IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

LIBERTY MUTUAL
INSURANCE COMPANY,

Appellant,

v.

VILLAGE CHIROPRACTIC AND
HEALING ARTS CENTER, P.A., as
Assignee of Holly Libes,

Appellee.
_____/

CASE NO.: 502010AP000002XXXXMB
CIVIL APPELLATE DIVISION "AY"
L.T. No.: 502008SC016833

Opinion filed: FEB 24 2011

Appealed from the County Court in and for Palm Beach County, Florida: Judge Nancy Perez

Attorneys for Appellant: Hinda Klein, Esq. and Carlos Cabrera, Esq.
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PER CURIAM

REVERSED.

Appellant/Defendant, LIBERTY MUTUAL INSURANCE COMPANY ("Liberty Mutual"), appeals an order granting summary judgment in favor of Appellee/Plaintiff, VILLAGE CHIROPRACTIC AND HEALING ARTS CENTER, P.A. ("Village Chiropractic") on Appellee/Plaintiff's breach of contract claim in the amount of $ 1,324.33.[1] On appeal, Liberty Mutual argues that the lower court's determination as to Plaintiff's motion for summary judgment was erroneous based upon the evidence presented. We agree. For the reasons set forth

[1] Although the underlying complaint alleged two separate counts, Village Chiropractic only sought damages on the breach of contract claim at issue here.

below, we find that the County Court's ruling that there was no issue of material fact was erroneous, and reverse.

I. BACKGROUND

On June 17, 2008, Holly Libes ("Ms. Libes") was involved in a car accident, which caused injuries to her lower back. On July 28, 2008, Ms. Libes began treatment for her injuries at Village Chiropractic, an establishment owned and operated by Steven Horowitz, D.C. ("Dr. Horowitz"), which provides both chiropractic treatment and massage therapy to its clients. From July 28, 2008 to October 15, 2008, Village Chiropractic submitted bills to Liberty Mutual and received payment for Ms. Libes' treatments during that time, which consisted of massage therapy, manual therapy, and therapeutic exercises. On October 4, 2008, at the request of Liberty Mutual, Ms. Libes submitted to an Independent Medical Examination ("IME") with chiropractor David Dresner, D.C. ("Dr. Dresner"). Based on the results of the IME as reported by Dr. Dresner, Liberty Mutual terminated Ms. Libes' chiropractic benefits, effective October 20, 2008. Thereafter, Ms. Libes received no *chiropractic* care, but continued to receive massage therapy from October 22, 2008 to March 4, 2009. Liberty Mutual has denied payment to Village Chiropractic for all massage therapy bills dated October 22, 2008 or later on the basis that "all chiropractic benefits" were terminated on and after October 20, 2008.

Ms. Libes executed an assignment of benefits in favor of Village Chiropractic, who filed suit seeking payment for massage therapy services rendered to Ms. Libes between October 22, 2008 and March 4, 2009. Village Chiropractic moved for summary judgment on its claims, and in support thereof presented the affidavits of Dr. Horowitz and Ms. Libes. Attached to Ms. Libes' affidavit was the report of the IME chiropractor, Dr. Dresner. In response, Liberty Mutual submitted the affidavit of Dr. Dresner, in which he stated that his comment in his IME Report that Ms. Libes did not require additional chiropractic care beyond October 20, 2008 was

meant to include "massage therapy" and any other similar treatments. Liberty Mutual did not submit or attach its own copy of Dr. Dresner's IME Report, but instead chose to refer to and rely upon the identical version of same attached to Ms. Libes' affidavit.

Upon its review of the motion for summary judgment, the lower court first addressed Village Chiropractic's objection to the admissibility of Dr. Dresner's October 4, 2008 IME Report. As the court stated, Florida Rule of Civil Procedure 1.510(e) requires that all documents in support of a motion for summary judgment must be sworn to or certified. The court held that Dr. Dresner's report did not comply with Rule 1.510(e) because it was neither certified nor sworn to by any party with any personal knowledge of its contents; instead, the IME Report had simply been attached to Ms. Libes' affidavit. The trial court also rejected Liberty Mutual's argument that Village Chiropractic waived the requirements of Rule 1.150(e) due to its reliance on the affidavit of Ms. Libes, which included the IME Report as an attachment. Accordingly, the trial court found that Liberty Mutual had presented no evidence that a valid report ever existed for purposes of compliance with § 627.736(7)(a), Florida Statutes because the report – at least in the form in which it was presented to the trial court on summary judgment – constituted inadmissible hearsay.

In its analysis of the sufficiency of the IME Report and Dr. Dresner's subsequent affidavit, the trial court noted that the IME Report stated only that "additional/future ***chiropractic care*** would no longer be considered reasonable, necessary and related" to the accident, but made no mention as to the need for any additional massage therapy. Relying on this absence of express language, the court determined that even if the IME Report was admissible, it would not qualify under § 627.736(7)(a) as a statement that treatment was not reasonable, related, or necessary. Moreover, the trial court held that Dr. Dresner's subsequent affidavit of May 18, 2009 – despite its inclusion of an express statement that massage therapy was not reasonable or

necessary after of October 4, 2008 – was also unsatisfactory because the statute required that such an opinion be obtained by prior to any cessation of payments.[2] Liberty Mutual filed this timely appeal, alleging that the trial court erroneously refused to consider Dr. Dresner's report and subsequent affidavit clarifying the opinions stated therein when ruling in favor of Village Chiropractic's motion for summary judgment.

