

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

**BEATRIZ SANTOS**  
Appellant,

**CASE NO.: 2010-CV-39**  
Lower Case No.: 2009-CC-13853-O

v.

**ALLSTATE PROPERTY & CASUALTY  
INSURANCE COMPANY,**  
Appellee.

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Appeal from the County Court, in and for Orange  
County, Florida, Judge Wilfredo Martinez.

Crystal L. Eiffert, Esquire and Chad A Barr, Esquire  
for Appellant.

David B. Shelton, Esquire and Candy L. Messersmith, Esquire  
for Appellee.

Before EGAN, EVANS, HIGBEE, J.J.

PER CURIAM.

**FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART TRIAL COURT**

Appellant, Beatriz Santos (“Santos”), brought an action for a declaratory judgment regarding her entitlement to personal injury protection (“PIP”) coverage under an insurance policy issued by Appellee, Allstate Property & Casualty Insurance Company (“Allstate”). Santos filed a timely appeal of the trial court’s “Final Order” entered July 30, 2012 in accordance with its “Order Granting Defendant’s Motion to Dismiss Plaintiff’s Third Amended Complaint” entered August 4, 2010.<sup>1</sup> This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

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<sup>1</sup> The Order Granting Defendant’s Motion to Dismiss Plaintiff’s Third Amended Complaint was actually entered on August 4, 2010 and filed on August 6, 2010.

### *Summary of Facts and Procedural History*

On or about May 16, 2009, Santos and her spouse were involved in an automobile accident. At the time of the accident, Santos and her spouse were insured by Allstate for PIP coverage. Santos was injured in the accident and received medical treatment/services from Chirowell Center, Inc. The medical bills were forwarded to Allstate for payment. Santos also retained counsel for the purpose of pursuing a bodily injury claim against the adverse driver.

A dispute arose between Santos and Allstate as to scheduling an examination under oath (“EUO”) of Santos. Ultimately, Santos alleges that Allstate unilaterally scheduled the EUO and Santos who was unavailable on the scheduled date did not appear for the EUO. Subsequently, Allstate’s counsel notified Santos’s counsel that due to Santos’ failure to appear for the EUO, she willfully and materially breached the insurance policy and that she would continue to be in breach of the policy unless she provided a written explanation as to why she did not appear for the EUO and submit to a voluntary sworn statement (“VSS”). Further, Allstate informed Santos that depending on the written explanation and extent of Santos’ recollections, Allstate may reconsider her claims for payment. The appointments for the VSS for Santos and her husband were scheduled for July 30, 2009. At the VSS appointment, while Santos’ spouse was being questioned, Santos became ill so the VSS was then rescheduled for August 13, 2009.

On August 12, 2009, Santos’ counsel had doubts about whether the policy required Santos to appear for the VSS. Santos’ counsel sent Allstate’s counsel correspondence advising them that because Allstate had already determined that Santos was in breach and because there was no provision in the policy that required her to submit to a VSS, she would not do so. However, Santos’s counsel also informed Allstate’s counsel that Santos would appear for the scheduled appointment if it was for a EUO, not a VSS, pursuant to the policy. Ultimately,

Allstate did not agree to a EUO in lieu of a VSS and maintained that the VSS was required to potentially cure the alleged breach. Santos did not appear to provide the VSS and Allstate did not pay the medical claims.

On August 14, 2009, Santos filed the action for a declaratory judgment pursuant to chapter 86, Florida Statutes. Subsequently, the initial complaint and the first and second amended complaints were dismissed with leave to amend. Allstate then moved to dismiss Santos' third amended complaint and the hearing on this motion was held on August 2, 2010. Prior to the hearing Santos forwarded to Allstate's counsel her fourth amended complaint. On August 4, 2010, the trial court entered the written order stating that the action was dismissed without prejudice, but it did not include language as to whether leave to amend was granted. Allstate moved to strike the fourth amended complaint arguing that Santos did not seek leave of court to file it and thus, the trial court having dismissed the action in its entirety, no longer had jurisdiction to reinstate the cause of action.

