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

ALFA VISION INSURANCE CORPORATION,

Appellant,

v.

**WELLNESS HEALTH ASSOCIATES, INC.,
a/a/o JACQUET LECOIT,**

Appellee.
_____/

CASE NO.: 2011-CV-21

Lower Case No.: 2007-CC-8404

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 23, 2011 granting various motions for summary judgment finding that Appellee, Wellness Health Associates, Inc. a/s/o Jacquet Lecoit ("WELLNESS") was entitled to No-Fault benefits from ALFA for medical services rendered to four 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 WELLNESS' allegations, on January 1, 2007, Victor Gue, Janeara Johnson, Shinika Johnson, and Jacquet Lecoit (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 WELLNESS for injuries sustained in the accident and executed separate assignments of benefits which assigned their right to No-Fault benefits to WELLNESS.

WELLNESS submitted the bills to ALFA for the services it rendered to the assignors along with the assignments. ALFA informed WELLNESS that payment of the claims was not forthcoming as it was investigating the coverage and liability. In June of 2007, WELLNESS submitted to ALFA four separate pre-suit demand letters for each assignor's claim with the subject medical bills and assignments. ALFA did not issue payment pursuant to WELLNESS' demand letters. As a result of ALFA's refusal to remit payment for the bills, in June of 2007 WELLNESS filed four separate lawsuits as assignee of the assignors against ALFA for recovery of No-Fault benefits.[1] Also, prior to obtaining treatment by WELLNESS, the assignors, except for Jacquet Lecoit, obtained treatment by Tampa Chiropractic Center ("TAMPA"). TAMPA also filed three lawsuits against ALFA for refusing to remit payment for the bills for treatment rendered to the same assignors, except for Jacquet Lecoit.[2] In

[1] The four lawsuits filed by WELLNESS are under case numbers 2007-CC-9624 (Jacquet Lecoit), 2007-CC-9643 (Victor Gue), 2007-CC-9644 (Shinika Johnson), and 2007-CC- 9647 (Janeara Johnson).

[2] The lawsuits filed by TAMPA are case numbers 2007-CC-8404, 2007-CC-8407, and 2007- CC-8410 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 TAMPA which is currently pending before the same appellate panel (case no. 2011-CV-22) and will be addressed by separate order.

January of 2009, the lower court consolidated TAMPA's three lawsuits under case number 2007-CC-8404 and in March of 2009 also consolidated WELLNESS' four lawsuits under case number 2007-CC-8404.

The operative complaints filed by WELLNESS are the complaints which were filed on or about June 26, 2007 for each of the four assignors. Count I of the complaints sought damages alleging that ALFA breached the policy of insurance for failing to pay No-Fault benefits to WELLNESS for the medical services rendered. WELLNESS withdrew Count II of the 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 in August 2007 and were the same in response to each complaint. Subsequently, ALFA filed Amended Affirmative Defenses in March 2009 and October 2010.

Beginning in September 2010, various motions for summary judgment were filed 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 WELLNESS and one filed by ALFA whereupon the lower court entered orders granting WELLNESS' motions and denying ALFA's motion. Following the entry of these orders, WELLNESS filed four separate motions for entry of final judgment and a hearing was held on February 22, 2011 addressing these motions. On February 23, 2011, the lower court entered the Final Judgment in favor of WELLNESS finding that it was entitled to

$16,368.93 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) WELLNESS 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 WELLNESS was entitled to affirmative relief when it only brought motions for summary judgment as to ALFA's Affirmative Defenses;

[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.

3) The lower court erred in granting an ore tenus motion for summary judgment in favor of Victor Gue and Shinika Johnson based on ALFA's Affirmative Defenses. 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 WELLNESS had standing pursuant to the Assignment of Benefits to file and maintain the lawsuit. Specifically, ALFA argues that the Assignments of Benefits assigned the benefits to Wellness Health Chiropractic, not Wellness Health Associates, Inc. thus, presenting a question of fact precluding the lower court from finding that WELLNESS had standing.

Conversely, WELLNESS 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) Many of the issues of fact ALFA attempts to raise have already been waived and/or stipulated to and deserve no consideration by this Court;

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

4) WELLNESS 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. WELLNESS 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, WELLNESS 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;

5) WELLNESS did not serve an oral motion for summary judgment, but instead, sought to amend its previously filed motion for summary judgment to add the cases of Victor Gue and Shinika Johnson as the defenses were the same in the WELLNESS and TAMPA cases. Further, WELLNESS points out that the arguments in opposition to summary judgment were the same, and most importantly, the lower court had already granted summary judgment in favor of TAMPA as it related to the exact same affirmative defenses. Therefore, WELLNESS concludes that there was no oral motion but simply an amendment to ensure that the entire case was resolved as a whole and in accordance with the previous rulings of the lower court; and

6) WELLNESS has standing to file and maintain the lawsuit. WELLNESS specifically argues that ALFA waived its right to challenge standing and does not have standing to challenge the validity of the subject assignments. WELLNESS also argues that ALFA did not present evidence or argument to refute that WELLNESS had such standing and the assignments at issue confer standing on WELLNESS.

Discussion

The Notice of Appeal of the Final Judgment

This Court first addresses WELLNESS' 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 WELLNESS' 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); s*ee 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 WELLNESS filed a motion to dismiss the appeal which would have been a more appropriate avenue to take with this argument.

