

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

**USAA CASUALTY INSURANCE  
COMPANY,**

**CASE NO.: 2014-CV-000005-A-O**

Lower Case No.: 2012-SC-012076-O

Appellant,

v.

**EMERGENCY PHYSICIANS OF CENTRAL  
FLORIDA, LLP, a/a/o Jonathan Cooper,**

Appellee.

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

Douglas H. Stein, Esquire, for Appellant.

Chad A. Barr, Esquire, for Appellee.

Before DAWSON, WOOTEN, and DAVIS, J.J.

**PER CURIAM.**

**FINAL ORDER AFFIRMING TRIAL COURT**

Appellant, USAA Casualty Insurance Company (“USAA”) timely appeals the trial court’s “Order” rendered on December 17, 2013 entering Final Judgment in favor of Appellee, Emergency Physicians of Central Florida, LLP (“EPCF”) as assignee of the insured, Jonathan Cooper (“Cooper”). 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*

On July 4, 2012, Cooper was involved in a motor vehicle accident. At the time of the accident, Cooper had personal injury protection (“PIP”) insurance coverage through USAA. Cooper received treatment for his injuries by EPCF at the Orlando Health Emergency Department (“Orlando Health”). At the time of receiving the medical services from EPCF, Cooper executed a document entitled “Conditions for Treatment Part B., Financial Responsibility, Assignment of Benefits, Release of Information, and Patient/Guarantor Agreement” (“Cooper & EPCF Agreement”). EPCF then submitted a claim to USAA for the medical services provided to Cooper. USAA received the claim on July 23, 2012. At that time, USAA did not pay the claim because of an incorrect accident date on the claim form. Thereafter, EPCF re-submitted to USAA a corrected claim form, but USAA still did not pay the claim. On October 3, 2012 EPCF sent to USAA its Notice of Intent to Initiate Litigation letter (“demand letter”). USAA received the demand letter on October 8, 2012. Also, included with the demand letter were copies of the claim and the Cooper & EPCF Agreement. USAA did not issue payment or a response to the demand letter until December 10 and 13, 2012 when it issued payments to EPCF for its claim in the amount of \$303.81 and the remaining balance of \$450.49, plus payment for penalties, interest, and postage.

On December 14, 2012, EPCF filed suit against USAA seeking payment of the unpaid personal injury protection benefits. Also, EPCF received USAA’s first payment on December 14, 2012 and the second payment on December 17, 2012. On January 25, 2013, EPCF filed its Notice of Filing Confession of Judgment that was later amended and filed on March 8, 2013. On February 22, 2013, USAA filed its Answer and Affirmative Defenses. Among the Affirmative Defenses, USAA alleged that payment had been made in full to EPCF and that

EPCF had not complied with all conditions precedent because the assignment of benefits did not confer standing.

Also, on February 22, 2013, USAA filed a Motion for Summary Judgment arguing that EPCF had been paid in full. On March 8, 2013, EPCF filed its Reply to the Affirmative Defenses asserting that USAA had confessed judgment and waived its claim of an invalid assignment of benefits by failing to place EPCF on notice of this defense in response to the demand letter and by issuing payment after receipt of the assignment of benefits. EPCF also pled in its Reply that it had accepted an equitable assignment of benefits from Cooper.

Thereafter, on April 22, 2013, USAA filed an additional Motion for Final Summary Judgment arguing that the assignment of benefits at issue did not confer standing on EPCF. On August 1, 2013, EPCF filed a Motion for Partial Summary Judgment as to USAA's Second and Third Affirmative Defenses addressing the assignment of benefits and standing. On August 19, 2013, EPCF filed an additional Motion for Final Judgment arguing that USAA's payments amounted to a confession of judgment. Hearings were held on August 29, 2013, September 18, 2013, and December 17, 2013 addressing the Motions for Summary and Final Judgment.

Upon conclusion of the hearing on December 17, 2013, the trial court entered the Order granting EPCF's Motion for Partial Summary Judgment and Motion for Final Judgment and denying USAA's Motion for Final Summary Judgment by finding: 1) EPCF had standing because the Cooper & EPCF Agreement was a valid and legally enforceable assignment and there was an equitable assignment of benefits between EPCF and Cooper and 2) USAA's payments of EPCF's claim after suit was filed was a confession of judgment.

### ***Arguments on Appeal***

USAA argues: 1) Its pre-trial payment of benefits was not a confession of judgment; 2) Cooper's purported assignment did not confer EPCF with standing to maintain the action because: a) The purported assignment was not an assignment but a mere direction to pay and b) There was no equitable assignment between EPCF and USAA. Lastly, USAA seeks appellate attorney fees per Florida Rule of Appellate Procedure 9.400(b) and section 768.79(3), Florida Statutes, based on its Proposal of Settlement that was served on EPCF on April 26, 2013 and rejected by EPCF.

Conversely, EPCF argues: 1) The trial court did not err as a matter of law in finding that USAA's payment was a confession of judgment and 2) The trial court did not err as a matter of law in finding that EPCF had standing because: a) EPCF is the real party in interest; b) There is no legal distinction between an "assignment of benefits" and a "direction to pay"; c) Courts have found that the subject assignment of benefits confers standing; d) Notwithstanding the foregoing, the trial court was correct in finding that an equitable assignment of benefits exists; e) USAA has no standing to challenge the assignment of benefits; f) USAA has waived its right to challenge the assignment of benefits; and g) EPCF did plead an equitable assignment of benefits. Lastly, EPCF seeks appellate attorney fees and costs per sections 627.736(8), 627.428(1), and 59.46, Florida Statutes, and Florida Rules of Appellate Procedure 9.040(d), 9.400(b), and 9.410.

