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

APPELLATE DIVISION

CASE NO. 17-036 AP

LOWER COURT CASE NO.
2012-875 SP 23

UNITED AUTOMOBILE
INSURANCE CO.,

Appellant,

v.

MILLENIUM RADIOLOGY, LLC.
a/a/o DANILO PADRON,

Appellee.
_____/

OPINION

Opinion filed:

On Appeal from the County Court in and for Miami-Dade County, Florida, Judge Linda Diaz.

Michael J. Neimand, Esq., for Appellant.

Marlene S. Reiss, Esq., for Appellee.

Before: MIGNA SANCHEZ-LLORENS, ANGÉLICA D. ZAYAS, and SCOTT BERNSTEIN, JJ.

ZAYAS, J.

"'Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.'" *Keys Country Resort, LLC v. 1733 Overseas Highway, LLC*, 2019 WL 1548878, at *2 (Fla. 3d DCA Apr. 10, 2019) (quoting *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). Moreover, "'[s]ummary judgment is not intended to weigh and resolve genuine issues of material fact, but only identify whether such issues exist.'" *Id.* (quoting *Perez–Gurri Corp. v. McLeod*, 238 So. 3d 347, 350 (Fla. 3d DCA 2017)). Therefore, "at summary judgment, evidence, including expert

witness affidavits, should be examined in order to determine whether issues exist, but the evidence should not be weighed and evaluated for a determination of the merits of the affidavits." *State Farm Mut. Auto. Ins. Co. v. Roberto Rivera-Morales, M.D. a/a/o Syed Ullah*, 26 Fla. L. Weekly Supp. 469a (Fla. 11th Cir. Ct. June 20, 2018) (*Ullah*).

In this PIP case, United Automobile Insurance Co. ("United Auto" or "Insurer") contested the reasonableness of the amount charged by Millennium Radiology, LLC ("Millennium" or "Provider") for a CT scan performed on the insured after an accident. The provider moved for summary judgment on reasonableness, and both parties filed affidavits. In support of summary judgment, Millennium filed an affidavit of Roberta Kahana, its owner and corporate representative. In opposition, United Auto filed the Affidavit of Edward A. Dauer, M.D. The trial court granted summary judgment. It found that the Provider met its prima facie burden as to the reasonableness of the charges, but it found that Dr. Dauer's affidavit failed to meet the requirements of *Daubert* and was therefore inadmissible. United Auto appeals.

United Auto argues that the Provider's evidence was insufficient and that the burden never shifted to it to show that there was a disputed issue of fact as to the reasonableness of the charges. We have reviewed the affidavit of Roberta Kahana, submitted by the Provider, and determine that it meets that requirements of Florida Rule of Civil Procedure 1.510(e). In addition, contrary to United Auto's argument, Kahana's affidavit is fact-based and not conclusory. In her affidavit Kahana specifically outlines the methods she used to determine that the charges were reasonable, and these methods were utilized pursuant to the mandates of section 627.736(5)(a), Florida Statutes. The trial court was correct to accept the Kahana affidavit and find that it met the Provider's summary judgment burden.

Since Millennium presented prima facie evidence to show that the charges were reasonable, the burden then shifted to United Auto to demonstrate the existence of a genuine issue of material fact regarding reasonableness. United Auto relied on the affidavit of Dr. Dauer but the trial court found that it failed to meet the requirements of *Daubert*, and was therefore inadmissible. Having carefully reviewed Dr. Dauer's affidavit, we find that Dr. Dauer qualifies as an expert under the *Daubert* standard, and that the trial court abused its discretion by determining otherwise.

The Provider asserts that Medicare rates are not relevant. We recognize that there are conflicting decisions on this issue in the opinions issued by the Appellate Division of the Eleventh Judicial Circuit. But, we agree with those cases finding that it is permissible for an expert to reference Medicare fee schedule payment amounts, even when the insurance company failed to elect the reimbursement method set forth in section 627.736(5)(a)(2), Florida Statutes.[1] Dr. Dauer's affidavit should not be rejected for referring to Medicare fee schedules.

The Provider argues that negotiated contract rates (HMO and PPO rates) are not relevant to determine the reasonableness of a medical bill, so that it was improper for Dr. Dauer to utilize them in his affidavit. But, section 627.736(5)(a) allows for information "relevant to the reasonableness of the reimbursement," to be considered in a determination of whether a charge for medical treatment or service is reasonable. *See also Ullah*, 26 Fla. L. Weekly Supp. 469a. We find that HMO and PPO rates are *relevant* to the reasonableness determination. *See Shands Jacksonville Medical Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 213 So. 3d 372, 376 (Fla. 1st DCA 2015) (In *dicta*, stating that "negotiated reimbursement rates" "may very well be relevant

[1] *See, e.g., United Auto. Ins. Co. v. Miami Dade Cty. MRI, Corp. a/a/o Tania Barrios*, 27 Fla. L. Weekly Supp. 7a (Fla. 11th Cir. Ct. Mar. 5, 2019); *United Auto. Ins. Co. v. Miami Dade Cty. MRI, Corp. a/a/o Ana Rojas*, 26 Fla. L. Weekly Supp. 865b (Fla. 11th Cir. Ct. Jan. 8, 2019); *State Farm Mut. Auto. Ins. Co. v. Gables Ins. Recovery, Inc. a/a/o Luis A. Aispur*, 26 Fla. L. Weekly Supp. 709a (Fla. 11th Cir. Ct. Oct. 30, 2018); *State Farm Mut. Auto. Ins. Co. v. Health & Wellness Assocs., Inc. a/a/o Scott*, 25 Fla. L. Weekly Supp. 220a (Fla. 11th Cir. Ct. May 24, 2017).

and discoverable in the context of litigation over the issue of reasonableness of charges instituted pursuant to subsection (5)(a) . . . .") Even though HMO and PPO rates are contracted rates, so they should perhaps not be given as much weight as other factors which might exist, the Court, at the summary judgment stage, is not allowed to weigh evidence. Summary judgment should not be granted on an issue if there is a mere scintilla of evidence on each side. In rejecting the use of HMO and PPO rates, the trial court improperly weighed evidence.

Dr. Dauer's affidavit was sufficient and the trial court abused its discretion by rejecting it. The affidavit created a genuine issue of material fact, and summary judgment should not have been granted.

Accordingly, the summary judgment entered below is hereby **REVERSED**.

SANCHEZ-LLORENS and BERNSTEIN, JJ., concur.

COPIES FURNISHED TO COUNSEL
OF RECORD AND TO ANY PARTY
NOT REPRESENTED BY COUNSEL.