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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

CASE NO.: 2012-CV-000017-A-O

Lower Case No.: 2005-SC-007291-O

v.

EMERGENCY PHYSICIANS OF CENTRAL FLORIDA, as assignee of Frank Mercatante,
Appellee.
_____/

Appeal from the County Court, for Orange County, Florida,
Faye L. Allen, County Judge.

Dale T. Gobel, Esquire and Michael V. Hammond, Esquire,
for Appellant.

Kevin B. Weiss, Esquire,
for Appellee.

Before O'KANE, WHITEHEAD, and PERRY, JR., J.J.

PER CURIAM.

AMENDED FINAL ORDER AFFIRMING TRIAL COURT[1]

Appellant, State Farm Mutual Automobile Insurance Company ("State Farm") timely appeals the trial court's "Amended Final Summary Judgment" entered October 8, 2012 *nunc pro tunc* to March 1, 2012 in favor of Appellee, Emergency Physicians of Central Florida ("EPCF") as assignee of the insured, Frank Mercatante ("Mercatante"). 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.

[1] This Final Order was amended to clarify a scrivener's error in the trial court's Order that is referenced in this Order on page 7 in paragraph 2– see footnote 3 on page 7 that provides clarification.

Summary of Facts and Procedural History

On February 4, 2005, Mercatante, while washing his vehicle, was injured when his head hit the side view mirror of the vehicle. The injuries resulted in a head laceration which required stitches. Mercatante was treated for his injuries in the emergency room with hospital physicians employed by EPCF. EPCF then obtained an assignment of benefits from Mercatante to present a claim under his automobile insurance with State Farm. Mercatante did not personally notify State Farm of the accident. EPCF then submitted its claim to State Farm for payment of medical expenses of $248.06. State Farm did not pay the claim. On June 27, 2005, State Farm received a pre-suit demand letter from EPCF's counsel. After receipt of this letter, State Farm still did not pay the claim and on August 3, 2005 EPCF filed suit against State Farm.

Ultimately, both parties filed motions for summary judgment that were heard on December 13, 2011. On March 1, 2012, the trial court granted EPCF's motion for summary judgment and entered the Summary Judgment Order that was appealed to this Circuit Court. On appeal, this Court found that the Order was not an appealable final order and relinquished jurisdiction of this case to the trial court for entry of a final order. On October 8, 2012, the trial court entered the Amended Final Summary Judgment *nunc pro tunc* to March 1, 2012 that this Court now reviews.[2] Also, on July 15, 2013, EPCF filed its Motion to Supplement the Record with the transcripts of the depositions of State Farm's employee, Ronda McAlpine, and EPCF's employee, Lori Wilhelm. This Motion was not previously addressed by this Court, but will be addressed herein.

[2] Judge Leon B. Cheek, III presided over the summary judgment hearing and entered the Summary Judgment Order on March 1, 2012. Judge Faye L. Allen entered the Amended Final Summary Judgment.

Summary of Arguments on Appeal

State Farm argues: 1) the trial court erred when it relied on the deposition testimony of Ronda McAlpine because the transcript of that deposition had not been filed with the trial court; 2) Florida's rebuttable presumption of prejudice to an insurer when an insured fails to report a claim requires the entry of judgment in favor of State Farm; and 3) even in the absence of Florida's rebuttable presumption equation, genuine issues of material fact and established Florida law preclude summary judgment on the adequacy of "notice".

Conversely, EPCF argues: 1) the Summary Judgment granted in favor of EPCF should be affirmed because EPCF provided State Farm with sufficient notice under Florida law; and 2) the trial court properly relied upon testimony from the McAlpine deposition because this was a case event which was properly noticed, attended by both parties, and relied upon by both parties at the summary judgment hearing. Lastly, EPCF also filed a motion seeking appellate attorney fees and costs pursuant to subsections 627.736(8) and 627.428(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.400.

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); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Accordingly, an appellate 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).

Generally, issues addressing a trial court's admission, exclusion, or reliance upon evidence is a matter within the sound discretion of the trial court. Therefore, the standard of review is abuse of discretion. Also, when reviewing erroneous rulings on evidentiary matters,

the appellate court examines the entire record to determine if the error is harmless. *LaMarr v. Lang*, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001).

