

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

PROGRESSIVE EXPRESS
INSURANCE COMPANY,

Appellant,

v.

BARTON LAKE HEALTHCARE
CENTERS, a/a/o Jose A. Martinez,

Appellee.

CASE NO.: CVA1 07-01
LOWER COURT CASE NO.:
2001-CC-9950

Appeal from the County Court,
in and for Orange County, Florida,
Judge Carolyn B. Freeman.

Douglas H. Stein, Esquire,
for Appellant.

Thomas Andrew Player, Esquire,
for Appellee.

Before EVANS, RODRIGUEZ, and LUBET, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT'S JUDGMENT

Barton Lake Healthcare Centers ("Appellee"), as assignee of Jose A. Martinez, brought an action to recover Personal Injury Protection ("PIP") benefits for treatment rendered to Jose Martinez, an insured of Progressive Express Insurance Company ("Appellant"). Appellant filed a timely appeal of the trial court's order granting Plaintiff's motion for final summary judgment. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

On July 17, 2001, Appellee sued Appellant for failure to pay the full amount of charges for medical services rendered pursuant to PIP benefits. It is undisputed that after this suit commenced, the insured's PIP benefits were exhausted. Subsequently, both Appellant and Appellee filed motions for summary judgment. Both parties moved for summary judgment on the issue of exhaustion of benefits. Appellee argued that Appellant was obligated to pay bills in full in the order in which they were received, and that failure to do so provided no protection from the obligation to Appellee because of a subsequent exhaustion to others. Appellant argued that because the insured's \$10,000 PIP policy benefits had been exhausted, Appellee's interests extinguished as a result of the insured's interests being extinguished.

After a hearing on December 13, 2006, the county court granted Appellee's motion for summary judgment. A final summary judgment for Appellee was entered on December 13, 2006. Appellant filed a motion for rehearing/clarification which was denied. On January 9, 2007, Appellant timely filed its notice of appeal.

The issue in this case is whether the trial court erred in granting Appellee's Motion for Final Summary Judgment. The standard of review for summary judgment is *de novo*. *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001). Accordingly, this Court must determine if there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* at 491-92, citing Fla. R. Civ. P. 1.510(c).

On Appeal, Appellant argues that the trial court erred in entering final summary judgment where there remain genuine issues of material fact. Additionally, Appellant argues that the trial court erred in entering final summary judgment where the available PIP benefits have been exhausted. Conversely, Appellee argues that at the time the trial court granted summary judgment, there were no valid and legally sufficient affirmative defenses which raised questions

of material fact. Also, Appellee argues that the exhaustion of benefits defense is not, in and of itself, dispositive of this cause of action.

Both Appellant and Appellee make factual arguments regarding the validity of the county court's ruling. However, the Court finds that the dispositive issue in this case is the exhaustion of benefits. Appellant moved for summary judgment on the sole grounds that because the \$10,000 PIP policy limits were exhausted, the insured's interest became extinguished. Thus, the Appellee's interests, as assignee of the insured, also became extinguished upon exhaustion of the PIP benefits. Additionally, at the hearing on the cross motions for summary judgment, the main issue argued by counsel was exhaustion of benefits.

At the time of the proceedings before the county court, there was no consensus among courts regarding the effect of exhaustion of benefits on the insurance company's claim. In fact, in the Final Summary Judgment, entered on December 13, 2006, the county court acknowledged that the courts "are all over the place" on the issue of exhaustion of benefits for PIP claims. Subsequently, the Fifth District ruled on the issue in *Progressive American Ins. Co. v. Stand-Up MRI of Orlando, a/a/o Eusebio Isaac*, 990 So. 2d 3 (Fla. 5th DCA 2008). In *Stand-Up MRI*, the Fifth District ruled that no requirement exists to set aside a reserve fund for disputed claims, and in the absence of a showing of bad faith, a PIP insurer is not liable for benefits once benefits have been exhausted. *Id.* at 4. The insured was involved in a car accident, and the insurance company partially denied a portion of his claims. *Id.* Stand-Up MRI then sued Progressive for payment of the disputed claims. *Id.* at 5. After the complaint was filed, the insured's available PIP benefits were exhausted because Progressive paid another medical provider. *Id.* Subsequently, Progressive moved for summary judgment on the basis that the insurance benefits had been exhausted. *Id.* The county court granted Progressive's motion for summary judgment

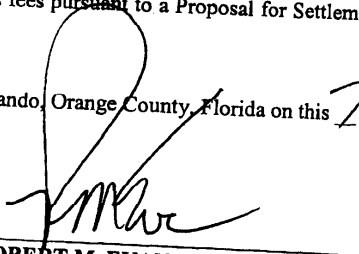
finding that absent any evidence that the exhaustion of benefits was undertaken in bad faith, the Plaintiff couldn't gain more from the insurance company than the contractual benefit amount. *Id.* On appeal, the Fifth District agreed. *Id.* Additionally, the Fifth District found that applying the English Rule for priority of payments was "detrimental to everyone except the provider(s) who is keeping the funds tied up." *Id.* at 6.

Disposition of a case on appeal "should be made in accordance with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered." *Hendeles v. Sanford Auto Auction, Inc.*, 364 So. 2d 467 (Fla. 1978). Accordingly, this appeal must be decided in accordance with the law set forth in *Stand-Up MRI*. The county court erred in its order on Final Summary Judgment by not finding that in the absence of bad faith, Appellant was entitled to summary judgment based on exhaustion of benefits. Additionally, the county court erroneously relied on the English Rule for priority of payments. Thus, in light of the present case law, Appellee was not entitled to judgment as a matter of law.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The trial court's Final Judgment in favor of Appellee is **REVERSED** and this cause is **REMANDED** for further proceedings consistent with this opinion.
2. Appellant's motion for appellate attorney's fees pursuant to a Proposal for Settlement is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 7
day of Feb , 2009.



ROBERT M. EVANS
Circuit Judge


JOSE R. RODRIGUEZ
Circuit Judge


MARCL. LUBET
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 **Douglas H. Stein, Esq.**, Anania, Bandklayder, Blackwell, Baumgarten, Torricella & Stein, 4300 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131-2144; **Daniel J. O'Malley, Esq.**, 332 N. Magnolia Ave., Orlando, FL 32802; **Rutledge M. Bradford, Esq.**, 5210 S. Orange Ave., Orlando, FL 32801; and **Kevin B. Weiss, Esq.**, Weiss Legal Group, P.A., 698 N. Maitland Ave., Maitland, FL 32751 on the 7 day of October, 2009.


Judicial Assistant