

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

ALFA VISION INSURANCE CORPORATION,

Appellant,

v.

**TAMPA CHIROPRACTIC CENTER
a/a/o VICTOR GUE,**

Appellee.

CASE NO.: 2011-CV-22

Lower Case No.: 2007-CC-8404

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Appeal from the County Court, for Orange County,
Heather L. Higbee, County Judge.

Robert Alden Swift, Esquire and
Tara Tamoney, Esquire, for Appellant.

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

Before WALLIS, JOHNSON, PERRY, JR., J.J.

PER CURIAM.

FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART TRIAL COURT

Appellant, Alfa Vision Insurance Corporation (“ALFA”) timely files this appeal of the lower court’s “Final Judgment” rendered on February 24, 2011 granting various motions for summary judgment finding that Appellee, Tampa Chiropractic Center a/s/o Victor Gue (“TAMPA”) was entitled to No-Fault benefits from ALFA for medical services rendered to three assignors/patients. 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.

Summary of Facts and Procedural History

ALFA issued a policy of insurance to Victor Gue providing him with No-Fault benefits. Per TAMPA's allegations, on January 1, 2007, Victor Gue, Janeara Johnson, and Shinika Johnson (collectively referred to as "assignors") were involved in a motor vehicle accident while occupying the insured vehicle. In January 2007, the assignors obtained treatment by TAMPA for injuries sustained in the accident and executed separate assignments of benefits which assigned their right to No-Fault benefits to TAMPA. Thereafter, the assignors obtained treatment at another medical facility, Wellness Health Associates, Inc. ("WELLNESS").

TAMPA submitted the bills to ALFA for the services it rendered to the assignors along with the assignments. ALFA informed TAMPA that payment of the claims was not forthcoming as it was investigating the coverage and liability. In May of 2007, TAMPA submitted to ALFA three separate pre-suit demand letters for each assignor's claim with the subject medical bills and assignments. ALFA did not issue payment pursuant to TAMPA's demand letters. As a result of ALFA's refusal to remit payment for the bills, in May of 2007 TAMPA filed three separate lawsuits as assignee of the assignors against ALFA for recovery of No-Fault benefits.¹ In January of 2009, the lower court consolidated TAMPA's three lawsuits under case number 2007-CC-8404. Subsequently, in March of 2009, the lower court consolidated WELLNESS' four lawsuits under case number 2007-CC-8404 as WELLNESS

¹ The three lawsuits filed by TAMPA are under case numbers 2007-CC-8404 (Victor Gue), 2007-CC-8407 (Shinika Johnson), and 2007- CC-8410 (Janeara Johnson).

also sought No-Fault benefits from ALFA for services rendered to the same assignors and to an additional assignor, Jacquet Lecoit.²

The operative complaints filed by TAMPA are the second amended complaints which were filed on or about December 23, 2009 for each of the three assignors. Count I of the second amended complaints sought damages alleging that ALFA breached the policy of insurance for failing to pay No-Fault benefits to TAMPA for the medical services rendered. TAMPA withdrew Count II of the second amended complaints prior to entry of the Final Judgment in this case. As such, the only count that remained when the Final Judgment was entered was Count I.

ALFA's answer and affirmative defenses were filed on March 3, 2010 and were the same in response to each second amended complaint. On April 15, 2010, ALFA filed Amended Affirmative Defenses in which ALFA amended its Fifth and Sixth Affirmative Defenses and withdrew its Fourth and Seventh Affirmative Defenses. As such, the operative Affirmative Defenses were the First, Second, Third, Amended Fifth and Amended Sixth Affirmative Defenses.

Beginning in August of 2010, TAMPA began filing motions for summary judgment addressing the claims and defenses pending before the lower court. Lengthy hearings before the lower court took place for the purpose of resolving all pending motions for summary judgment filed by TAMPA whereupon the lower court entered orders granting TAMPA's motions. Following the entry of these orders, TAMPA filed three separate motions for entry

² The lawsuits filed by WELLNESS are under case numbers 2007-CC-9624, 2007-CC-9643, 2007-CC-9644, and 2007-CC- 9647 and are not part of this appeal. However, ALFA has also filed an appeal regarding the Final Judgment entered by the lower court as to WELLNESS which is currently pending before the same appellate panel (case no. 2011-CV-21) and will be addressed by separate order.

of final judgment and a hearing was held on February 22, 2011 addressing these motions. On February 24, 2011, the lower court entered the Final Judgment in favor of TAMPA finding that it was entitled to \$4,804.98 in No-Fault benefits, prejudgment interest, plus post-judgment interest. Thereafter, ALFA this filed this appeal.³

Standard of Review

The standard of review for summary judgment is de novo. *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001) and *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). 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. *Krol* at 491, 492, citing Fla. R. Civ. P. 1.510(c).