Lastly, a decision of a trial court comes to the appellate court with a "presumption of correctness" and the burden is on the appellant to demonstrate reversible error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

Analysis

EPCF's Motion to Supplement Record on Appeal with Transcripts of Ronda McAlpine's and Lori Wilhelm's Depositions

First, this Court addresses EPCF's Motion to Supplement the Record with transcripts of the October 4, 2007 depositions of State Farm's employee, Ronda McAlpine ("McAlpine') and EPCF's employee, Lori Wilhelm ("Wilhelm"). EPCF claims that these transcripts were filed in the lower court on October 31, 2007. State Farm in its Response to the Motion objects to the Motion and argues that the lower court docket reflects that the transcripts were never filed in the lower court and therefore the record on appeal cannot be supplemented with the transcripts.

Pursuant to Florida Rule of Appellate Procedure 9.200(a), the record on appeal must include the original documents, all exhibits that are not physical evidence, and any transcripts(s) of the proceedings filed in the lower tribunal. This Court has reviewed the lower court docket and finds that the subject transcripts do not appear on the docket. Although the trial court refers to the deposition of McAlpine in the Summary Judgment Order and during the hearing, there is no record that these transcripts were filed in the lower court or submitted as exhibits at the hearing. Therefore, the transcripts cannot be included in the record on appeal. *See Matson v. Wilco Office Supply & Equip. Co.*, 541 So. 2d 767, 769 (Fla. 1st DCA 1989) (holding that the videotape played for the jury that was not filed with the trial court, was not part of the record on appeal). Accordingly, EPCF's Motion to Supplement the Record on Appeal must be denied.

Also, EPCF's Appendix to the Answer Brief that solely includes the deposition transcripts of McAlpine and Wilhelm that are not part of the record on appeal must be stricken and all references to the Appendix in the Answer Brief must be stricken.

Trial court's Reliance on Ronda McAlpine's Deposition

As discussed above, this Court finds that McAlpine's deposition was not filed in the lower court or submitted as an exhibit at the hearing. Thus, the trial court's reliance on the deposition was in error. However, from review of the record, this Court finds that the trial court's error was harmless because other evidence in the record supports the trial court's decision, specifically the January 6, 2009 deposition of State Farm's claims adjuster, Gina Rodriguez ("Rodriguez"), which was filed in the lower case on February 16, 2009 and is discussed below.

Rodriguez was the claims adjuster who contacted Mercatante to verify the facts of the accident, what his injuries were, what sort of treatment he previously had or anticipated having, and explained the coverage to him. She stated that the file for Mercatante's claim was set up on June 28, 2005 in response to the pre-suit demand letter from EPCF's counsel received by State Farm on June 27, 2005. She acknowledged that the demand letter included the Notice of Intent to Initiate litigation dated June 22, 2005, a request for disclosure, patient account information from EPCF, and the assignment of benefits.

Rodriguez further testified about her telephone conversation with Mercatante. When asked why he didn't report the claim to State Farm, Mercatante explained to Rodriguez that he didn't know he had to report the claim to State Farm because he thought his health insurance was going to pay for the medical expenses. She then asked Mercatante what treatment he had sought and if there was any additional treatment that might be needed. She also asked him how many

cars there were in his household and if he had any wage loss and any prior accidents. Lastly, she advised Mercatante of his coverage and that the PIP coverage was the primary coverage and State Farm was responsible for paying the bills.

Rodriguez also testified that State Farm did not assert any coverage defenses with either PIP or medical payments coverage and on June 28, 2005 she made the decision to extend the PIP coverage to Mercatante and re-assigned the claim to the processing team. Rodriguez also discussed the follow-up letter sent to Mercatante on July 6, 2005 that explained the coverage and included medical authorization and mileage reimbursement forms for Mercatante to complete and submit to process his claim. Lastly, according to the diary notes, Rodriguez testified that neither she nor any other employees with State Farm made any further contact with Mercatante after the follow-up letter was sent to him.

Among the trial court's findings in the Summary Judgment Order were: 1) State Farm received a pre-suit demand letter from EPCF's counsel on June 27, 2005; 2) some time prior to July 6, 2005, State Farm was in contact with Mercatante concerning the accident and related injury; 3) during this conversation, Mercatante admitted that he did not report the accident because he did not know he was supposed to and he was confused about the coverage; 4) thereafter, a claim number was assigned to the claim; and 5) a follow-up letter was sent to Mercatante summarizing his coverage and requesting the return of a medical authorization form so that the claim could be expedited. Thus, the trial court found that State Farm was on notice of the claim, fully investigated the claim, verified the accident with their insured, and determined coverage prior to suit being filed. These findings are supported by Rodriguez's testimony in her deposition that was properly filed and presented in EPCF's motion for summary judgment at the hearing. Accordingly, the trial court's error in referencing McAlpine's deposition was harmless

as it did not result in a miscarriage of Justice. *See* section 59.041, Florida Statutes, (2012), (stating that no judgment shall be reversed due to the improper admission or rejection of evidence, unless after an examination of the entire case, the error complained of has resulted in a miscarriage of justice and stating that this statute is to be liberally construed).

