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

ROSE HEALTHCARE CENTER, INC., f/k/a Rose Chiropractic Centre, P.A., a/a/o Jitendra Kumar Pandya,

Appellant,

v.

CASE NO.: CVA1 09-24
Lower Court Case No.: 2006-CC-7465-O

INFINITY INSURANCE COMPANY and Leader Insurance Company, n/k/a INFINITY AUTO INSURANCE COMPANY,

Appellees.
_____/

Appeal from the County Court,
for Orange County,
Antoinette Plogstedt, Judge.

Aaryn Fuller, Esquire,
for Appellant.

Patrick D. Hinchey, Esquire,
for Appellees.

Before LEBLANC, KOMANSKI, and STRICKLAND, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Rose Healthcare Center, Inc., f/k/a Rose Chiropractic Centre, P.A., a/a/o Jitendra Kumar Pandya ("Rose Healthcare"), timely appeals the trial court's "Summary Final Judgment," entered on May 8, 2009, in favor of the Appellees, Infinity Insurance Company and Leader Insurance Company, n/k/a Infinity Auto Insurance Company (collectively, "Infinity"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We

dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Facts and Procedural History

Rose Healthcare sued Infinity for the payment of PIP benefits under an insurance policy issued to Jitendra Pandya ("Pandya"). Rose Healthcare alleged that Infinity failed to pay covered medical expenses resulting from a covered motor vehicle accident.

On September 9, 2005, Pandya began receiving treatment from Rose Healthcare. To pay for his treatment, Pandya assigned his PIP benefits under the Infinity insurance policy to Rose Healthcare. Rose Healthcare then submitted to Infinity several CMS 1500 Health Insurance Claim Forms, all of which stated that Rose Healthcare treated Pandya for injuries resulting from a loss that occurred on September 5, 2005.

Upon reviewing the CMS 1500 forms, an Infinity claims adjuster noted that the police report in Pandya's file indicated a motor vehicle accident on August 29, 2005, but there was no evidence of a covered loss on September 5, 2005. Because Rose Healthcare's CMS 1500 forms indicated that Pandya was treated for injuries resulting from a loss on September 5, 2005, the claims adjuster referred the claims to Infinity's Special Investigative Unit ("SIU"). The claims adjuster also issued several Explanations of Benefits to Rose Healthcare, indicating that the claims were pending further investigation. All of the Explanations of Benefits indicated a date of loss of August 29, 2005.

After submitting three demand letters to Infinity, Rose Healthcare filed suit in the trial court. The initial complaint did not mention the date of Pandya's accident. Later, Rose Healthcare amended its complaint to allege that it treated Pandya for injuries resulting from an accident on August 29, 2005. In its answer to the Amended Complaint, Infinity raised the affirmative defense of failure to provide notice of a covered loss because Rose Healthcare failed

to submit properly completed CMS 1500 forms.

The parties filed competing motions for final summary judgment. The trial court granted final summary judgment in favor of Infinity, holding that Rose Healthcare's CMS 1500 forms failed to place Infinity on notice of a covered loss, and Rose Healthcare's demand letters failed to satisfy statutory requirements. This appeal followed.

Discussion of Law

On appeal, Rose Healthcare argues that the trial court erred when it held that Infinity was not on notice of a covered loss because the CMS 1500 forms were in substantial compliance with statutory requirements. In the alternative, Rose Healthcare argues that Infinity should be estopped from claiming that it was not on notice of a covered loss and that Infinity has waived the defense. Finally, Rose Healthcare argues that the trial court erred when it held that its demand letters failed to comply with section 627.736(11), Florida Statutes.

On the contrary, Infinity asserts that the trial court did not err in granting final summary judgment in its favor because the CMS 1500 forms did not comply with statutory requirements. Infinity further argues that it should not be estopped from asserting that it was not on notice of a covered loss because Rose Healthcare failed to raise the estoppel argument before the trial court and the facts do not support estoppel. Infinity also asserts that it did not waive the defense. Finally, Infinity argues that the trial court did not err when it held that Rose Healthcare's demand letters failed to comply with section 627.736(11), Florida Statutes.