Arguments on Appeal

On appeal, ALFA argues that:

1) The lower court erred by interpreting the facts and presuming that an accident occurred and by finding that the alleged injuries sustained by the assignors were related to the accident when there were material issues of fact as to whether the alleged accident was intentionally and fraudulently caused and whether the assignors were actually injured or their injuries were intentionally caused. Thus, ALFA argues that the lower court usurped the role of the jury as the fact finder;

2) TAMPA did not file a motion for summary judgment seeking affirmative relief on its claims in its Complaint and the allegations under each claim were denied by ALFA. Therefore, ALFA argues that the lower court erred by ruling that TAMPA was entitled to

³ ALFA also brought separate appeals as to the lower court's granting of the Final Judgments of Attorney's Fees and Costs rendered October 11, 2011 in favor of TAMPA and WELLNESS, case numbers 2011-CV-87 and 2011-CV-88, which will be addressed in separate orders.

affirmative relief when it only brought motions for summary judgment as to ALFA's Affirmative Defenses;

3) The lower court erred in granting an ore tenus motion for partial summary judgment as to a portion of ALFA's Second Affirmative Defense that raised section 627.736(4)(b), Florida Statutes, as a defense to payment of the subject claims. ALFA argues that it should have been afforded twenty days to submit evidence in response to such a motion. Therefore, the granting of the ore tenus motion was in violation of the Florida Rule of Civil Procedure 1.510(c); and

4) The lower court erred in determining, as a matter of law, that TAMPA had standing pursuant to the assignment of benefits to file and maintain the lawsuit. Specifically, ALFA argues that a question of fact arose due to the ambiguous assignment of benefits which precluded the lower court from finding that TAMPA had standing.

Conversely, TAMPA argues that:

1) The Initial Brief and argument contained therein is improper to the extent that it seeks review of summary judgment orders not raised in the Notice of Appeal;

2) The evidence supports that the assignors were involved in a motor vehicle accident and the medical services rendered by TAMPA to them were related to the accident and ALFA did not present evidence or argument to refute this finding;

3) TAMPA met its summary judgment burden on the issue of standing and ALFA did not present evidence or argument to refute that it had such standing;

4) ALFA's Second Affirmative Defense raising section 627.736(4)(b), Florida Statutes, is not properly before this Court as it fails to point to an order entered by the lower

court on this defense and it was not properly pled. Thus, TAMPA argues that consideration of the 627.736(4)(b) defense is waived on appeal; and

5) TAMPA was entitled to affirmative relief on the breach of contract claim as its motions for summary judgment addressed all the viable claims and the defenses in this case. TAMPA further argues that ALFA failed to show what additional evidence or arguments ALFA could have presented that had not already been addressed at length during the hearings on the motions for summary judgment. Thus, TAMPA concludes that there was no legal requirement for it to file a motion which asks the court to decide again what it has already decided and ALFA is merely presenting an argument based on semantics.

Discussion

The Notice of Appeal of the Final Judgment

This Court first addresses TAMPA's procedural argument in its Answer Brief that appellate review of the Final Judgment should be barred because ALFA failed to state in the Notice of Appeal the underlying orders granting summary judgment. This Court disagrees with TAMPA'S argument and finds that this appeal is not procedurally barred from review as it is clear from the record that the Final Judgment was derived from the various orders granting summary judgment. Also, appeal of a final judgment brings up all interlocutory orders entered as a necessary step in the proceeding. *Auto Owners Insurance Co. v. Hillsborough County Aviation Authority*, 153 So. 2d 722, 724 (Fla. 1963); see *Carpenter v. Super Pools, Inc.*, 534 So. 2d 426 (Fla. 5th DCA 1988). Therefore, in this appeal it was not necessary that the orders granting summary judgment be stated in the Notice of Appeal. Lastly, there is

nothing in the record showing that TAMPA filed a motion to dismiss the appeal which would have been a more appropriate avenue to take with this argument.

TAMPA's Standing

This Court next addresses the lower court's ruling as to TAMPA's standing to bring and maintain the action in the lower case. ALFA alleged in its Amended Sixth Affirmative Defense that "Plaintiff lacks standing to bring this claim as the Assignment of Benefits does not assign Plaintiff any rights to bring suit. Plaintiff lacks standing as it is not identified as the assignee. Instead, the Assignment of Benefits does not designate which entity is entitled to bring suit." ALFA asserted this defense because the Assignment of Benefits documents did not include TAMPA's name nor any other health care provider's name.

