REEMBERTO DIAZ
CIRCUIT COURT JUDGE

NOT FINAL UNTIL TIME EXPIRES
TO FILE RE-HEARING MOTION,
AND IF FILED, DISPOSED OF.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION

CASE NUMBERS:
16-059 AP
16-356 AP

TRIAL CASE NUMBER:
2013-3485 SP 01

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Appellant,

vs.

PAN AM DIAGNOSTIC SERVICES, INC. d/b/a WIDE OPEN MRI a/a/o Jermaine Lewis,

Appellee.

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Opinion Filed: August 21, 2018

An appeal from a decision by the County Court in and for Miami-Dade County, Florida. Myriam Lehr, Judge.

Nancy W. Gregoire, Esq. and Andrew W. Bray, Esq., for Appellant.

Yigal D. Kahana, Esq. and Robert J. Hauser, Esq., for Appellee.

Hearing on: June 13, 2018.

Before: DENNIS, SARDUY, and DIAZ, JJ.

PER CURIAM.

On October 3, 2012 State Farm (Appellant/Defendant)'s insured Jermaine Lewis was involved in automobile accident. On October 31, 2012 the insured had two MRI studies performed at Appellee/Plaintiff Pan Am Diagnostic Services, Inc. d/b/a Wide Open MRI. The insured assigned his benefits to Appellee. Appellee billed $2150.00 for each procedure, for a total of $4300.00. Appellant paid benefits of $1773.04 plus $21.57 interest, ($1794.61 total) for the two procedures. On February 15, 2013 Plaintiff/Appellee filed a county court lawsuit against defendant/Appellant for the remaining unpaid PIP benefits due plus interest, or $1666.98.

Appellant denied that the MRIs were medically necessary or related to the insured's accident and denied any further obligation to the Appellee other than what it had already paid, and demanded a trial by jury. In December 2014 Appellee filed a motion for partial summary judgment on relatedness and necessity. Appellee then moved for final summary judgment in March 2015, before any hearing on the December 2014 motion for partial summary judgment.

The motion for final summary judgment claimed that Appellant admitted medical necessity and relatedness were not at issue, that the affidavit of the clinic's owner Roberta Kahana (Kahana) established the reasonableness of the MRI charges, and Appellant could not consider the Medicare Part B physician's fee schedule to determine a reasonable charge because there was no election of such in their policy. The Appellee also filed the deposition of Tim Kelly, Appellant's claims representative assigned to the file, wherein he testified that Appellant was not disputing medical necessity and relatedness of the MRIs at that time but was reserving its right to discovery. Mr.

Kelly also averred that Appellant reimbursed Appellee using the Medicare Part B physician's fee schedule because Appellant had concluded that was a reasonable amount.

In response in opposition to plaintiff's motion for final summary judgment, Appellant filed the affidavits of Bradley L. Simon, D.C. and Michael S. Propper, M.D., along with the deposition of Mrs. Kahana. The response claimed that Appellant could rely on many factors to determine reasonableness of a charge, and those factors include federal and state medical fee schedules, including the Medicare Part B physician's fee schedule. The defendant's opposition also averred that consideration of the Medicare Part B fee schedules as to reasonableness was a question of fact for a jury, not a legal issue for a court.

On October 26, 2015 the trial court conducted a hearing on the plaintiff's motion for final summary judgment. Plaintiff additionally argued that the Simon and Propper affidavits were legally incompetent. In response, defendant asserted 1) that the clinic did not satisfy its burden to show that the MRIs were medically necessary or related to the insured's accident, 2) the PIP statute allowed Appellant to retroactively challenge medical necessity and relatedness despite its payment, 3) the Simon affidavit was competent evidence on medical necessity and relatedness, 4) the Kahana affidavit was incompetent to satisfy Appellee's burden concerning reasonableness because Ms. Kahana was a lay witness who could not give expert opinions or rely on hearsay, 5) the Propper affidavit was competent evidence concerning reasonableness, and 6) subsection (5)(a)1. permitted Appellant to consider the Medicare Part B physician's fee schedule concerning reasonableness.

Standard of Review

On appeals of summary judgments, the appellate court must review the evidence *de novo*, and interpret the affidavits and the other evidence in the light most favorable to the non-moving party. *See Rakusin Law Firm v. Estate of Dennis*, 27 So. 3d 166, 166–67 (Fla. 3d DCA 2010).