The standard of review for an order granting summary judgment is de novo. Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 130 (Fla. 2000). The Court must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Krol v. City of Orlando, 778 So. 2d 490, 491-

92 (Fla. 5th DCA 2001) (citing Fla. R. Civ. P. 1.510(c)).

The parties agree that there are no genuine issues of material fact. Each party argues that it is entitled to final summary judgment, and their respective representations of the material facts are in agreement. Therefore, in reviewing the trial court's order, we must determine whether Infinity is entitled to a judgment as a matter of law.

Substantial Compliance

An insurer is not required to pay a claim with respect to a bill or statement that does not substantially meet the applicable requirements of section 627.736(5)(d), Florida Statutes. § 627.736(5)(b)1.d., Fla. Stat. (2005). Under section 627.736(5)(d), all statements and bills for medical services shall be submitted to the insurer on a *properly completed* CMS 1500 form or other approved form. An insurer shall not be considered to have been furnished with notice of a covered loss unless "the statements or bills are *properly completed in their entirety as to all material provisions*, with all relevant information being provided *therein*." § 627.736(5)(d), Fla. Stat. (2005) (emphases added). "'Properly completed' means providing truthful, substantially complete, and *substantially accurate* responses as to all material elements to each applicable request for information or statement . . . ." § 627.732(13), Fla. Stat. (2005) (emphasis added). "If an insured submits a claim for PIP benefit, but fails to properly complete a CMS 1500 form, the insurer may avoid recovery by asserting as an affirmative defense the failure to receive notice of a covered loss . . . ." USAA Cas. Ins. Co. v. Pembroke Pines MRI, Inc., 31 So. 3d 234, 237 (Fla. 4th DCA 2010) (citing Ortega v. United Auto. Ins. Co., 847 So. 2d 994, 996-97 (Fla. 3d DCA 2003)).

Rose Healthcare argues that its CMS 1500 forms were in substantial compliance with statutory requirements because the date of loss is not a material provision on the claim forms.

Rose Healthcare further asserts that, even if the date of loss is a material provision, it rectified its error by attaching its initial report which lists the proper date of loss. On the other hand, Infinity argues that Rose Healthcare's CMS 1500 forms did not comply with statutory requirements because the date of loss is a material provision and it was completed inaccurately on every claim form.

Rose Healthcare cites two decisions of the Broward County Court in support of its argument that its CMS 1500 forms substantially complied with statutory requirements. Both decisions state that "[a] review of Florida cases involving construction of expressions similar to 'substantial completion' indicates that a court should overlook mere technical deficiencies and instead look at whether the party is provided with all material information necessary to permit clear review." Toueg v. United Auto. Ins. Co., 13 Fla. L. Weekly Supp. 1016a (Fla. Broward Cty. Ct. Aug. 1, 2006); Fort Lauderdale Ctr. for Chiropractic Care, Inc. v. Progressive Express Ins. Co., 16 Fla. L. Weekly Supp. 110b (Fla. Broward Cty. Ct. Nov. 24, 2008) (both citing Fla. Jur. 2d Words and Phrases S-Z, 288 (2005)). Rose Healthcare characterizes that statement to mean that the appropriate inquiry to undertake in assessing substantial compliance with section 627.736(5)(d), Florida Statutes, is whether the insurer had all of the information needed to process the claim. We find that Rose Healthcare mischaracterizes the rule of law promulgated by the Broward County Court. Furthermore, we distinguish those cases from the instant matter as the material facts of both cases are substantially different from those of the instant matter.

