

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

PROGRESSIVE EXPRESS  
INSURANCE CO.,

CASE NO.: 2014-CV-000033-A-O  
Lower Case No.: 2006-CC-004382-O

Appellant,

v.

DAVID G. SHAW, D.C., P.A.,  
a/a/o Jean Hyacinthe,

Appellee.

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Appeal from the County Court,  
for Orange County, Florida,  
Adam McGinnis, County Judge.

Douglas H. Stein, Esquire, and  
Stephanie Martinez, Esquire, for Appellant.

Chad A. Barr, Esquire, for Appellee.

Before SHEA, G. ADAMS, and BLACKWELL, J.J.

PER CURIAM.

**FINAL ORDER AFFIRMING TRIAL COURT**

Appellant, Progressive Express Insurance Co. (“Progressive”) as assignee of the insured, Jean Hyacinthe (“Hyacinthe”), timely appeals the trial court’s “Order Granting Plaintiff’s Second Amended Motion for Final Summary Judgment entered September 23, 2013, “Amended Order Granting Motion for Final Summary Judgment entered February 17, 2014, and “Order on Defendants Rehearing” entered April 21, 2014. 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*

Hyacinthe who had personal injury protection (“PIP”) insurance coverage with Progressive, was injured in an automobile accident on January 19, 2004. Thereafter, he received medical services from Appellee, David G. Shaw, D.C., P.A. (“Shaw”). Per the assignment of benefits from Hyacinthe, Shaw submitted to Progressive a claim for the medical services it provided to Hyacinthe from January 20, 2004 through March 31, 2004 totaling \$9,340.00. Progressive investigated the claim and did not pay it due to concerns that that fraud was involved with Hyacinthe’s claim and with another claim from an alleged injured passenger, Edward Direny (“Direny”). On August 24, 2004, Shaw filed suit against Progressive in the County Court in Seminole County. Progressive filed its Answer and Affirmative Defenses that were later amended. Thereafter, in 2006 the case was transferred to the County Court in Orange County. Discovery ensued and both parties filed numerous motions for summary judgment.

Ultimately, on September 13, 2013, a hearing was held addressing Shaw’s Second Amended Motion for Final Summary Judgment. On September 23, 2013, the trial court entered an Order granting the Motion finding that no record evidence existed to support that Hyacinthe knowingly concealed or misrepresented any material fact or circumstance, engaged in fraudulent conduct in connection with the presentation of this claim, or that he did anything that prejudiced Progressive in its handling of the claim. Thereafter, Progressive filed a Motion for Rehearing of the court's Order that was heard on October 10, 2013. On February 17, 2014, the trial court entered an Amended Order Granting Plaintiff's Motion for Final

Summary Judgment to clarify that the judgment applied only to Hyacinthe and did not to Direny whose case was pending for trial. On April 17, 2014, the trial court entered the Order denying Progressive's Motion for Rehearing.

### *Summary of Arguments on Appeal*

Progressive argues that the trial court erred in entering summary judgment where there are genuine issues of material fact as to whether the insured committed insurance fraud including: 1) discrepancies in Hyacinthe's examination under oath ("EUO") and deposition about facts prior to the accident; 2) the number and identity of any passengers in the subject vehicle; 3) the existence of an ambulance at the accident scene; 4) Direny's social security number; and 5) the Notary Public's conflict of interest in notarizing Direny's Affidavits. Progressive also seeks appellate attorney fees per Florida Rule of Appellate Procedure 9.400(b) and section 768.79(1), Florida Statutes, based on its Proposal of Settlement that was served on Shaw on February 10, 2006 and rejected by Shaw.

Conversely, Shaw argues that the trial court did not err as a matter of law in finding that there was no record evidence to support Progressive's fraud affirmative defense because: 1) Progressive waived its argument as to the material misrepresentation defense; 2) Progressive failed to plead fraud with the required specificity; 3) the EUO transcripts were inadmissible hearsay and not summary judgment evidence; 4) the crash report and Trooper Miller's testimony from the crash report are inadmissible and not summary judgment evidence; 5) section 316.068(2), Florida Statutes (2006), pertaining to the rebuttable presumption as to the number of passengers reported in a crash report, cannot be retroactively applied to the subject accident; 6) there is no genuine issue that Hyacinthe and Direny were in the subject vehicle when the accident occurred; 7) Direny's I.D. card is not relevant to Shaw's

claim for reimbursement for medical treatment rendered to Hyacinthe; 8) there was no record evidence that the discrepancies were fraudulent or material; and 9) at a minimum, the summary judgment as to fraud regarding the alleged fake I.D. card must be affirmed for lack of a record. Shaw also 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. 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 v. City of Orlando*, 778 So. 2d 490, 491-492 (Fla. 5th DCA 2001) (citing Fla. R. Civ. P. 1.510(c)).

### ***Analysis***

The crux of this appeal is whether genuine issues of material fact exist in this case that preclude summary judgment. This Court finds from review of the claims and record evidence, none of the facts that may be in dispute are material to Hyacinthe's injuries and to Shaw's claim for the medical services rendered to Hyacinthe. Instead, those facts primarily relate to Direny. Thus, the issues surrounding Direny including whether he was a passenger, his alleged fake I.D. card and social security number, and the validity of his Affidavits can be properly addressed in the case addressing Shaw's claim for the medical services rendered to Direny. *See Shaw v. Progressive Express Ins.*, case no. 2006-CC-006834. In the Hyacinthe case there are no genuine issues of material fact precluding recovery for Shaw. Importantly, there is no dispute that Hyacinthe was the driver of the subject vehicle and that he incurred injuries from the accident. Further, per the record evidence, it is not disputed that Hyacinthe

received medical treatment from Shaw for those injuries that was reasonable, related, and necessary as a result of the subject accident. Lastly, this Court's finding that there are no remaining genuine issues of material fact precluding summary judgment in favor of Shaw, is dispositive. Therefore, it is not necessary that the other arguments in this appeal be addressed herein.

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

1. The trial court's "Order Granting Plaintiff's Second Amended Motion for Final Summary Judgment entered September 23, 2013, "Amended Order Granting Motion for Final Summary Judgment entered February 17, 2014, and "Order on Defendants Rehearing" entered April 21, 2014 are **AFFIRMED**.

2. Shaw's "Appellee's Motion to Tax Appellate Attorney's Fees and Costs" filed March 27, 2015 is **GRANTED** as to the attorney's fees and the assessment of those fees is **REMANDED** to the trial court. Also, Shaw 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. Progressive's "Appellant's Motion for Attorney's Fees Pursuant to Proposal for Settlement" filed November 6, 2014 is **DENIED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida, on this 20th day of July, 2015.

/S/ \_\_\_\_\_  
**TIMOTHY SHEA**  
**Presiding Circuit Judge**

G. ADAMS and BLACKWELL, 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, and Stephanie Martinez, Esquire**, Seipp, Flick & Hosley, LLP, Two Alhambra Plaza –Suite 800, Miami, Florida 33134-5214; **Chad A. Barr, Esquire**, Law Office of Chad A. Barr, P.A., Suite 300, Maitland, Florida 32751; **The Honorable Adam McGinnis** and **The Honorable Tina L. Caraballo**, 425 N. Orange Avenue, Orlando, Florida 32801, on this 20th day of July, 2015.

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