

[REDACTED]

[REDACTED]

[REDACTED]

Appellant,

vs.

[REDACTED]

and

[REDACTED]

Appellees.

On Appeal from Order of the [REDACTED]
[REDACTED]
[REDACTED]

APPELLANT'S THIRD AMENDED INITIAL BRIEF

[REDACTED]

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STATEMENT OF CASE AND THE FACTS

T [REDACTED] hereby challenges the Lower Tribunal's order of [REDACTED] granting Summary Judgment to [REDACTED]. The relevant facts of this case indicate many events, both legal and factual, are cause of this appeal. Appellee [REDACTED] was diagnosed with [REDACTED] [REDACTED])¹ in 2011. He filed a Supplemental Petition to Modify ([REDACTED]) the parties martial agreement of [REDACTED]² praying for the Court to release him from his obligation to provide \$300k in life insurance for the sole benefit of child [REDACTED] until she was 18 years of age³. At of the time of this filing Appellee [REDACTED] is confined to a wheelchair, cannot speak, is affected by "pseudo bulbar affect", but is otherwise lucid⁴.

¹ A fatal, debilitating, and terminal illness.

² A modification which did not change the terms contested herein was Ordered on 07/13/2010.

³ The plain English contractual terms of the martial settlement agreement do not tie the obligation to maintain \$300k in policy(s) to App [REDACTED] duty to pay child support. Appe [REDACTED] mistakenly testified that the policy was "too expensive" and he could not afford to maintain premium payment. The record indicates otherwise.

⁴ It is unknown when, but not if, Appellee [REDACTED] shall pass from his affliction and its side-effects.

It is factually contested⁵ by Appellee [REDACTED] that he refused and/or otherwise failed to accept⁶ a "waiver of premium⁷" offered to him by [REDACTED] Life Insurance Company allowing him to convert his group policy to a personal policy for negligible cost and no future premiums due.

It is factually contested by Appell [REDACTED] that his failure to accept the "waiver of premium" conversion allowed him to transfer the policy to any other person as long as new significant monthly premiums⁸ were paid. This other person, his Wife at the time, Appellee [REDACTED], knew (as stated during deposition) that both Appellees' should seek Court and/or the Appellant's approval to change the ownership and beneficiary of the policy. The only uncontested fact is that Appellee [REDACTED] is now the uncontested owner and beneficiary of the policy.

It is factually contested by Appell [REDACTED] that the transfer of the above policy to the ownership of Appellee [REDACTED] was done before obtaining approval from the Court and/or Appellee [REDACTED].

⁵ The Trial Court, based on newly discovered evidence and a 12.540(b) Motion by Appellee [REDACTED] file [REDACTED], stated in an Order [REDACTED], that a mistake in fact was averred by Appellee [REDACTED] causing the Court to rule improperly on the prayer in the Supplemental Petition [REDACTED].

⁶ Appellee [REDACTED] testified to a "mistake of fact" on Page 75 of the deposition filed on the re [REDACTED] (Lower Tribunal docket line 178).

⁷ Lower Tribunal docket line 174.

⁸ Approximately \$640/month according to testimony replete throughout the record.

Appellee [REDACTED] has no ability to obtain life insurance in the amount of \$300k because of his terminal illness. Other policies in his name do not equal the \$300k due contractually pursuant to the martial settlement agreement of [REDACTED]. He does not have enough assets to cover the difference between his other policies and the \$300k due contractually.

Appellee [REDACTED] does not have enough assets available to him to be able to provide \$300k in alternate value to child [REDACTED] to compensate her for his contractual duty under the martial settlement agreement nor obviate the Trial Court's illegal error in finding that it had legal and/or factual basis to modify the contractual duties under the martial settlement agreement in the Order of [REDACTED].

The Appelle [REDACTED]) eventually divorced during the pendency of this case. Appellee Carolyn [REDACTED] was granted sole ownership of the policy by Circuit Judge [REDACTED] [REDACTED]). An appeal of this grant of ownership to Appellee Carolyn Newton was denied as issued by the 5th DCA in [REDACTED].

It is factually contested by Appell [REDACTED] that she is an indispensable party⁹ to the Lower Tribunal case¹⁰. Appellee [REDACTED] argument that she entitled to summary judgment when it is uncontested that she is the owner of the policy at issue and that said policy was transferred to her voluntarily when she in fact contests that she committed any act which would expose her to suit under any of the Counts filed in the Third-Party complaints¹¹ is a contested fact in this *de novo* appeal.

