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

CESAR CEVALLOS,

CASE NO.: CVA1 06-86
LOWER COURT CASE NO.:
2006-SC-2228

Consolidated with:

AMIRA TRUJILLO,

CASE NO.: CVA1 07-32
LOWER COURT CASE NO.:
2006-SC-2227

Appellants,
v.

MERCURY INSURANCE COMPANY
OF FLORIDA**,**

Appellee.
_______________________________________/

Appeal from the Small Claims Court,
in and for Orange County, Florida,
Judge Deborah Blechman and
Judge Antoinette Plogstedt.

Aaron E. Leviten; Allen, Kopet & Associates,
for Appellant.

Jamie Billotte Moses; Fisher, Rushmer,
Werrenrath, Dickson, Talley &
Dunlap, P.A. and Steven Kirschner; for Appellee.

Before LATIMORE, THORPE, and MIHOK

FINAL ORDER AFFIRMING TRIAL COURTS' FINAL SUMMARY JUDGMENTS

Appellants, Cesar Cevallos and Amira Trujillo, each timely appealed the trial courts' decision entering Final Summary Judgment against them, rendered November 16, 2006 and March 26, 2007, respectively. On June 8, 2007, this Court consolidated the two

cases for purposes of this appeal. On appeal the Appellants seek reversal of the orders denying them benefits under a Personal Injury Protection insurance policy. This Court has jurisdiction. Fla. R. App. P. 9.030(c)(1)(A).

On August 20, 2005, Cevallos and Trujillo (collectively "Appellants") were passengers in a vehicle driven by Octavio Villacis (a non-party to this lawsuit). Appellants, as passengers, were involved in a motor vehicle accident in Broward County, Florida, and suffered injuries as a result of the accident. Villacis held an automobile insurance policy through Mercury Insurance Company of Florida.

In the trial court action, Appellant Cevallos filed his Complaint on March 10, 2006, and a Pretrial Conference was scheduled for April 24, 2006. Appellee Mercury did not attend the pretrial conference and subsequently Cevallos file motions for default and default judgment. Appellee filed its "Motion in Opposition to Plaintiff's Default and in the Alternative Defendant's Motion to Set Aside Default." The trial court, in response to this motion, reset the Pretrial Conference for June 5, 2006. Appellee filed an affidavit offering an explanation as to why counsel failed to appear at the initial pretrial conference. Over Cevallos' objection and following hearings on the propriety of resetting the Pretrial conferences, the trial court denied Cevallos' motion for default. The trial court then granted Appellee's motion for summary judgment on November 16, 2006, finding that Appellee was not on notice of a covered loss because a proper HCFA form had not been submitted by the Appellants. Following a denial of Cevallos' motion for rehearing and reconsideration and motion to certify a question to the Fifth District Court of Appeal, Cevallos timely filed this appeal.

The cases consolidated for this appeal involved Appellant Trujillo, wife of Appellant Cevallos, who was also injured in the auto accident. As in the Cevallos matter, Appellee's counsel failed to appear the pretrial conference, and subsequently Appellant Trujillo filed a motion for default and default judgment. The trial court reset the case for Mediation and Pretrial Conference. After hearing Appellant Trujillo's Motion to Strike Order Resetting the Case, the trial court granted that motion and entered a default against Appellee Mercury. By this time, Appellee filed its affidavit explaining the failure to appear at the pretrial conference. Appellee moved to set aside the default and the trial court granted that motion on December 22, 2006. Following the setting aside of the default, Appellee filed its motion for summary judgment and, as in the Cevallos matter, the trial court granted summary judgment on March 26, 2007. The trial court found that since a properly completed HCFA form was not submitted, the Appellee did not have proper notice of a covered loss, and as a matter of law summary judgment was appropriate. Appellant Trujillo timely appealed the Order Granting Defendant's Motion for Final Summary Judgment.