II. ANALYSIS

The standard or review of a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo. Donovan Const., Inc. v. Vacker, 938 So. 2d 597, 599 (Fla. 4th DCA 2006) (citing Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005). With respect to issues of fact,

> [t]he law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977); Holl v. Talcott, 191 So. 2d 40 (Fla. 1966), *cert. denied*, 232 So. 2d 181 (Fla. 1969). A summary judgment should not be granted *unless the facts are so crystallized that nothing remains but questions of law.* Shaffran v. Holness, 93 So. 2d 94 (Fla. 1957).

Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) (emphasis added). Thus, "[i]f the evidence raises any issue of material fact, if is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury." Id. (citing Williams v. Lake City, 62 So. 2d 732 (Fla. 1953); Crovella v. Cochrane, 102 So. 2d 307 (Fla. 1st DCA 1958)). Finally, it is also critical to remember "that as to evidence already in the record the court must

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[2] "According to the plain language of § 627.736(7)(a), the only way that Liberty Mutual could withdraw payment for massage therapy would have been to ***first*** obtain an opinion stating that massage therapy was not reasonable, related, or necessary. Here, no such opinion exists. Instead, Liberty Mutual relies on an opinion rendered by Dr. Dresner on May 18, 2009 – well after Liberty Mutual withdrew and denied payment, well after this lawsuit was filed, and even after the massage treatment at issue was concluded. In contravention to § 627.736(7)(a), Liberty Mutual failed to obtain an opinion stating that no additional massage therapy was reasonable, necessary or related prior to withdrawing Ms. Libes' massage therapy benefits." (Trial Court Order, p. 5) (emphasis in original).

draw every possible inference in favor of the non-moving party." Edwards v. Simon, 961 So. 2d 973, 974 (Fla. 4th DCA 2007).

Liberty Mutual argues that Dr. Dresner's affidavit alone created an issue of material fact because he stated specifically therein that the term "chiropractic care" encompassed "all forms of therapeutic care rendered at Village Chiropractic including, but not limited to, massage therapy..." Nonetheless, the trial court barred Dr. Dresner's affidavit from consideration based on its finding that the affidavit was untimely. This Court, however, does not need to address the propriety of the lower court's determinations with respect to what evidence was appropriate for consideration because we find that the record reflected a genuine issue of fact. See Love v. Allis-Chalmers Corp., 362 So. 2d 1037, 1038 (Fla 4th DCA 1978).

> The parties have devoted a good portion of their briefs to a discussion of the evidence attached to the motion for rehearing but we do not find it necessary to reach the problems involved in that phase of the case. In our opinion the record before the trial court was such that the order granting summary judgment should not have been entered; the record reflected a genuine issue of fact.

In the instant case, as in Love, the record contained depositions, answers, sworn responses, and affidavits, all of which dealt with essential issues of fact relevant to the outcome of the case. Love dealt with a factually similar scenario, wherein the appellee, Allis-Chalmers, moved for summary judgment, relying primarily on the opposing party's failure to comply with certain administrative and timeliness requirements. Id. In light of such noncompliance on the part of Love, the trial court was essentially limited to Allis-Chalmers' version of the material facts at issue; hence, the trial court entered summary judgment in favor of Allis-Chalmers. On appeal, the Court in Love held that summary judgment was improper despite Love's failure to properly respond because the record before the trial court – as provided by the movant – was "replete with evidence that there was a genuine issue of fact." Id. We hold that the record in the

instant case similarly indicates that there is a genuine issue of fact as to whether the term "chiropractic care" as used by Dr. Dresner in his IME Report encompasses massage treatments.

The Court in Love reasoned that at the time of the ruling, depositions and affidavits that were contradictory to the factual assertions of the movant were a part of record before the trial court. Id. The instant case is analogous to the circumstances of Love, in that Dr. Dresner's IME Report was attached to both Ms. Libes' affidavit and Mery Espinal's deposition, both of which were a part of the record before the court. Moreover, as the Court in Love also considered, there was also an untimely sworn affidavit before the court that cast doubt on Village Chiropractic's position. Thus, the Court in Love concluded that "[i]n this state of the record we are convinced that justice precluded the trial judge from entering summary judgment for appellee and thus the entry of that order constituted an abuse of discretion." Id. at 1039. We hold that the record in this case clearly illustrates the existence of a genuine issue of material fact as to the import of the IME Report. Accordingly, the final order of summary judgment in favor of Village Chiropractic was in error. Love v. Allis-Chalmers Corp., 362 So. 2d 1037 (Fla. 4th DCA 1978); see also Reliance Ins. Co. v. D'Amico, 528 So. 2d 533, 535 (Fla. 2d DCA 1988) (citing Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979) (holding that an insurance policy may be interpreted against the insurer "[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning" exists) (citations omitted)).

Accordingly, we REVERSE the trial court's order granting summary judgment, and remand for further proceedings consistent with this opinion. Further, Appellee Village Chiropractic's Motion for Appellate Attorney's Fees is DENIED.

KELLEY, FRENCH, McCARTHY, JJ., concur.