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

CASE NO.: 2010-CV-33
Lower Court Case No.: 2005-CC-14951

SHERUNA LATOYA MARTIN,
Appellant,
v.

MGA INSURANCE COMPANY,
Appellee.
_____/

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

Kimberly P. Simoes, Esquire,
for Appellant.

Dale E. Tarpley, Esquire,
for Appellee.

Before LUBET, THORPE, RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT'S JUDGMENT

Sheruna Latoya Martin ("Appellant") brought an action against MGA Insurance Company ("Appellee") to recover Personal Injury Protection ("PIP") benefits for medical treatment rendered to her. Appellant timely appeals the trial court's order rendered May 26, 2010 granting Appellee's motion for final summary judgment. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A) and dispenses with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

This Court first addresses the relevant undisputed facts leading up to this action. Appellant was involved in an automobile accident on November 19, 2004 while driving the vehicle owned by her mother Charlene Wright. At the time of the accident, Ms. Wright had a PIP insurance policy in place with Appellee. Appellant sought benefits under the policy to cover her medical treatment expenses incurred from the accident. Back on December 1, 2000 when Ms. Wright applied for the insurance coverage, she did not list Appellant when completing the portion of the application requiring that the applicant list any children or dependents of the insured or the insured's spouse under the age of 21 who do not reside at the residence of the insured. At the time when Ms. Wright submitted this application, Appellant was 16 years old and resided with her grandparents. When Appellant submitted her claim and Appellee became aware of this omission from the application, Appellee declared the policy void *ab initio*, returned the paid premiums to Ms. Wright, and denied coverage for the medical expenses incurred by Appellant. Also, contained in the policy application right above where Ms. Wright signed the application was the provision:

> "I further understand that if any of the information contained in this application is false or incorrect, it may jeopardize the coverage under any policy or renewal of any policy issued based on this information (FS 627.409). This policy may be declared null and void if the information provided in this application is false, misleading, or would materially affect the acceptance of the risk by the company."

Further, Ms. Wright provided a recorded statement confirming that Appellant was her daughter; Appellant was driving her vehicle when the accident occurred; Appellant had driven her vehicle before; and Appellant had a valid driver's license on the date when the policy was activated.

The basis for Appellee moving for summary judgment was that Ms. Wright's failure to disclose in the application the existence of Appellant was a material misrepresentation which warranted voiding the policy as a matter of law. The trial court concurred with Appellee and granted the Motion for Final Summary Judgment.

On Appeal, Appellant argues that the trial court erred in entering final summary judgment where there remains an issue of material fact as to the what the additional insurable risk was to substantiate what the increased premium would have been if Ms. Wright had listed Appellant in the application.

Conversely, Appellee argues that there are no remaining issues of material fact in this action. Specifically, Appellee stresses that there exists ample evidence in the court record that shows that the premium would have increased by $1,158.00 based upon the assessment as to the increased insurable risk. Further, Appellee argues that under Florida law, when a misstatement or omission materially affects the insurer's risk, or would have changed the insurer's decision whether to issue the policy and its terms, section 627.409, Florida Statutes, may preclude recovery.

Appellee goes on to state that false material misrepresentations on an insurance application void the policy even if the misrepresentations were unintentional. Misrepresentations need not be fraudulently or knowingly made by the claimed insured in order to void the policy. A policy provision which voids the insurance policy for misrepresentations of material facts is given full force and effect. Therefore, Appellee claims that it fully carried its burden of proving the misrepresentation and its materiality. Citing *Preferred Risk Life Ins. Co. v. Sande*, 421 So. 2d 566, 570 (Fla. 5th DCA 1982), Appellee argues that materiality is only a fact question when there is a dispute as to what was asked by the agent when the policy was issued or a dispute as to

the accuracy of the answers on the application itself. In the case at hand, there is no dispute as to what was asked by the agent nor a dispute as to the accuracy of the answers on the application.

The issue in this appeal 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. 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. Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126 (Fla. 2000)*;* and *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001).

Upon review of the court record, this Court finds that the trial court did not err when granting Appellee's Motion for Final Summary Judgment. Among the trial court's findings, were the following undisputed material facts: 1) Appellant was the under-21 child of the insured person Ms. Wright; 2) Ms. Wright made a material misrepresentation on her application of insurance by failing to list Appellant; and 3) Had Appellee known of the under-21 child driver, it would have charged an increased premium or refused to issue the policy. Therefore, there remain no issues of material fact for a jury to decide and Appellee was entitled to entry of summary judgment in its favor as a matter of law. As to the ample evidence in support of the trial court's findings, specifically see the application for insurance, the affidavits of Appellee's corporate representatives, Sandra DiMare and Robert Wilkerson, and deposition transcripts of Sandra DiMare and another corporate representative, Connie Doval.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Final Judgment, rendered May 26, 2010 is **AFFIRMED**. Further, "Appellant's Motion for Appellate Attorneys' Fees and Costs" filed February 28, 2011 is **DENIED.** Appellee's "Motion for Appellate Attorney Fees" filed December 16, 2010 is **GRANTED** and the assessment of such fees and costs is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 5th day of August, 2011.

_/S/_____
MARC L. LUBET
Circuit Judge

/S/_____
JANET C. THORPE
Circuit Judge

_/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 5th day of August, 2011 to: **Kimberly P. Simoes, Esquire**, 120 S. Woodland Blvd., Suite 202, DeLand, Florida 32720 and **Dale E. Tarpley, Esquire,** Dutton Law Group, 4921 Memorial Highway, Suite 200, Tampa, Florida 33634.

/S/_____
Judicial Assistant