DCI MRI, and Virtual Imaging cases that are based on the 2008 version of section 627.736(5)(a) and did not involve the pre-2008 version of section 627.736(5)(b)(2).

The trial court should have denied Nu-Best's motion for summary judgment based on the mandatory language in the 2002 and 2003 version of section 627.736(5)(b)(2) restricting the amount to be charged specifically for video fluoroscopic procedures which "shall not exceed the maximum reimbursement allowance for such procedures as set forth in the applicable fee schedule or other payment methodology established pursuant to s. 440.13 [of the Workers' Compensation Law]."

The workers' compensation fee schedule should have been used to determine the sum to be paid by State Farm for the video fluoroscopic procedures; or to determine if all sums due to Nu-Best for the procedures performed have already been remitted by State Farm. The workers' compensation fee schedule sets the maximum fee to be paid under the 2002 and 2003 version of the section 627.736(b)(2). See In re Standard Jury Instructions in Civil Cases (no. 06-02), 966 So. 2d 940, 941 n.1 (Fla. 2007)(creating

verdict form for claim for PIP benefits including notation that with regard to "reasonable charge" the description may require a supplemental instruction for "fee-capped diagnostic testing for services as described in section 627.736(5)(b), Florida Statutes (2003).") The order granting summary judgment and the final judgments entered in the underlying cases are reversed.

This Court notes that on remand, the trial court rulings should be governed by the declaratory judgment entered by the Circuit Court in State Farm Mutual Insurance Company v. Nu-Best Whiplash Injury Center, Inc., Case No. 09-019125CI-07 (Fla. 6th Cir. Ct. Nov. 21, 2014). The Circuit Court's decision after the non-jury trial on the declaratory judgment counts holds that **"CPT Code 76120 is the proper American Medical Association CPT Code used to describe video fluoroscopy** (referred to by Nu-Best as 'Digital Motion X-Ray' or 'DMX')."

Reversed and remanded for further proceedings in accordance with the holdings in this opinion.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 30 day of April, 2015.

Original Order entered on April 30, 2015, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia Muscarella.

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