In both Toueg and Fort Lauderdale Center for Chiropractic Care, automobile insurers raised the defense of improperly completed claim forms in actions for PIP benefits, and in both cases, the issue was a technical deficiency regarding the healthcare provider's signature. In Toueg, the healthcare provider's name was typewritten where it should have been manually

signed. 13 Fla. L. Weekly Supp. 1016a. In Fort Lauderdale Center for Chiropractic Care, the healthcare provider's signature was affixed via stamp, rather than being manually signed. 16 Fla. L. Weekly Supp. 110b. In both cases, the court held that the defect in affixing the healthcare provider's signature, *without any other defect*, did not render the forms ineffective in providing notice of a covered loss because the insurers did not argue that the defect caused them any difficulty in reviewing the respective claims and the insurers had clearly been provided with all information needed to process the respective claims. Toueg, 13 Fla. L. Weekly Supp. 1016a; Fort Lauderdale Ctr. for Chiropractic Care, 16 Fla. L. Weekly Supp. 110b. In other words, the method utilized in affixing the healthcare provider's signature is immaterial because, whether it is typewritten, stamped, or manually signed, the same information is provided and nothing necessary to process the claim is withheld.

Unlike Toueg and Fort Lauderdale Center for Chiropractic Care, the instant matter does not involve a defect in the method of entering or affixing a particular response to a request for information on a claim form. Rather, the instant matter involves an inaccurate response. To phrase it another way, in the two cited decisions from the Broward County Court, the name entered for the healthcare provider was accurate, though it was not manually signed, while in the instant matter, the date of loss entered is inaccurate. Therefore, the substantial difference between the material facts of the two cited cases and the material facts of the instant matter is that, in Toueg and Fort Lauderdale Center for Chiropractic Care, all of the information provided on the claim forms was complete and accurate, while in the instant matter, the response provided for the date of loss is clearly inaccurate.

Furthermore, the Broward County cases provide no opinion as to whether the date of loss, Box 14 on the CMS 1500 form, is a "material provision" under section 627.736(5)(d), Florida

Statutes. Rather, the two decisions only suggest a general rule of law that courts may utilize to determine whether a request for information on a claim form is a "material provision," and Rose Healthcare's characterization of that rule of law is inaccurate. The two cited opinions do not support the proposition that a claim form is substantially compliant if the insurer *has* all of the information needed to process the claim. Rather, an accurate characterization would be that a claim form is substantially compliant if *the claim form provides* all of the information necessary to process the claim. The latter characterization conforms to the requirements of section 627.736(5)(d), Florida Statutes; specifically, "statements or bills [must be] properly completed . . . with all relevant information being provided *therein*." (Emphasis added).

There is no reported appellate case law that explicitly establishes whether the date of loss is a "material provision." Furthermore, there is no statutory guidance or reported appellate case law that provides a standard by which courts may determine whether any particular provision is material. Therefore, this Court approves and adopts the following rule of law, based on sections 627.736(5)(d) and 627.732(13), Florida Statutes, and on a modification of the standard promulgated by the Broward County Court in Toueg and Fort Lauderdale Center for Chiropractic Care. A request for information on a CMS 1500 form or other approved form is a "material provision" if the information requested is necessary to properly process the claim.

One step in properly processing a claim, among other steps not mentioned herein, is determining whether the healthcare treatment provided was a result of a covered loss. Accurate notification of the date of loss from which the claimed healthcare treatment resulted is necessary for the insurer to verify that the treatment was a result of a covered loss. Therefore, the date of loss, Box 14 on the CMS 1500 form, is a "material provision" under section 627.736(5)(d), Florida Statutes.

On every claim form submitted by Rose Healthcare, the entry for the date of loss is inaccurate. Therefore, Rose Healthcare failed to "properly complete" the CMS 1500 forms "in their entirety as to all material provisions" because it failed to provide "substantially accurate responses as to all material elements to each applicable request for information." See §§ 627.732(13), 627.736(5)(d), Fla. Stat. (2005).