On October 14, 2010, TAMPA filed its "Motion for Summary Judgment as to Standing pursuant to an Assignment of Benefits and supporting Memorandum of Law" as to each assignor arguing that the record evidence and testimony confirmed that ALFA had no doubt as to whom the medical provider was or who the assignee was intended to be. Specifically, TAMPA argued that at no time between the time, January 23 through 25, 2007, when ALFA received TAMPA's medical bills and when this action was filed, did ALFA ever indicate that it did not know from whom it was receiving the bills and who held the assignments. In support of the Motion for Summary Judgment, TAMPA's submitted the affidavit from its owner, Michelete Julssaint dated October 13, 2010 confirming the Assignment of Benefits to TAMPA from the assignors. Also, TAMPA pointed out that the evidence showed that ALFA forwarded correspondence to TAMPA informing it that the three separate claims were under investigation as to coverage and liability, but there was no

mention of the assignment issue. Lastly, TAMPA argued that ALFA did not notify TAMPA in response to the demand letter or at any time prior to the filing of this lawsuit that it contested the validity of the Assignments of Benefits.

In response to TAMPA's Motion for Summary Judgment, ALFA argued that the assignments were ambiguous and thus, should have been presented to the jury as the fact finder to determine whether the assignors intended to assign their benefits to TAMPA. ALFA also argued that Michelete Julssaint's affidavit should have been stricken because it was conclusory, self-serving, and did not state the intent of the assignors.

Upon hearing the Motion for Summary Judgment, the lower court did not strike Michelete Julssaint's affidavit and on February 16, 2011 entered an order granting the Motion as to each assignor finding that the record evidence showed that TAMPA was the assignee of the Assignment of Benefits.

Upon review of the record evidence, this Court finds that the lower court's ruling granting TAMPA's motion for summary judgment as to standing was supported by ample evidence showing that: 1) TAMPA was the assignee of the No-Fault benefits; 2) ALFA was sufficiently put on notice of the assignment; 3) ALFA's correspondence and another actions show that it was aware of the assignment; 4) ALFA did not question the assignment during the events leading up to when TAMPA filed the lawsuits; and 5) The evidence supports that there was an equitable assignment of the benefits to TAMPA. *See Giles v. Sun Bank, N.A.*, 450 So. 2d 258 (Fla. 5th DCA 1984). Therefore, this Court finds that there is no genuine issue of material fact as to the assignment of the No-Fault benefits to TAMPA and a matter of law the lower court's ruling as to standing must be affirmed.

Order Granting Summary Judgment as to Fraud Issue

Lastly, this Court addresses the lower court's rulings on TAMPA's Motions for Summary Judgment filed on September 10, 2010 that addressed ALFA's Second, Third, and Amended Fifth Affirmative Defenses alleging fraudulent activity pertaining to the accident. ALFA's allegations were that the alleged motor vehicle accident was intentional and thus, under section 627.736, Florida Statutes, medical claims for persons shown to have committed insurance fraud would not be recoverable. Specifically, as stated in the Amended Fifth Affirmative Defense, ALFA alleged that any injuries to the assignors, if found to exist, were the result of fraud perpetrated on ALFA by the assignors and others involved in the alleged incident and/or parties or others allegedly insured under the insurance policy. ALFA further asserted that the assignors and/or others were participants of a staged accident and if the assignors suffered any injuries they were intentionally caused.

In support of its Motions for Summary Judgment on this issue, TAMPA submitted the deposition of the insured/assignor, Victor Gue, dated March 11, 2008. In response to the motions, ALFA submitted the affidavit of assignor, Shinika Johnson, dated August 10, 2009 and subsequently portions of her affidavit were stricken. Upon hearing, the lower court on February 18, 2011 entered orders granting the Motions for Summary Judgment.

From what this Court is able to discern, the pertinent information gathered and summarized from by Victor Gue's deposition was that: 1) He was driving the vehicle when the accident occurred and the other persons in the vehicle with him were Janeara Johnson and Shinika Johnson. He did not recall whether Jacquet Lecoit was in the vehicle. The transcript from Jacquet Lecoit's deposition is also included in the court record. In his deposition,

Jacquet Lecoit stated that he was a passenger in the vehicle along with Shinika Johnson and Janeara Johnson and Victor Gue was driving the vehicle.⁴

Conversely, the pertinent information gathered and summarized from the portion of Shinika Johnson's affidavit that was not stricken includes that: 1) She, Victor Gue, Janeara Johnson, Jacquet Lecoit were passengers in Victor Gue's vehicle; 2) An unknown man, not Victor Gue, was driving the vehicle; 3) Prior to the accident, they had been riding in Victor Gue's vehicle for two to three hours and were all in his vehicle when the accident occurred; 4) Prior to the accident, the driver would suddenly hit the brakes and when he saw another vehicle pull out into traffic he would accelerate quickly as if he was trying to hit that vehicle; 5) The driver would get angry and hit the steering wheel if he did not hit a vehicle; 6) The driver stopped at a green light and allowed a vehicle to go in front of Victor Gue's vehicle and as the other vehicle began to pull out, the driver accelerated and was struck by the other vehicle; 7) After the accident occurred the unknown man who was driving disappeared; and 8) Shinika stated that she was not injured in the accident and stopped going to the chiropractor.