### ***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).

### *Analysis*

First, from review of the record and briefs in this case, this Court finds that there are no genuine issues of material fact. Therefore, next, this Court must determine whether as a matter of law the entry of summary judgment in favor of EPCF was proper in this case.

***Confession of Judgment Issue:*** The Florida Supreme Court in *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983), addressed section 627.428, Florida Statutes, that provides for the award of attorney's fees to prevailing insured persons or assignees and extended the application of the statute in cases where a confession of judgment occurred via the insurer's payment of the claim after suit was filed but before judgment was entered. The Court in *Wollard* also cited *Gibson v. Walker*, 380 So. 2d 531 (Fla. 5th DCA 1980) where the Fifth District Court of Appeal addressed the confession of judgment issue and explained:

[T]he statutory obligation for attorney's fees cannot be avoided simply by paying the policy proceeds after suit is filed but before a judgment is actually entered because to so construe that statute would do violence to its purpose, which is to discourage litigation and encourage prompt disposition of valid insurance claims without litigation.

*Gibson v. Walker*, 380 So. 2d at 533.

In the instant case, USAA argues that the lawsuit was not the catalyst for its payment of EPCF's claim; thus, the payment was not a confession of judgment. From review of the record and based on the totality of the facts/evidence in this case, this Court finds that USAA's argument lacks merit. On October 8, 2012, USAA received EPCF's demand letter informing USAA that it's "failure to issue both payments in full within thirty (30) days after

receipt of the notice will result in litigation.” Instead, USAA did not issue payments of the claim until December 10 and 13, 2012 resulting in EPCF not receiving the payments until December 14 and 17, 2012. Also, the record is void of any communications between USAA and EPCF between the time USAA received the demand letter and when it paid the claim. Thus, due to USAA’s failure to issue payment within the thirty days per section 627.736(4)(b), Florida Statutes, and subsequent failure to issue payment within the additional thirty days allowed by section 627.736(10), Florida Statutes, it is not surprising that EPCF found it necessary to file suit to collect the claim. In support of EPCF’s Motion for Partial Summary Judgment and Motion for Final Judgment, EPCF filed the Affidavit of EPCF’s financial coordinator/corporate representative, Lori Wilhelm, revealing that EPCF was unaware that USAA was going to issue the payments because prior to December 14, 2012, EPCF did not receive any response to the demand letter.

Therefore, it is reasonable to conclude that the lawsuit was already in progress when EPCF received the payments for its claim causing it to incur attorney fees and costs. Further, EPCF did not receive full payment of its claim until it received the remaining balance payment on December 17, 2012 after the lawsuit was filed. Accordingly, based on the specific facts in this case, the trial court did not err by finding that USAA’s payments of EPCF’s claim was a confession of judgment. *See Tampa Chiropractic Center, Inc. v. State Farm Mutual Automobile Insurance Co.*, 141 So. 3d 1256, 1259 (Fla. 5th DCA 2014) (holding that if the insurer paid the disputed claims after the medical provider filed its amended counterclaim, then insurer confessed judgment and an award of attorney’s fees to the provider was appropriate).

*Assignment/Standing Issue:* USAA also argues that EPCF did not have standing to maintain this action because the Cooper & EPCF Agreement did not convey the assignment of benefits and right to sue, but instead was only a direction to pay. This Court finds that the USAA's confession of judgment defeats its lack of assignment/standing argument. *See Tampa Chiropractic Center, Inc.*, 141 So. 3d at 1259-1260 (rejecting insurer's argument that it could not confess judgment in a cause of action over which the trial court lacked subject-matter jurisdiction and explaining that insurer's argument was at odds with the purpose of the confession of judgment doctrine to deter insurers from contesting valid insurance claims).

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

1. The trial court's "Order" rendered on December 17, 2013 entering Final Judgment in favor of EPCF is **AFFIRMED**.

2. EPCF's "Appellee's Motion to Tax Appellate Attorney's Fees and Costs" filed November 17, 2014 is **GRANTED** as to the attorney's fees and the assessment of those fees is **REMANDED** to the trial court. Also, EPCF is entitled to have costs taxed in its favor by filing a proper motion with the trial court pursuant to 9.400(a), Fla. R. App. P.

3. USAA's "Appellant's Motion for Attorney's Fees Pursuant to Proposal for Settlement" filed July 22, 2014 is **DENIED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida, on this 26th day of May, 2015.

/S/  
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**DANIEL P. DAWSON**  
**Presiding Circuit Judge**

WOOTEN and DAVIS, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Douglas H. Stein, Esquire**, Seipp, Flick, & Hosley, LLP, Two Alhambra Plaza – Suite 800, Coral Gables, Florida 33134; **Chad A. Barr, Esquire**, Law Office of Chad A. Barr, P.A., 698 North Maitland Avenue, Suite 300, Maitland, Florida 32751; **The Honorable Wilfredo Martinez**, lower court Judge, 425 N. Orange Avenue, Orlando, Florida 32801, on this 26th day of May, 2015.

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