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

APPELLATE CASE NO: 2012-CV-0083-A-O
Lower Case No.: 2003-SC-000598-O

REGIONAL MRI OF ORLANDO, INC.,
a/a/o LORRAINE GERENA

Appellant,
vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE CO,

Appellee.
_____/

Appeal from the County Court
for Orange County, Florida
Deborah B. Ansbro, County Court Judge

Aaryn Fuller, Esq.
Attorney for Appellant

Kenneth P. Hazouri, Esq.
Attorney for Appellee.

Before WHITE, DOHERTY, SCHREIBER

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant Regional MRI of Orlando seeks review of the trial court's decision precluding it from litigating an issue during attorney's fee proceedings, namely whether Appellee State Farm had made a valid offer of settlement under § 768.79, Florida Statutes. Appellee contends that the law of the case has already established the validity of the offer and prevents Appellant from raising this

issue during fee litigation. Appellant concedes that the trial court's award of appellate fees is correct, but it challenges the award of trial court fees.

Whether a matter has been established as the law of a case is a question of law and is reviewed de novo on appeal. *Pompano Masonry Corp. v. Anastasi*, 125 So. 3d 210, 212 (Fla. 4th DCA 2013).

This suit originated in 2003 in small claims court. Appellant Regional MRI of Orlando (MRI) filed against Appellee State Farm Mutual Automobile Insurance Company to recover on an unpaid medical bill resulting from services rendered to Lorraine Gerena, a State Farm policy holder. Prior to filing suit, MRI had sent a bill to State Farm for $1250.00. When State Farm received that bill, there was only $531.99 remaining for payout on Gerena's $10,000 PIP policy.

Before State Farm paid MRI, it received a lost wages claim from Gerena and it paid her the $531.99 left on her policy. MRI filed suit, asserting that State Farm should have paid MRI this amount since the insurer received MRI's bill before it received Gerena's wages claim.

The trial court rendered a final judgment dated July 15, 2009, in which it determined that State Farm legitimately paid the claims of its policyholder and was not required to give preference to the earlier-filed claim of MRI. It reserved on State Farm's motion for attorney's fees and costs.

MRI appealed. This Court's order dated February 23, 2011 affirmed the trial court and concluded:

> State Farm served an offer of settlement on Regional MRI in October 2003. Regional MRI rejected the offer, and State Farm subsequently obtained a judgment of no liability from the trial court. In the instant appeal, State Farm filed a motion for appellate attorney's fees pursuant to Florida Rule of Appellate Procedure 9.400(b), and State Farm has prevailed in this matter, as we affirm the trial court's judgment in favor of State Farm. Therefore, we find that State Farm is entitled to an award of appellate attorney's fees pursuant to section 768.79, Florida Statutes.

MRI filed a petition for writ of certiorari with the Fifth District Court of Appeal. The District court denied the petition. It also awarded State Farm appellate fees and remanded the case to this Court. This Court remanded the case to the trial court for a determination of attorney's fees.

In fees proceedings before the trial court, MRI raised for first time the question of whether State Farm's proposed settlement offer was legally sufficient under the criteria of § 768.79, Florida Statutes. The trial court concluded that this issue had already been decided by the circuit court; as such, it was the law of the case and could not be relitigated. It cited to *Silva v. U.S. Sec. Ins. Co.*, 734 So. 2d 429 (Fla. 3d DCA 1999); *Tiede v. Satterfield*, 870 So. 2d 225 (Fla. 2d DCA 2004). These cases both found that, on a remand to the trial court for a fees hearing, the losing party could not litigate the issue of the sufficiency of the proposal of settlement. Where a prior appellate decision found that an award of appellate fees was warranted, the sufficiency of the proposal of settlement had been established by implication and its validity was the law of the case.

MRI contends on appeal that *Silva* and *Tilde* are distinguishable, and, more importantly, that these cases are no longer good law. It cites to *Delta Prop. Mgmt. v. Profile Investments, Inc.*, 87 So. 3d 765 (Fla. 2012) as setting a new standard for determining what the law of a case is.