Mercatante's Failure to Report Accident, Rebuttable Presumption of Prejudice to State Farm, and Sufficiency of Notice provided to State Farm

First, from review of the record, both State Farm and EPCF agree that Mercatante's accident on February 4, 2005 was covered by his policy and that the medical care rendered by EPCF was reasonable and necessary and that the bill was appropriate to the care received by the insured. Instead, the issues in the lower case and on appeal derive from State Farm's argument that Mercatante's insurance policy requires the insured to report a claim before the claim can be processed. Thus, State Farm contends that Mercatante's failure to report a claim creates a presumption of prejudice that must be overcome by EPCF in order to prevail. Conversely, EPCF argues that State Farm was placed on sufficient "notice" per section 627.736(4)(b), Florida Statutes, and that State Farm had ample time to investigate the claim after receipt of the pre-suit demand letter on June 27, 2005.

As discussed above, the trial court found that State Farm was on notice of the claim, fully investigated the claim, verified the accident with their insured, and determined coverage prior to suit being filed. The trial court pointed out in the Order that although incomplete and erroneous information makes the verification of a claim more difficult, the statutory burden remains with the insurer to make a decision on coverage within thirty days.[3] In support of this ruling the trial court cited *Palmer v. Fortune Ins. Co.* 776 So. 2d 1019, 1022 (Fla. 5th DCA 2001).

[3] In the Order the trial court inadvertently stated "insured" instead of "insurer" that has the statutory burden.

This Court finds that, notwithstanding Mercatante's failure to contact State Farm about the claim, which was not surprising given the circumstances in this case, State Farm received sufficient notice of the claim prior to EPCF filing suit and had adequate time to investigate the claim as evidenced by Rodriguez's testimony. Her testimony addressed the documentation received from EPCF and the information obtained from Rodriguez's telephone conversation with Mercatante. Further, State Farm's arguments are negated by Rodriguez's testimony about her decision to extend the PIP coverage to Mercatante, the re-assignment of the claim to the processing team, and the follow-up letter to Mercatante confirming his PIP coverage with medical authorization and mileage reimbursement forms for him to complete and submit.

Based on Rodriguez's testimony and the follow-up letter, it appears that State Farm was going to process and pay the claim even though Mercatante did not initially contact State Farm about the claim. Accordingly, the evidence supports the finding that State Farm was not prejudiced in this case to preclude payment of the claim. *See Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985) (holding that the failure to timely report a claim does not give rise to the automatic forfeiture of insurance benefits, absent prejudice to the insurer); *see also State Farm Mutual Automobile Ins. Co. v. Curran*, 83 So. 3d 793 (Fla. 5th DCA 2011); *Stark v. State Farm Florida Ins. Co.*, 95 So. 3d 285 (Fla. 4th DCA 2012). Lastly, from review of the record evidence, this Court finds that there are no genuine issues of material fact remaining and finds that as a matter of law the entry of summary judgment in favor of EPCF was proper in this case.

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

1) EPCF's "Appellee's Motion to Supplement the Record" filed July 15, 2013 is **DENIED**; EPCF's "Appendix to Appellee's Answer Brief" is **STRICKEN**; and all references to the Appendix in the Answer Brief are **STRICKEN**;

2) The trial court's "Amended Final Summary Judgment" entered October 8, 2012 nunc pro tunc to March 1, 2012 is **AFFIRMED**; and

3) EPCF'S "Appellee's Motion to Tax Appellate Attorney's Fees" filed July 15, 2013 is **GRANTED** and the assessment of those fees is **REMANDED** to the trial court. Appellee is entitled to have costs taxed in its favor by filing a proper motion with the trial court pursuant to Florida Rule of Appellate Procedure 9.400(a).

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 8th day of May, 2014. NUNC PRO TUNC to April 23, 2014.

/S/
JULIE H. O'KANE
Presiding Circuit Judge

WHITEHEAD and PERRY, JR., J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Delivery to **Dale T. Gobel, Esquire and Michael V. Hammond, Esquire,** Gobel Flakes, LLC, 189 South Orange Avenue, Suite 1430, Orlando, Florida 32801-3254 and **Kevin B. Weiss, Esquire**, The Nation Law Firm, 570 Crown Oak Centre, Longwood, Florida 32750 on this 8th day of May, 2014.

/S/
Judicial Assistant