WELLNESS' Standing

This Court next addresses ALFA's argument that the lower court erred in determining, as a matter of law, that WELLNESS had standing to bring and maintain the action in the lower case. On September 27, 2010, ALFA filed a Motion for Leave to Amend its Answer and Affirmative Defenses to add its Seventh Affirmative Defense that states "Plaintiff lacks standing to bring this claim as the Assignment of Benefits does not assign Plaintiff any rights to bring suit as the Assignments do not assign any benefits to Wellness Health Associates, Inc." ALFA asserted this defense because the Assignment of Benefits documents did not state Wellness Health Associates, Inc. as assignee, but instead stated Wellness Health Chiropractic as assignee.

Also, while this Motion was pending, on September 30, 2010, ALFA filed its Motion for Final Summary Judgment arguing again that WELLNESS lacked standing because the Assignment of Benefits stated Wellness Health Chiropractic as assignee. ALFA further

argued that there was no corporation or entity registered by the name Wellness Health Chiropractic nor any fictitious name registered by that name. ALFA also included exhibits in support of its Motion. On October 1, 2010, WELLNESS filed its Response in opposition to ALFA's Motion for Final Summary Judgment and argued that ALFA did not raise the standing issue as an affirmative defense and abandoned the issue during the course of the litigation. WELLNESS also argued that it received an equitable assignment by providing medical services to the insured. Lastly, WELLNESS argued that section 865.09, Florida Statutes, governing fictitious names provided the opportunity to cure any defect by complying with the registration requirements and such compliance was permissible even after suit was filed. Therefore, WELLNESS concluded it should be provided such an opportunity to cure the defect, thus, precluding summary judgment.

On November 5, 2010, the lower court granted ALFA's Motion for Leave to Amend its Answer and Affirmative Defenses to add its Seventh Affirmative Defense and deemed it filed as of October 22, 2010. In the meantime, on November 1, 2010, WELLNESS filed its own Motion for Final Summary Judgment on the Issue of Standing and in support of its arguments included the affidavit of Pierre Moise, Director of Operations for WELLNESS and a copy of the fictitious name registration certificate for Wellness Health Chiropractic effective September 29, 2010. Therefore, WELLNESS argued that it had complied with the fictitious name statute and that it was the real party in interest since it and Wellness Health Chiropractic were one in the same. WELLNESS also renewed its arguments that the Assignment of Benefits created an equitable assignment for the patients' PIP benefits and 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 as evidenced by the correspondence between ALFA and WELLNESS regarding the claims. Lastly, WELLNESS argued that ALFA could not now claim some 3 years later that it did not know who it was dealing with. On January 14, 2011, the lower court denied ALFA's Motion for Final Summary Judgment on the issue of standing. On February 22, 2011, the lower court granted WELLNESS' Motion for Final Summary Judgment on the Issue of Standing.[4]

Upon review of the record evidence, this Court finds that the lower court's rulings on ALFA's and WELLNESS' Motions for Summary Judgment as to the issue of standing was supported by ample evidence showing that: 1) WELLNESS was the assignor 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; and 4) ALFA did not question the assignment during the events leading up to when WELLNESS filed the lawsuits; 5) WELLNESS ultimately complied with the fictitious name statute by properly registering Wellness Health Chiropractic as a fictitious name; and 6) The evidence supports that there was an equitable assignment of the benefits to WELLNESS. *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 WELLNESS and a matter of law the lower court's rulings as to standing must be affirmed.

[4] The lower court's order referenced WELLNESS' Motion as a motion for "partial" not "final" summary judgment and it appears this wording was done because the Motion addressed only the Seventh Affirmative Defense.

Orders Granting Summary Judgment as to Fraud Issue

Lastly, this Court addresses the lower court's rulings on WELLNESS' Motions for Summary Judgment filed on September 30, 2010 and November 1, 2010 that addressed ALFA's Second and Sixth Amended 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 Sixth Amended 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, WELLNESS submitted the depositions of assignors, Victor Gue (March 11, 2008) and Jacquet Lecoit (September 10, 2009). 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 22, 2011 entered orders granting the motions.

From what this Court is able to discern, the pertinent information gathered and summarized from the depositions of assignors, Victor Gue and Jacquet Lecoit.[5] was that Victor Gue was driving the vehicle when the accident occurred and that the other persons in the vehicle were Janeara Johnson and Shinika Johnson. However, Victor Gue in his deposition stated that he did not recall whether Jacquet Lecoit was in the vehicle.

[5] In Jacquet Lecoit's deposition his name is stated as Lecoit Jacquet.

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 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 WELLNESS' Motions for Final Summary Judgment as to ALFA's Amended Second and Sixth 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 23, 2011 as to the Order entered on January 11, 2011 denying Defendant's (ALFA) Motion for Summary Judgment on the Issue of Standing and the Order entered on February 22, 2011 granting Plaintiff's (WELLNESS) Motion for Partial Summary Judgment on the Issue of Standing is **AFFIRMED**. Accordingly, WELLNESS' "Motion to Tax Attorney Fees" filed December 19, 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 23, 2011 is **REVERSED** and this cause is **REMANDED** for further proceedings consistent with this opinion. Accordingly, WELLNESS' "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