Prior to *Delta*, the law of the case doctrine was "limited to rulings on questions of law actually presented and considered on a former appeal. . . Additionally, the law of the case doctrine may foreclose subsequent consideration of issues *implicitly addressed or necessarily considered by* the appellate court's decision." *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001). (Emphasis added). Appellant reads *Delta* as eliminating the second category of foreclosed issues and argues that the law of case only covers issues actually, explicitly ruled on by the appellate court.

This Court finds that *Delta* does not change the doctrine of the law of the case. *Delta* stated it was specifically adhering to *Juliano's* definition. *Delta*, 87 So. 3d at 770. The issue in *Delta* was whether, after a remand to the trial court, a party was foreclosed from raising a matter that could

have been raised on the first appeal but was not. *Delta* concluded that so long as the matter had not actually been presented and decided, the law of the case did not prevent a party from bringing it up on a remand. See, also, *Fitchner v. Lifesouth Cmty. Blood Centers, Inc.*, 88 So. 3d 269, 275 (Fla. 1st DCA 2012): an issue is not foreclosed by the doctrine of the law of the case merely because it could have been presented in an earlier appeal.

No case since *Delta* has concluded that *Delta* changed the established doctrine of the law of the case. *Florida Diversified Films, Inc. v. Simon Roofing & Sheet Metal Corp.*, 118 So. 3d 240, 242 (Fla. 3d DCA 2013) states the established rule: '[t]his doctrine prevents reconsideration of all issues *necessarily decided* in the former appeal," unless manifest injustice requires otherwise. (Emphasis added).

The question then for this Court to decide is whether the legal sufficiency of State Farm's proposal of settlement was implicitly or necessarily considered in the prior appeal of this case. In its order on the prior appeal, this Court noted that State Farm had made an offer of settlement and the Court specifically awarded appellate fees pursuant to § 768.79. To have concluded that appellate fees were appropriate, it was necessary for this Court to have decided that the mentioned offer was valid under that statute. In the absence of a valid offer, there would have been no legal basis for the award of the appellate fees under § 768.79.

Silva and *Tiede*, id., are on point and are controlling. In *Silva*, a trial court judgment in favor of the insurer was appealed; the insurer filed a motion for appellate fees based on § 768.79. The insured did not challenge that basis for appellate fees. The appellate court affirmed the trial court's judgment and awarded appellate fees pursuant to that statute. On remand, the insured tried to argue for the first time that the insurer's offer of settlement was not valid. When the trial court's award of fees was appealed, the appellate court concluded that the validity of the offer was the law of the

case as determined on the first appeal. The court concluded that "if . . . a particular holding is implicit in the decision rendered, it is no longer open for consideration." *Silva*, 734 So. 2d at 431.

Similarly, in *Tiede*, the losing party failed to challenge the opposing party's motion for appellate fees claimed on the basis of an offer of settlement. When the appellate court remanded the case to the trial court for a determination of fees, the losing party was precluded from challenging the offer of settlement since the award of appellate fees on the first appeal had necessarily established that the offer was sufficient. *Tiede*, 870 So 2d. at 228. See, similarly on the point, *Specialty Restaurants Corp. v. Elliott*, 924 So. 2d 834 (Fla. 2d DCA 2005); sufficiency of settlement offer could not be raised after case remanded for fees.

During the first appeal in this case, State Farm filed a motion for appellate fees under § 768.79. Not only did MRI not oppose that motion during litigation of the first appeal, it has conceded in this appeal that appellate fees were appropriate. Since this Court has previously awarded fees on the basis of § 768.79, the availability of fees under that statute is the law of the case and is not subject to further challenge.

It is hereby **ORDERED AND ADJUDGED** that the trial court's order is **AFFIRMED.**

DONE AND ORDERED this 13th day of June, 2014.

/S/
KEITH F. WHITE
Presiding Circuit Judge

DOHERTY and SCHREIBER, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Kenneth P. Hazouri, Esq.,** de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, 332 N. Magnolia Avenue, Orlando, Florida 32801; and **Aayrn Fuller, Esq.,** Bogin, Munns & Munns, P.A., 2601 Technology Drvie, Orlanod, Florida 32804, this 13th day of June, 2014.

/S/
Judicial Assistant