Finally, Rose Healthcare's contention that it rectified the date of loss error by attaching its initial report to the claim forms does not avail. Again, section 627.736(5)(d), Florida Statutes, explicitly requires the CMS 1500 forms to be "properly completed . . . with all relevant information being provided *therein*." (Emphasis added). Thus, Rose Healthcare was required to include all relevant information *in the CMS 1500 form*. It would have been error for Rose Healthcare to omit the date of loss from the CMS 1500 form and provide it on an attached initial report. However, Rose Healthcare committed even worse error by entering a completely inaccurate date on *every* CMS 1500 form. Even if we were to entertain Rose Healthcare's argument that it rectified its error by attaching the initial report, we would reach the same result. On every *statutorily mandated* claim form, of which several were submitted, Rose Healthcare consistently entered the same inaccurate date of loss, while listing the proper date on only one *attachment*. Therefore, we find that the trial court did not err in holding that Rose Healthcare failed to place Infinity on notice of a covered loss.

Estoppel

Rose Healthcare attempts to avoid the affirmative defense of failure to provide notice of a covered loss by arguing that Infinity should be estopped from raising it. Rose Healthcare argues that, by entering August 29, 2005, as the date of loss on the Explanations of Benefits, Infinity represented to Rose Healthcare that it was aware that Pandya's treatment resulted from the

August 29, 2005, accident. Rose Healthcare then asserts that it relied on this representation to its detriment, and Infinity should be estopped from changing its position.

"On review of the order of the [trial court,] the [appellate court] should confine itself to consideration of only those matters and questions which were before the lower court and should not go beyond the record made and appearing in the lower court." Jacques v. Wellington Corp., 183 So. 718, 719 (Fla. 1938). Furthermore, "[i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection, exception, or motion below." Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010) (quoting Harrell v. State, 894 So. 2d 935, 940 (Fla. 2005)).

There is no evidence in the record demonstrating that Rose Healthcare articulated an argument for estoppel before the trial court. Rose Healthcare did not file a written response to Infinity's motion for summary judgment. Rose Healthcare did not raise the issue of estoppel in its own motion for summary judgment, and contrary to its assertion in its Reply Brief, Rose Healthcare did not articulate an argument for estoppel during the April 9, 2009, hearing on the competing motions for summary judgment. Though Rose Healthcare's counsel did say the words "estopped" and "estoppel" during the hearing, Rose Healthcare failed to raise any coherent argument for estoppel, and it certainly did not raise the specific contention now asserted on appeal. Therefore, the argument has been waived, and this Court does not consider it.

Waiver

Rose Healthcare also attempts to avoid Infinity's defense that it was not on notice of a covered loss by arguing waiver. Rose Healthcare forwards the following three (3) theories in support of its argument: 1) by continuing to investigate other aspects of Pandya's claims, in addition to the date of loss submitted by Rose Healthcare, Infinity engaged in conduct that

implies waiver; 2) by failing to specify in its Explanations of Benefits that it was refusing to pay Rose Healthcare's claims because of the defective CMS 1500 forms, and waiting until after litigation was initiated to raise the affirmative defense, Infinity engaged in conduct that implies waiver; and 3) in its original Answer and Affirmative Defenses, Infinity failed to deny specifically and with particularity that Rose Healthcare had satisfied all conditions precedent, instead waiting until it filed its answer to the Amended Complaint to do so, and thus Infinity waived the defense that it was not on notice of a covered loss.

In support of its first theory, Rose Healthcare cites the decision of the Eleventh Judicial Circuit Court of Florida in Alzate v. United Auto. Ins. Co., 11 Fla. L. Weekly Supp. 878a (Fla. 11th Cir. Ct. July 20, 2004). In Alzate, several medical bills submitted to an auto insurer by a healthcare provider were not timely. Id. However, rather than denying the claims because they were untimely and stating such in the explanations of benefits, the insurer continued to process and investigate the claims, ordering an independent medical examination ("IME") and conducting an examination under oath. Id. Furthermore, far from denying the claims based on the untimely bills, the insurer paid the claims at a reduced rate, based on the recommendation of the physician who performed the IME. Id. The court found that "such conduct does not evince an intent to deny all bills based upon [their untimely submission]." Id. In addition, the court found that the untimely bills did not prejudice the insurer in any way, and despite the untimely bills, the insurer was able to process the claims in a timely fashion. Id. Therefore, the court held that, by its conduct, the defendant insurer waived its right to raise the defense of untimely bills. Id.