This appeal comes to this Court from a final summary judgment. When reviewing a final summary judgment this Court's standard of review is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *Kaplan v. Morse*, 870 So. 2d 934, 936 (Fla. 5th DCA 2004). A party is not entitled to summary judgment unless there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Volusia County*, 760 So. 2d at 130. It is the moving party's burden to conclusively establish that there is no dispute as to any material fact. *Kaplan,* 870 So. 2d at 935. "[U]nless the facts are so crystallized that

nothing remains but questions of law," summary judgment should not be granted. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985).

The first two errors alleged by the Appellants concern the procedural requirements of the Small Claims Court Rules. Specifically, Appellants allege that the trial erred by failing to enter a default in the Cevallos case and also erred by failing to sustain a default in the Trujillo case.[1] As previously mentioned, Appellee's counsel failed to attend a pretrial conference in both matters. Appellants cite Florida Small Claims Rule 7.170(a), concerning defaults, which states: "[i]f the defendant does not appear at the scheduled time, the plaintiff is entitled to a default to be entered by either the judge or clerk." Fla. Sm. Cl. R. 7.170(a) (2008). From a plain reading of the rule, Appellants were entitled to a default in both the Cevallos and Trujillo cases after the defendant failed to appear. This did not occur in the Cevallos case and although a default was entered in the Trujillo case it was eventually vacated. Despite Appellants' correct interpretation of the rules concerning pre-trial conferences and defaults, the entry of defaults would not have entirely resolved the disputes.

In addition to the rule concerning entry of defaults, the Florida Small Claims Rules also set out procedures for obtaining relief from judgments, orders, and/or proceedings. Under Rule 7.190(b), on proper motion a court may relieve a party or party's legal representative from a final judgment, order, or proceeding for a variety of reasons, including for "mistake, inadvertence, surprise, or excusable neglect." Fla. Sm. Cl. R. 7.190(b) (2008). Appellee's counsel properly brought motions before each trial

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[1] Appellee claims that these orders are not properly up for appeal. Florida law, however, clearly states that appeals from final orders call up for review all necessary interlocutory steps leading to that final order, whether they were separately appealed or not. *Saul v. Bae*, 399 So. 2d 130 (Fla. 2d DCA 1981).

court opposing the motions for default and requesting that the default entered in the Trujillo case be vacated. In order to grant relief from the default order

> [t]he trial court must determine whether the defendant demonstrated that his neglect to respond was excusable and that he had a meritorious defense. As an additional factor in determining whether the neglect was excusable the court may consider whether the defendant subsequently demonstrated due diligence in seeking relief upon learning of the default.

B.C. Builders Supply Co., Inc. v. Maldonado, 405 So. 2d 1345, 1347 (Fla. 3d DCA 1981).

Florida precedent establishes a tough standard when an appellate court is asked to reverse the granting of a motion to vacate a default. Looking at prior decisions regarding appeals of defaults, the Second District Court of Appeals stated that "[a]n analysis of the various decisions strongly suggests that a greater showing is required to reverse the trial court's granting of a motion to vacate default than in reversing the denial of such a motion." *Garcia Ins. Agency, Inc. v. Diaz*, 351 So. 2d 1137, 1138-39 (Fla. 2d DCA 1977). Appellants would need to demonstrate a gross abuse of discretion in order to allow this Court to overturn the trial court's decision to vacate the defaults.

Appellee's counsel filed an affidavit with the trial court explaining why he had failed to attend the pretrial conferences. The trial courts accepted the affidavits and considered additional testimony and even requested additional memoranda (in the Cevallos case) regarding the issue of meritorious defenses. The record does not contain a transcript from the hearings below on the default order, but the research memoranda requested by the Cevallos court are contained in the record. A review of the record indicates no gross abuse of discretion on the part of either trial court judge. Absent such abuse, this Court must affirm the decisions of the trial court judges to vacate the default (Cevallos) and to not enter a default (Trujillo).

Second, Appellants allege that the trial courts improperly granted motions for summary judgment in favor of Mercury Insurance. Specifically, Appellants claim that summary judgment should not have been entered by either trial court judge during the discovery phase of the litigation. Additionally, they allege that the trial courts erred by granting summary judgment based on a defense not raised by Mercury in its pleadings.