Affidavit Sufficiency

Affidavits submitted in support of summary judgment are subject to the requirements of Florida Rule of Civil Procedure 1.510(e), which provides:

> [s]upporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts thereof referred to in an affidavit must be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

"[G]eneral statements in an affidavit which are framed in terms only of conclusions of law do not satisfy a movant's burden of proving the nonexistence of a genuine material fact issue." *Heitmeyer v. Sasser,* 664 So. 2d 358, 360 (Fla. 4th DCA 1995) (citing *Seinfeld v. Commercial Bank & Trust Co.*, 405 So. 2d 1039 (Fla. 3d DCA 1981)); *see also Shirey v. State Farm Mut. Auto. Ins. Co.*, 94 So. 3d 619, 621 (Fla. 4th DCA 2012). However, instead of subjecting an expert witness's summary judgment affidavit to the standard that the expert would be held to at trial, caselaw indicates that a more lenient standard applies at the summary judgment stage:

> [w]e do not think it was ever intended that in a complicated case such as this one, the opponent of a motion for summary judgment be obligated to have his expert witness cover all the details and formalities that would be required in offering the same experts' testimony at a trial of the cause. To do so would turn the summary judgment process itself into a trial of, rather than a search for, issues. This does not mean that the evidentiary matter submitted in opposition, including that offered in an affidavit, should not be of the kind which would be admissible in evidence at trial. The evidentiary matter offered must be both relevant and competent as to the

> issues in the cause. But it need not be in the exact form, or cover all the preliminaries, predicates, and details which would be required of a witness, particularly an expert witness, if he were on the stand at trial.

Holl v. Talcott, 191 So. 2d 40, 45 (Fla. 1966); *see also OneWest Bank, FSB v. Jasinski*, 173 So. 3d 1009, 1013-14 (Fla. 2d DCA 2015) (quoting this portion of *Holl* and applying the same reasoning to a non-expert witness).[1]

Relatedness and Medical Necessity

Appellant produced the Affidavit of Bradley I. Simon, D.C. in opposition to summary judgment to contest relatedness and medical necessity. He has 14 years of medical experience providing chiropractic care in the community. He reviewed the medical file of the insured, police reports of the accident, and concluded that for such a minor accident he could not fully substantiate a causal relationship between the accident and the injuries.

The trial court held that Appellant could not dispute relatedness and medical necessity because it had already paid the claim; the trial court found it would be bad faith and an unfair trade practice if it were allowed to contest relatedness and medical necessity at this juncture. This was error. Under the applicable statute, an insurer may contest relatedness and medical necessity at any time. *See* § 627.736(4)(b), Fla. Stat. (2012). A contested issue of material fact was raised by the Appellant in its affidavit regarding relatedness and medical necessity to counter Appellee's submitted evidence.

Reasonableness

Concerning reasonableness determinations, the applicable statutory section is section 627.736(5)(a)1., Florida Statutes (2012). It states in pertinent part:

> . . . With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of

[1] In the *Holl* case, the fact that the medical expert witness did not explain in his affidavit why the acts of the defendant were negligent or detail the standards of care that were breached did not cause his affidavit to be deficient. *Holl*, 191 So. 2d at 46.

> usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

Dr. Propper's Affidavit

Dr. Propper speculates that the Appellee receives usual and customary charges and accepts payments for less than what it billed in this case because the owner and billing custodian Kahana stated that that facility has contracts with general health insurers. Therefore, he concludes that the rate Appellee receives is less than what it billed at in this case, and accordingly the $4300.00 billed in this case is unreasonable, *see* Propper Aff. ¶ 31. He appears to consider the "community" as the medical community as a whole in his affidavit. *Id.* at ¶¶13, 32. He also relied on the federal Medicare Part B physician's fee schedule for his reasonableness comparison. Under the statute, his affidavit is acceptable concerning his consideration of the "various federal and state medical fee schedule[s.]"

Dr. Propper relied on Medicare Part B fee schedules, a statutory factor, for the determination of reasonableness in his affidavit. He is qualified as an expert as a result of owning, acting as medical director of, and being associated with, health care providers who have billed for services including MRI's. As an expert, he is allowed to give his opinion when 1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. Dr. Propper basically states that most MRI services in PIP cases are reimbursed at a level of the Medicare Part B fee schedules and the Appellee's rates are exponentially higher than those normally paid; on the whole the rates paid by Appellant are reasonable since they are widely

accepted by providers providing this MRI service, thus the conclusion flowing from the factors he examined is that the charge is outside the norm and not reasonable.

The Appellant's affidavits set forth contested issues of material fact concerning relatedness, medical necessity, and reasonableness to withstand Appellee's motion for final summary judgment.

REVERSED and **REMANDED.**

Fee Appeal

For the fee appeal, case number 16-356 AP, the Fee Judgment is reversed. Under sections 57.041 and 627.428, Florida Statutes, entitlement requires prevailing party status. The Fee Judgment is reversed and remanded contingent upon the party who ultimately prevails below. State Farm moved for appellate attorney's fees in 16-059 under section 768.79, Florida Statues, the offer of judgment statute. Appellant's motion is granted conditionally, dependent upon the prevailing status and upon the testing of the offer of judgment for compliance with section 768.79, Florida Statutes and Florida Rule of Civil Procedure 1.442.

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