In Alzate, the defect in the claim forms—namely, their untimely submission—was obvious and immediately ascertainable. The dates of treatment were more than thirty (30) days earlier than the post-marked date on their respective claim forms, therefore rendering the claim

forms untimely under the then-current form of the applicable statute. Id. Unlike Alzate, the defect on the claim forms in the present case was not obvious or immediately ascertainable. While it was immediately obvious that the date of loss claimed by Rose Healthcare differed from the date of loss reported by Pandya, it was not obvious or immediately ascertainable that this was an error and a defect on the claim forms. There are several possible scenarios in which the date of loss entered by Rose Healthcare could have been intentional and correct. For instance, merely because Pandya may have been involved in an accident on August 29, 2005, it is not therefore impossible or unlikely that he suffered a loss on September 5, 2005. In that case, coverage may or may not have been available for the second loss suffered, depending on the factual circumstances. Therefore, rather than guess, Infinity's claims adjuster submitted the claims to SIU for further investigation.

The trial record demonstrates that Christine Davison, the original SIU investigator assigned to Pandya's claims, considered the possibility that the date of loss claimed was correct and the claim forms were not defective. During her deposition, the following conversation transpired in the course of direct examination by Rose Healthcare's counsel:

> Q . . . . We talked about one or more medical records that had a date of loss different than August 29th, 2005. And my question is, do you have any reason to believe that that was anything except a scrivener's error[?] Somebody made a mistake[?]
>
> MS. McCULLOUGH: Object to form. You can answer if you know.
>
> A I wasn't certain that it was an error on the part of the doctor.
>
> BY MR. CORNELIUS:
>
> Q Okay. And that's what I want to know. What would lead you to believe that it wasn't an error?
>
> MS. McCULLOUGH: Object to form.
>
> BY MR. CORNELIUS:
>
> Q You're telling me you weren't certain it was an error, and I want to know what would cause you to think it wasn't an error.
>
> A Because of the different reporting of the injury. How it changed between the initial statements and the subsequent treatment.[1]

[1] See Record on Appeal at page 363.

Therefore, we distinguish Alzate from the instant matter because, prior to the initiation of its investigation, Infinity could not be certain that the claim forms were defective.

Even if we were to entertain the argument that Infinity's claims adjuster should have guessed about Rose Healthcare's intentions regarding the date of loss entered on the claim forms, we would find that the reasonable assumption would have been that Rose Healthcare purposely entered September 5, 2005, as the date of loss. Rose Healthcare continually reinforced that assumption by submitting several subsequent CMS 1500 forms, all bearing a date of loss of September 5, 2005. Furthermore, Rose Healthcare's first two demand letters claimed a date of loss of September 5, 2005. It was not until Rose Healthcare submitted its third demand letter on April 3, 2006, over six months after Infinity began its investigation, that it stated a date of loss of August 29, 2005. By that time, Explanations of Benefits had already been sent in response to all of the claim forms submitted by Rose Healthcare, and we find that the date of loss claimed in the third demand letter was not enough to overcome the reasonable assumption that Rose Healthcare intended what it entered on the previous two demand letters and the several CMS 1500 forms previously submitted to Infinity. Therefore, we find that Infinity did not waive the affirmative defense by continuing to investigate all aspects of Pandya's claims.