On August 10, 2010, Santos withdrew her fourth amended complaint and filed a motion for clarification on the trial court's order dismissing her third amended complaint and/or a motion for leave to amend. The basis for her motions was that her counsel did not have the opportunity to review and object to the proposed order before it was entered as Allstate's counsel sent the proposed order via e-mail to counsel's legal assistant who inadvertently deleted the proposed order. Further, she argued that the trial court impliedly granted her leave to amend to file a fourth amended complaint. The motion for clarification was addressed at the hearing on August 20, 2010 whereupon the trial court stated that it could not rule without reviewing the transcript of the August 2, 2010 hearing. Instead, of filing and submitting the transcript to the trial court so it could rule on the motion for clarification and leave to amend, Santos filed a

notice of appeal on August 27, 2010 of the Order dismissing her third amended complaint. Accordingly, on October 3, 2010, the trial court entered a written order stating that it cannot rule on the motion for clarification.

On appeal, this Court found that the trial court's "Order Granting Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint entered on August 4, 2010" stated that the complaint was dismissed without prejudice, but it did not include language as to whether leave to amend was granted. Therefore, it was unclear as to whether the Order was final and appealable. Accordingly, this Court entered an order abating the appeal and remanded it to the trial court for entry of a final order. On July 30, 2012, the trial court entered a Final Order stating that the complaint was dismissed without prejudice, but without leave to amend.

#### *Standard of Review*

Generally, the standard of review of an order dismissing a complaint is de novo. However, when dismissing a complaint seeking a declaratory judgment, the trial court's ruling is accorded great deference and the standard of review is whether the trial court abused its discretion. *Palumbo v. Moore*, 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001).

#### *Arguments on Appeal*

Santos argues on appeal: (1) The third amended complaint properly set out a claim for declaratory judgment regarding entitlement to insurance coverage; 2) A declaratory judgment action regarding insurance coverage is appropriate and is not synonymous with a claim for actual damages in the form of insurance benefits; 3) A declaratory judgment action is appropriate when a determination of coverage is dependent on disputed facts; 4) She is not required to comply with conditions precedent to the recovery of insurance benefits in order to assert a declaratory judgment action regarding entitlement to insurance benefits; and 5) The trial court abused its

discretion in denying her leave to amend as the August 4, 2010 Order was entered as a result of excusable neglect.

Conversely, Allstate argues 1) Santos' third amended complaint was properly dismissed as Santos failed to demonstrate an actual, present controversy and 2) Santos abandoned her fourth amended complaint so there is no ruling for this Court to review.

#### *Discussion*

This Court now addresses the Final Order entered July 30, 2012 that dismissed Santos' Third Amended Complaint in accordance with the Order Granting Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint entered on August 4, 2010. In reviewing a motion to dismiss a complaint, the court must confine itself to the four corners of the complaint and accept all allegations as true. *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860-861 (Fla. 5th DCA 1996). A motion to dismiss for failure to state a cause of action admits all well pleaded facts as true, as well as reasonable inferences that may arise from those facts. *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 383 (Fla. 4th DCA 1999).

Section 86.011, Florida Statutes (2010), provides that the Court may render declaratory judgments on the existence or nonexistence of: 1) any immunity, power, privilege, or right; or 2) any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. In *Allstate Insurance Company v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992), the Fifth District Court of Appeal found that upon review of Chapter 86, Florida Statutes, a party can bring a declaratory judgment action for the Court to resolve disputed factual issues as the Legislature gave the Court the authority to do so in order to determine the existence or nonexistence of such immunity, power, privilege, or right. *Allstate* at 1006-1008. To be entitled

to declaratory relief, a party must show he is in doubt as to some right or status and that he is entitled to have such doubt removed. § 86.021, Fla. Stat. (2010); *Kelner v. Woody*, 399 So.2d 35, 37 (Fla. 3d DCA 1981).

A cause of action for declaratory relief must show that:

There is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

*Santa Rosa County v. Admin. Comm'n, Div. of Admin. Hearings*, et al., 661 So. 2d 1190, 1192-1193 (Fla. 1995) (citing *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991) quoting *May v. Holley*, 59 So.2d 636, 639 (Fla.1952)). Further, the test of sufficiency of a complaint in an action for a declaratory action is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention but whether he is entitled to a declaration of rights at all. *Orange County, et al. v. Expedia, Inc., Orbitz, LLC, and Orbitz, Inc.*, 985 So. 2d 622, 624 (Fla. 5th DCA 2008).

