DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PROGRESSIVE SELECT INSURANCE COMPANY,

Appellant,

v.

KAGAN JUGAN & ASSOCIATES, P.A.,
a/a/o MOSES RAYNER,

Appellee.

No. 2D21-274

March 2, 2022

Appeal from the County Court for Lee County; Devin S. George, Judge.

Michael C. Clarke and Jennifer L. Emerson of Kubicki Draper, P.A., Tampa, for Appellant.

Michael C. McQuagge and Thomas DeMinico of McQuagge Law Firm, Fort Myers, for Appellee.

LaROSE, Judge.

Progressive Select Insurance Company (Progressive) appeals the trial court's order denying its attorney's fee motion. Progressive sought fees from Kagan Jugan & Associates (the Provider) pursuant

to Florida's offer of judgment statute. *See* § 768.79, Fla. Stat. (2018). We have jurisdiction.[1] S*ee* Fla. R. App. P. 9.030(b)(1)(A). We reverse.

Background

Progressive's insured, Moses Rayner, suffered injuries in a motor vehicle accident. The Provider furnished him medical and rehabilitative care. Mr. Rayner assigned his reimbursement rights under his insurance policy to the Provider. The Provider later sued Progressive, seeking allegedly unpaid personal injury protection (PIP) benefits.

Progressive answered and raised several affirmative defenses. Progressive claimed that it paid the proper reimbursement amount due under the policy and section 627.736(5)(a), Florida Statutes (2014), using the participating physician fee schedule under Medicare Part B. Progressive then moved for summary judgment.

Progressive thereafter served an offer of judgment, proposing to resolve the case for "One Dollar and No Cents ($1.00) for [PIP]

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[1] Progressive initiated this appeal in the circuit court. Subsequently, the case was transferred to us. *See* § 26.012(1), Fla. Stat. (2020) (eliminating circuit court jurisdiction over appeals of county court orders and judgments, effective January 1, 2021).

benefits" and "Forty-Nine Dollars and No Cents ($49.00) for [the Provider]'s Attorney's fees and costs." Presumably unimpressed with the offer, the Provider did not respond.

Thereafter, the trial court entered a summary judgment for Progressive. The trial court explained that it was bound by our decision in *State Farm Mutual Automobile Insurance Co. v. MRI Associates of Tampa, Inc.*, 252 So. 3d 773 (Fla. 2d DCA 2018), *approved*, 46 Fla. L. Weekly S379 (Fla. Dec. 9, 2021).

Progressive promptly moved for attorney's fees. *See* § 768.79(6)(a) ("If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs . . . and attorney's fees . . . ."). Progressive contended that its nominal offer was made in good faith, as evidenced by the trial court's entry of "final judgment in [Progressive]'s favor." Progressive also observed that the trial court's finding of "zero liability support[s] the reasonableness of [its] offer."

In opposition to the fee motion, the Provider argued that the summary judgment involved "an unsettled issue of law." The

Provider observed that the Florida Supreme Court accepted jurisdiction to review *State Farm*. *See MRI Assocs. of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. SC18-1390, 2019 WL 3214553, at *1 (Fla. July 17, 2019).[2] The Provider argued that the "unsettled" nature of the law underpinning *State Farm* required denial of the fee motion because Progressive "could have no . . . good faith basis that their exposure would be nominal." Thus, the Provider maintained that the trial court could properly deny the fee motion "because the question of law upon which the judgment was rendered . . . is being decided by the Florida Supreme Court."

The trial court denied the fee motion. It found that "under the totality of circumstances" and the " 'reasonableness' factors of [section] 768.79(7)(b)," the "offer of judgment was not made in good faith":

> Given the timing of the offer being made, when little to no discovery or even communication ([Progressive] did not even appear at the pretrial conference), the fact that the issue involved was a highly contested issue statewide, with multiple conflicting rulings, both for and against

[2] Our decision in *State Farm* issued on May 18, 2018. The Florida Supreme Court accepted jurisdiction four months after the trial court entered summary judgment and Progressive filed its fee motion in the instant case.

> [Progressive], to which the law surrounding said issue is STILL "unsettled" at best, the Court does not find that the subjective motivations and beliefs of the offeror in making the nominal offer were in "good faith" to settle the case.

Analysis

The trial court's reasoning in denying Progressive's fee motion is flawed.