Rose Healthcare's second theory, that Infinity waived the defective claim form defense by failing to identify the defect in its Explanations of Benefits, is closely related to its first theory in that both theories assume and rely upon the proposition that the defect was ascertainable prior to Infinity's investigation of the claims or prior to Infinity's preparation of the Explanations of Benefits. In support of its second theory, Rose Healthcare cites the decision of the Dade County Court in Finlay Diagnostic Ctr., Inc. v. Progressive Am. Ins. Co., 15 Fla. L. Weekly Supp. 618b (Fla. Dade Cty. Ct. Apr. 3, 2008). Furthermore, in its Fourth Notice of Supplemental Authority,

Rose Healthcare cites the decision of this Court in Preziosi West/East Orlando Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 17 Fla. L. Weekly Supp. 876a (Fla. 9th Cir. Ct. June 24, 2010). Both opinions promulgate a similar rule of law, which has been articulated and established with binding authority by the Fifth District Court of Appeal in Fla. Med. & Injury Ctr., Inc. v. Progressive Express Ins. Co., 29 So. 3d 329 (Fla. 5th DCA 2010).[2] Specifically, "[under section 627.736(4)(b), Florida Statutes,] a defect in a submitted claim has to be brought to the provider's attention by the insurer so it can be rectified." Id. at 339. "If the insurer fails to specify the defect in the form so that it can be rectified as contemplated by subsection (4), it will be deemed to have waived its objection to payment." Id. at 341.

If the defect in Rose Healthcare's CMS 1500 forms were ascertainable prior to Infinity's preparation and mailing of its Explanations of Benefits, then Rose Healthcare may have had a good argument for waiver under its second theory. However, as demonstrated in our analysis of Rose Healthcare's first theory for waiver, the defect was not obvious or immediately ascertainable, and the most reasonable assumption would have been that Rose Healthcare correctly completed all of its several CMS 1500 forms and its first two demand letters, intentionally entering a date of loss of September 5, 2005, on every form.[3] Again, Rose Healthcare did not state a date of loss of August 29, 2005, until it submitted its third demand letter, which occurred *after* all of the Explanations of Benefits had been prepared and sent.

[2] Finlay Diagnostic addresses defective claim forms, while Preziosi West/East and Florida Medical address defective Disclosure and Acknowledgement forms. Though the forms have different effects and perform different functions, this specific rule of law pertaining to the particular issue of a defendant raising a defective form as an affirmative defense is applicable in both scenarios.

[3] It is worth mentioning at this point, regarding these first two theories, that any argument asserting that Infinity should have contacted Rose Healthcare to determine whether Rose Healthcare intended to enter August 29, 2005, as the date of loss instead of September 5, 2005, would not prevail. It is not the duty of an insurer to provide substantive information to a healthcare provider that would enable the healthcare provider to *bring* its claims within coverage. In other words, it would be detrimental to an insurer's rights and interests to require it to contact a healthcare provider that submitted bills for treatment not appearing to be covered *for substantive reasons*, as opposed to mere technical defects, and coach that healthcare provider on how to bring its claims within coverage.

Furthermore, Rose Healthcare initiated litigation the following month, in May 2006, and it failed to allege any date of loss in its original complaint, thus missing another opportunity to help correct its several previous errors. It was not until Rose Healthcare alleged a date of loss of August 29, 2005, in its Amended Complaint, on October 6, 2008, over three years after the first claim forms were submitted, that one could conclusively ascertain that the claim forms were defective with regard to any relief sought in that complaint. In its answer to Rose Healthcare's Amended Complaint, Infinity raised the affirmative defense of failure to provide notice of a covered loss. Therefore, we find that Infinity did not waive the affirmative defense by failing to address the defect in its Explanations of Benefits.

Rose Healthcare's third and final theory in support of waiver invokes Florida Rule of Civil Procedure 1.120(c), which provides in pertinent part: "[a] denial of [the] performance or occurrence [of conditions precedent] shall be made specifically and with particularity." Furthermore, in Ingersoll v. Hoffman, 589 So. 2d 223 (Fla. 1991), the Supreme Court of Florida held that "[a] general denial is not one 'made specifically and with particularity.'" Id. at 224. Therefore, Rose Healthcare argues that Infinity waived the defense that it was not on notice of a covered loss because providing notice of a covered loss is a condition precedent to filing suit, and Infinity only generally denied the performance or occurrence of all conditions precedent in its *original* Answer and Affirmative Defenses. However, Infinity raised the affirmative defense of failure to provide notice of a covered loss, specifically and with particularity, in its answer to Rose Healthcare's Amended Complaint. Nonetheless, Rose Healthcare asserts that Infinity had already waived the argument by that time.