The Appellants argue that without complete discovery, including rulings on motions to compel discovery, there cannot be any ruling on defendant's motions for summary judgment. Summary judgment is a tool used by the courts, on proper motion, to resolve matters between parties where there are no disputed questions of material fact. Florida courts have long held that legal questions are the province of the judge. *Carver v. Jenkins*, 209 So. 2d 882, 883 (Fla. 3d DCA 1968) (citing *Piowaty v. Regional Agricultural Credit Corp.*, 160 Fla. 136 (1948)). When no factual questions remain, summary judgment can effectively resolve a conflict. *See Copeland v. Florida New Investments Corp.*, 905 So. 2d 979 (Fla. 3d DCA 2005). By ruling on the motions for summary judgment in favor of Mercury, the lower courts determined that no material facts were in dispute in both the Cevallos and Trujillo cases.

Despite some latitudes that Florida courts have carved into the PIP statute, no exception exists to the requirement that a HCFA form or other approved form be provided to the insurer when an insured seeks reimbursement for a covered loss. The statute clearly sets out that

> [a]ll statements and bills for medical services rendered by any physician, hospital, clinic, or other person or institution shall be submitted to the insurer on a properly completed CMS 1500 form, UB 92 form, or any other standard form approved by the office or adopted by the commission for purposes of this paragraph.

§ 627.736(5)(d), Fla. Stat. (2005).

In other Florida circuit court cases, parties who submitted deficient HCFA forms were found to not have placed the insurers on notice of a covered loss. *Top Chiropractic a/a/o Wilce Theodule v. Nationwide Mutual Ins. Co.*, 12 Fla. L. Weekly Supp. 152c (Fla. 9th Cir. Ct. Nov. 19, 2004). These deficiencies were found in HCFA forms that were actually submitted to the insurers; in the instant case an HCFA form or other approved form was not submitted. Appellee correctly analogizes the instant case with *Sharon Bryant v. Direct General Ins. Co.*, 11 Fla. L. Weekly Supp. 274a (Fla. 7th Cir. Ct. Jan. 9, 2004), in which no proper HCFA form was submitted to the insurer for treatments occurring within thirty days of the postmarked date of the statement. Without a proper HCFA form, an insurer cannot properly be put on notice of a covered loss and therefore is not required to reimburse the claimant. *Id*. The trial courts correctly granted summary judgment by ruling as a matter of law the insurer was entitled to receive a properly submitted HCFA form prior to processing the claims. Since no such form was ever submitted, and finding no other abuse of discretion within the records on appeal, the trial courts property granted final summary judgments in favor of Appellee.

Finally, this Court finds no merit in the argument that the trial courts erred by entering summary judgment on a defense not raised by the Appellee or that the Appellee waived this defense. Appellee's answer and affirmative defenses to the initial complaint raised compliance with all pertinent parts of the Florida Personal Injury Protection statute. As such, the Appellants' alleged errors do not have merit.

Finally, pursuant to the Florida Rules of Appellate Procedure, motions for attorney's fees "may be served not later than the time for service of the reply brief…"

Fla. R. App. P. 9.400(b). Appellee filed its "Motion [for] Appellate Attorney's Fees and Costs," on October 12, 2007, and the Reply Brief was due September 28, 2007. As such, the motion was not timely submitted and is denied.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the trial courts' Orders Granting Defendant's Motion for Final Summary Judgment dated, November 16, 2006, and March 26, 2007, are hereby **AFFIRMED**. Appellee's "Motion [for] Appellate Attorney's Fees and Costs," is hereby **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this ___3_____day of __February__________, 2009.

___/S/______________________________
ALICIA L. LATIMORE
Circuit Judge

_/S/__________________________________
JANET C. THORPE
Circuit Judge

___/S/________________________________
A. THOMAS MIHOK
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: **Aaron E. Leviten, Esq.,** Allen, Kopet & Associates, P.O. Box 1330, Winter Park, FL 32790-1330; **Jamie Billotte Moses, Esq.,** Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A., P.O. Box 712, Orlando, FL 32802-0712; and **Steven Kirschner, Esq.**, 1555 Howell Branch Rd., Suite C201, Winter Park, FL 32789.

____/S/______________________________
JUDICIAL ASSISTANT