I. The Hierarchy of Decisional Holdings

In granting Progressive summary judgment, the trial court acknowledged that *State Farm* was binding. Yet, in denying Progressive's fee motion, the trial court surveyed what it thought were "conflicting rulings" and found that the law was "unsettled." The incongruity is plain.

The trial court's inconsistent application of binding precedent ignores the structure of our state court system. Clearly, "if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it." *Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992) (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976)).

At the time the case was before the trial court, our law was settled under *State Farm* and the trial court was bound by it.[3] *See id.* Courts may not search for conflicting decisions when controlling precedent readily furnishes the needed answer. *Cf. Dep't of Highway Safety & Motor Vehicles v. Walsh*, 204 So. 3d 169, 171 (Fla. 1st DCA 2016) (describing the trial court's failure to follow binding precedent as a "profound error").

II. Progressive's Good Faith Offer of Judgment

We review "a trial court's order on attorney's fees . . . for an abuse of discretion." *Money v. Home Performance All., Inc.*, 313 So. 3d 783, 786 (Fla. 2d DCA 2021) (quoting *Saltzman v. Hadlock*, 112 So. 3d 772, 774 (Fla. 5th DCA 2013)). In light of the so-called "unsettled" law, the trial court found that Progressive's offer was not made in good faith. We review this finding, too, for an abuse of discretion. *See Miccosukee Tribe of Indians of Fla. v. Lewis Tein*

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[3] *State Farm* issued one month after the Provider filed suit and two months before Progressive submitted its offer of judgment. At oral argument before this court, the Provider conceded that when Progressive served its offer of judgment, *State Farm* was binding and, as a result, its case against Progressive was "valueless." Incidentally, the Florida Supreme Court very recently approved of our decision in *State Farm*. *See MRI Assocs. of Tampa, Inc.*, 46 Fla. L. Weekly at S379.

P.L., 277 So. 3d 299, 301 (Fla. 3d DCA 2019) ("A trial court's ruling that an offer of judgment was not made in good faith is reviewed for abuse of discretion." (first citing *State Farm Fla. Ins. Co. v. Laughlin-Alfonso*, 118 So. 3d 314, 315 (Fla. 3d DCA 2013); and then citing *Downs v. Coastal Sys. Int'l, Inc.*, 972 So. 2d 258, 261 (Fla. 3d DCA 2008))).

"[S]ection 768.79 creates a mandatory right to attorney's fees if its prerequisites are met." *McGregor v. Molnar*, 79 So. 3d 908, 910 (Fla. 2d DCA 2012) (citing *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995)).

> Under section 768.79, a right to attorney's fees is established once the two statutory requisites are satisfied. These requisites are (1) "a party has served a demand or offer for judgment, and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. These are the only elements of the statutory entitlement. No other factor is relevant in determining the question of entitlement."

Miccosukee Tribe of Indians of Fla., 277 So. 3d at 302 (quoting *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th DCA 1993)). "[T]he right to an *award* turns only on the difference between the amount of a rejected offer and the amount of a later judgment."

Schmidt, 629 So. 2d at 1041. Progressive met its burden. Although its offer was nominal, Progressive is not barred from recovering fees.

Of course, even if a party is entitled to costs and fees under the statute, "the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." § 768.79(7)(a); s*ee* *McGregor*, 79 So. 3d at 910-11 ("A [trial] court may in its discretion disallow an entitlement to fees, 'but only if it determines that a qualifying offer "was not made in good faith." That is the sole basis on which the court can disallow an entitlement to an award of fees.' " (quoting *Dvorak*, 663 So. 2d at 612)).

In finding that Progressive's offer was not made in good faith, the trial court examined the "reasonableness" factors enumerated in section 768.79(7)(b).

> When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:
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> 1. The then apparent merit or lack of merit in the claim.
> 2. The number and nature of offers made by the parties.
> 3. The closeness of questions of fact and law at issue.

> 4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
> 5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
> 6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

But, a trial court may not rely on these factors to decline to award fees altogether. *See Braaksma v. Pratt*, 103 So. 3d 913, 915 (Fla. 2d DCA 2012) (citing *Dvorak*, 663 So. 2d at 612). Unfortunately, that is what the trial court did. It conflated two distinct analyses. Whether an offer is made in good faith is conceptually distinct from the reasonableness of the awarded fee.