"When [a] claim or defense asserted in [an] amended pleading arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,

the amendment shall relate back to the date of the original pleading." Fla. R. Civ. P. 1.190(c). "The relation back doctrine is to be applied liberally." C.H. v. Whitney, 987 So. 2d 96, 99 (Fla. 5th DCA 2008) (citation omitted).

The claims asserted by Rose Healthcare in its Amended Complaint arose out of the same conduct, transaction, or occurrence set forth in its original Complaint. Therefore, its Amended Complaint relates back to the date of its original Complaint. Likewise, the defenses asserted by Infinity in its answer to Rose Healthcare's Amended Complaint arose out of the same conduct, transaction, or occurrence addressed in its original Answer and Affirmative Defenses. Therefore, likewise, Infinity's amended answer relates back to the date of its original Answer and Affirmative Defenses. Thus, Infinity cannot be said to have waived a defense asserted in its amended answer because it failed to assert it in its original answer. [4]

In its answer to Rose Healthcare's Amended Complaint, Infinity alleged that "[t]he CMS-1500 forms . . . fail to place the correct Defendant on notice of a covered loss . . . . Specifically, the CMS-1500 forms note the date of accident as September 5, 2005. . . . The CMS-1500 forms are required to adhere to the Florida Statute §627.736(4)(b)(5)(d) [sic]." This affirmative defense, together with Infinity's denial that Rose Healthcare had satisfied all conditions precedent, suffices to deny the performance or occurrence of the subject condition precedent "specifically and with particularity." Therefore, we find that Infinity has not waived the defense of failure to provide notice of a covered loss, and Infinity is entitled to a judgment as a matter of law. In light of this conclusion, we find it unnecessary to address the parties' arguments

[4] Furthermore, Rose Healthcare's contention that it would be unduly prejudiced if Infinity were allowed to assert this defense more than two years after the initiation of this suit is without merit. Rose Healthcare did not allege that it treated Pandya for an accident that occurred on August 29, 2005, until it filed its Amended Complaint. Thus, Infinity could not have conclusively ascertained the defect in Rose Healthcare's CMS 1500 forms or raised the affirmative defense until that time. Therefore, Rose Healthcare is no more prejudiced by this Court allowing Infinity's affirmative defense to stand than Infinity would be prejudiced if we were to find waiver.

regarding the sufficiency of Rose Healthcare's demand letters.

Attorney's Fees

Infinity timely filed a motion for appellate attorney's fees pursuant to Florida Rule of Appellate Procedure 9.400 and section 57.105, Florida Statutes. We do not find that Rose Healthcare's arguments were frivolous or made in bad faith, nor do we find that Rose Healthcare or its attorney knew or should have known that its arguments were not supported by the material facts or the law. Therefore, we deny Infinity's motion for appellate attorney's fees.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Summary Final Judgment," entered on May 8, 2009, is **AFFIRMED**; and the Appellees' Motion for Appellate Attorney's Fees is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___1st_____ day of ___February_____, 2011.

_/S/_____
BOB LEBLANC
Circuit Judge

__/S/_____
WALTER KOMANSKI
Circuit Judge

_/S/_____
STAN STRICKLAND
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: **Aaryn Fuller, Esq., Bogin, Munns & Munns, P.A.**, 2601 Technology Drive, Orlando, Florida 32802-2807 and **Patrick D. Hinchey, Esq., Vernis & Bowling of Central Florida, P.A.,** 1450 South Woodland Boulevard, 4th Floor, DeLand, Florida 32720 on the ___1st_____ day of __February_____, 2011.

_____/S/_____
Judicial Assistant