With a motion for summary judgment, the moving party must show conclusively that there is no genuine issue of material fact and despite the presumption of correctness which attaches to an order of the trial court, the reviewing court must draw every possible inference in favor of party against whom summary judgment motion was granted. *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 30, 32 (Fla. 1977). On appeal, a reviewing court should consider the evidence contained in the record in the light most favorable to the nonmoving

⁴ In Jacquet Lecoit's deposition his name is stated as Lecoit Jacquet.

party and if the slightest doubt exists, summary judgment must be reversed. *Delta Fire Sprinklers, Inc. v. OneBeacon Insurance Co.*, 937 So. 2d 695, 698 (Fla. 5th DCA 2006).

In the instant case, disputed issues of material fact remain as revealed by Victor Gue's and Jacquet Lecoit's depositions and Shinika Johnson's Affidavit that are in conflict and directly relate to the issue as to whether the accident was intentional and if so, which assignors, if any, intentionally participated in the staged accident. Therefore, the issue of alleged fraudulent activity along with the conflicting evidence should have been presented to the jury as the trier of fact to weigh the evidence, including the demeanor and credibility of the witnesses. "Generally, the issue of fraud is not a proper subject of a summary judgment since it is a subtle thing requiring a full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud." *Amazon v. Davidson*, 390 So. 2d 383, 385 (Fla. 1980). "The affirmative defense of fraud is usually considered a jury question and is not ordinarily appropriate for summary judgment proceedings." *Public Health Trust of Dade County v. Prudential Insurance Co.*, 415 So. 2d 896, 897 (Fla. 3d DCA 1982). Accordingly, this Court concurs with ALFA's argument on appeal that summary judgment on these Affirmative Defenses was improper.

In conclusion, this Court finds that reversal is warranted as to the lower court's Final Judgment pertaining to the granting of TAMPA's Motions for Summary Judgment regarding ALFA's Amended Fifth Affirmative Defense and TAMPA's Motions for Partial Summary Judgment as to ALFA's Second and Third Affirmative Defenses. Lastly, this Court's review and findings as to these arguments pertaining to the fraud issue are dispositive. Therefore, it is not necessary that this Court address the other arguments on appeal.

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

1. The lower court's Final Judgment rendered on February 24, 2011 as to the Order rendered on February 16, 2011 granting "Plaintiff, Tampa Chiropractic Center, Inc.'s Motion for Summary Judgment as to Standing pursuant to an Assignment of Benefits" is **AFFIRMED**. Accordingly, TAMPA's "Motion to Tax Attorney Fees" filed July 25, 2011 (for appellate attorney fees and costs per sections 627.428 and 627.736(8), Florida Statutes) is **GRANTED** as to the portion of attorney fees related to this Court's affirmance of the Final Judgment herein and is **REMANDED** to the lower court for the assessment of attorney fees.

2. The remaining portion of the lower court's Final Judgment rendered on February 24, 2011 is **REVERSED** and this cause is **REMANDED** for further proceedings consistent with this opinion. Accordingly, TAMPA'S "Motion to Tax Attorney Fees" is **DENIED** as to the remaining portion of attorney fees related this Court's reversal of the Final Judgment herein.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 18th day of February, 2013.

/S/
F. RAND WALLIS
Circuit Judge

/S/
ANTHONY H. JOHNSON
Circuit Judge

/S/
BELVIN PERRY, JR.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished to: **Robert Alden Swift, Esquire and Tara Tamoney, Esquire**, Cole, Scott & Kissane, P.A., Tower Place, Suite 750, 1900 Summit Tower Boulevard, Orlando, Florida 32810, robert.swift@csklegal.com, tara.tamoney@csklegal.com, meghan.falk@csklegal.com and **Crystal L. Eiffert, Esquire and Chad A. Barr, Esquire**, Eiffert & Associates, P.A., 122 E. Colonial Drive, Suite 210, Orlando, Florida 32801, service@ealawgroup.com, cbarr@ealawgroup.com on this 18th day of February, 2013.

/S/ _____
Judicial Assistant