#### *Dismissal of Third Amended Complaint*

In the instant case, Santos' Third Amended Complaint and Demand for Jury Trial filed April 29, 2010 includes very general allegations in support a declaratory cause of action. However, the Third Amended Complaint is lacking specific allegations to identify which provision(s) Santos is seeking the trial court's interpretation of and lacking allegations as to why

she is in doubt about the coverage.<sup>2</sup> Accordingly, from review of the Third Amended Complaint and transcript from the August 2, 2010 hearing, the trial court did not abuse its discretion in dismissing the Third Amended Complaint for failure to allege sufficient facts to state a cause of action for declaratory relief. Therefore, the trial court's ruling as to the Third Amended Complaint must be affirmed.

*Leave to Amend to File Fourth Amended Complaint*

Santos is also seeking this Court to review the trial court's Order entered October 3, 2010 (filed October 7, 2010) addressing her motion for clarification on the court's ruling dismissing her Third Amended Complaint and her motion for leave to amend to file her fourth amended complaint. As stated above, at the hearing on August 20, 2010, the trial court stated that it could not rule without reviewing the transcript of the August 2, 2010 hearing. Therefore, the trial court in the October 3, 2010 Order did not rule on these motions. However, the trial court in its Final Order entered on July 30, 2012, ruled that Santos' action was dismissed without prejudice, but without leave to amend. This Court finds that the trial court's Final Order and the record, including the transcripts from the hearings, lack clarity and do not provide grounds for the trial court to deny Santos' leave to file a fourth amended complaint. Accordingly, the trial court's Final Order entered July 30, 2012 must be reversed as to the portion of the ruling "without leave to amend" to provide Santos leave to file a fourth amended complaint.

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<sup>2</sup> Oddly, Santos' initial and First Amended Complaints included specific alleged facts involving the issues with the EUO and VSS requirements as stated above in the summary of facts and also included the specific relief sought for the declaratory judgment. However, Santos eliminated these allegations from her Second and Third Amended Complaints and the only information located in the record that vaguely sheds light on this issue is from the August 2, 2010 hearing addressing the Third Amended Complaint. At the hearing, the trial court stated that there were not enough facts or information in the complaint as to what Santos was specifically seeking a declaratory judgment on. In response, Santos' counsel provided a very unclear explanation stating that they were narrowing it down and approaching it from the aspect that they didn't have enough facts.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The trial court's Final Order entered July 30, 2012 (that incorporates the trial court's "Order Granting Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint" entered on August 4, 2010) is **AFFIRMED as to the dismissal of Santos' Third Amended Complaint without prejudice.**

2. The trial court's Final Order entered July 30, 2012 is **REVERSED as to the portion of the ruling stating "without leave to amend"** and this cause is **REMANDED** for further proceedings consistent with this opinion including the entry of an order to provide Santos leave to file a fourth amended complaint.

3. Santos's Amended Motion to Tax Attorney's Fees filed January 6, 2011 is **GRANTED** as to the appellate attorney fees, conditioned on Santos ultimately prevailing in the trial court action and the assessment of the attorney fees is **REMANDED** to the trial court. Also, Santos is entitled to have costs taxed in her favor by filing a proper motion with the trial court pursuant to 9.400(a), Fla. R. App. P.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida on this 4th day of February, 2013.

/S/ \_\_\_\_\_  
**ROBERT J. EGAN**  
Circuit Judge

/S/ \_\_\_\_\_  
**ROBERT M. EVANS**  
Circuit Judge

/S/ \_\_\_\_\_  
**HEATHER L. HIGBEE**  
Circuit Judge



**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Crystal L. Eiffert, Esquire and Chad A Barr, Esquire**, Eiffert & Associates, P.A., 122 E. Colonial Drive, Suite 210, Orlando, Florida 32801 and **David B. Shelton, Esquire and Candy L. Messersmith, Esquire**, Rumberger, Kirk & Caldwell, Post Office Box 1873, Orlando, Florida 32802-1873 on the 5th day of February, 2013.

/S/ \_\_\_\_\_  
Judicial Assistant