"[T]he question of whether a proposal was served in good faith turns entirely on whether the offeror had a reasonable foundation upon which to make his offer and made it with the intent to settle the claim against the offeree should the offer be accepted." *Wagner v. Brandeberry*, 761 So. 2d 443, 446 (Fla. 2d DCA 2000). "[T]he issue of good faith is determined solely by the subjective motivations and beliefs of the offeror." *Id.*; *see Miccosukee Tribe of Indians of Fla.*, 277 So. 3d at 302 ("[T]he question of '[w]hether the

offeror has good faith rests on whether the offeror has a reasonable foundation on which to base the offer.' " (second alteration in original) (quoting *Arrowood Indem. Co. v. Acosta, Inc.*, 58 So. 3d 286, 289 (Fla. 1st DCA 2011))).

The record reflects that Progressive presented the trial court with a thorough and reasoned explanation for its offer. Progressive's offer was not pulled out of the air. Progressive explained to the trial court the painstaking analysis it undertook to support its offer. And, it bears repeating that Progressive's offer was founded on a "red cow" case from our court. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1390 n.2 (11th Cir. 1993) ("The term 'red cow' is used in some legal circles, particularly in Florida, to describe a case that is directly on point, a commanding precedent."); *see Pardo*, 596 So. 2d at 666-67. The nominal amount of the offer is not dispositive to a determination of whether Progressive made the offer in good faith. *E.g., State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So. 2d 874, 876 (Fla. 2d DCA 1997) (holding that an offer of one dollar was made in good faith); *see Gawtrey v. Hayward*, 50 So. 3d 739, 743 (Fla. 2d DCA 2010) ("In assessing whether Ms. Gawtrey's nominal offer was made in good faith, the

trial court was required to look at whether Ms. Gawtrey had a reasonable basis when the offer was made to conclude that her exposure in the case was nominal."); *Matrisciani v. Garrison Prop. & Cas. Ins. Co.*, 298 So. 3d 53, 61 (Fla. 4th DCA 2020) (explaining that insurer's nominal offer of settlement can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal); *Miccosukee Tribe of Indians of Fla.*, 277 So. 3d at 303 ("[T]he Tribe had a well-founded, good faith, and legally correct belief that sovereign immunity divested the trial court of subject matter jurisdiction. . . . Given these circumstances, the nominal offers had a reasonable foundation, namely the Tribe's nominal exposure. In these circumstances, the nominal offers did not indicate a lack of good faith."); *Taylor Eng'g, Inc. v. Dickerson Fla. Inc.*, 221 So. 3d 719, 720 (Fla. 1st DCA 2017) ("[A] nominal offer is made in good faith where the offeror has a reasonable basis to believe that its exposure to liability is minimal."); *United Auto Ins. Co. v. Partners in Health Chiropractic Ctr.*, 233 So. 3d 1201, 1204-05 (Fla. 3d DCA 2017) (holding that offeror "was not required to show that it had no exposure in the case at the time the proposal for

settlement was made—it was only required to demonstrate that at the time of its offer, it possessed a reasonable basis to conclude that its exposure was nominal"); *Dep't of Highway Safety & Motor Vehicles v. Weinstein*, 747 So. 2d 1019, 1021 (Fla. 3d DCA 1999) ("[I]ssue of 'good faith,' is, by its very nature, determined by the subjective motivations and beliefs of the pertinent actor. As is true in this case, so long as the offeror has a basis in known or reasonably believed fact to conclude that the offer is justifiable, the 'good faith' requirement has been satisfied.").

The trial court also found that the timing of Progressive's offer, so soon after the Provider filed suit with nary any discovery, indicated a lack of good faith. We see it differently.

State Farm issued in May 2018, after the Provider filed suit. Progressive moved for summary judgment in June 2018. In so doing, Progressive insisted that it was permitted to "limit reimbursement to 80% of the schedule of maximum charges in accordance with . . . [section] 627.736(5)(a)(1[)-(]5) . . . and Progressive's policy of insurance." Less than one month later, Progressive served the Provider with its offer of judgment.

"The underlying purpose of the offer of judgment statute includes the early termination of litigation by encouraging realistic assessments of the claims made." *U.S. Sec. Ins. v. Cahuasqui*, 760 So. 2d 1101, 1104 (Fla. 3d DCA 2000). Progressive's offer reflected its legally correct belief that it was not liable. The timing of the offer did not diminish Progressive's reasonable foundation upon which it based its offer.

Conclusion

We conclude that the trial court abused its discretion in denying Progressive's fee motion after finding that Progressive's offer of judgment was not made in good faith.

Reversed and remanded.

SLEET and ATKINSON, JJ., Concur.

Opinion subject to revision prior to official publication.