SUMMARY OF ARGUMENT

As to Issue One: The Lower Tribunal's knowledge¹² as to the totality of the facts¹³, law, and circumstances¹⁴, before two different Judicial Officers¹⁵, as well as the Court's own

⁹ An indispensable party is one whose inclusion is necessary to solve the case or controversy. In this case, Appe [REDACTED] is the owne [REDACTED] Life Insurance Company of Ame [REDACTED], the only source of funds, assets, etc., which could satisfy Appellee [REDACTED] contractual obligation and to obviate the Trial Court's errors.

¹⁰ Due the fact that no policy(s) or assets of Appellee [REDACTED] are sufficient to obviate the Trial Court's error due to "mistake in fact" & the Court's ruling of [REDACTED], which granted leave for Appe [REDACTED] to file a Third-Party complaint, Appe [REDACTED] remains an indispensable party for whom summary judgment should not be available under either prong (uncontested facts and no legal basis).

¹¹ Filed on [REDACTED].

¹² The record is replete with Motions citing law and disputed and undisputed facts which the Trial Court either failed to review, ignored, or was unwilling (biased) to consider.

¹³ Some contested by Appellee [REDACTED], some contested by Appellee [REDACTED], some conceded by all parties.

¹⁴ Attorney for Appellee [REDACTED] indicated on Page 22 of the transcript of [REDACTED] hearing be [REDACTED], indicated that Appe [REDACTED] was to agree to be a third-party to the Lower Tribunal case. This position changed when the Appellee [REDACTED] obtained counsel and divorced Appe [REDACTED].

¹⁵ Honorable Judge [REDACTED] also presided over and made rulings in Lower Tribunal case.

acknowledged error(s) due to "mistake-in-fact" testimony of Appellee [REDACTED], renders the grant of a summary judgment in favor of Appellee [REDACTED] reversible error because without jurisdiction over Appellee [REDACTED], as a indispensable third-party, justice could not be done for the benefit of minor child [REDACTED] as the Lower Tribunal knew that Appellee [REDACTED] would not have enough assets or insurance policies to cover his contractual liabilities stemming from the Marital Settlement Agreement.

As to Issue Two: The Lower Tribunal's legislation from the bench¹⁶, by refusing to consider (and dismissing without argument) motions to establish constructive trusts, not granting Motions to Continue for good cause¹⁷, not granting re-hearings while admitting rulings were based on "mistake-in-fact"¹⁸, and refusing to consider that the fact that the parties agreed that the purpose of the \$300k in life insurance was not merely to

¹⁶ On Page 24 of the transcript of the [REDACTED] hearing before Judge [REDACTED], the Court acknowledged that its role was to enforce the Judgment, but failed to do so believing Appe [REDACTED] testimony which was consider a "mistake-in-fact", and that the Court is or was not compelled to enforce the Martial Settlement Agreement as a contract.

¹⁷ On Page 29 through 32 of the transcript of [REDACTED] hearing, Judge [REDACTED] refused to continue a trial when the evidence required to prove that Appellee Brian Stewart Newton had transferred ownership and the beneficiary of the policy without Court approval, & contrary to contract law, and was unavailable (yet). If the Appellant's counsel had buckled under undue pressure from the Court, the evidence which proved the "mistake-in-fact" would have never been garnered.

¹⁸ Page 60 & 75 of the transcript of [REDACTED] indicates where Appellee [REDACTED] testified to a "mistake-in-fact" which caused the Court to rule improperly on the insurance obligation (premiums were "too expensive"). Furthermore, the Court had no ability to cancel the contractual obligations due to the price of the premium (which were subsequently found to actually be zero through a "waiver of premium" offered by Prudential).

secure child support¹⁹, all created reversible error because the Court had no legal authority to modify the contractual terms of the Martial Settlement Agreement.

As to Issue Three: The Lower Tribunal's grant of summary judgment based on the fact that there are no issues of material fact is in error. Appellee [REDACTED] contests many facts which have never made it to the record because the Lower Tribunal will not grant re-hearing on Appellee [REDACTED] Supplemental Petition to Modify Insurance obligation. Appellee [REDACTED] contests that she knew that Appellee [REDACTED] was required to keep the policy and therefore participated in it's transfer to her ownership in violation of Court order, it is contested that she is an indispensable party for justice to be done, it is contested that the transfer of the insurance to her ownership and her independent payment of the premium is an act of tortious interference with contract, and/or illegal transfer, and/or dissipation of assets, and/or unjust enrichment, etc. Based on any of these cause of action, Appellee [REDACTED] disagreement on material facts renders a Summary Judgment reversible error.

¹⁹ Pages 49 through 51 of the Deposition of Appellee [REDACTED] indicates that both Appellee's knew the \$300k policy at issue in this case was a contractual requirement for the benefit of the child's college and graduate education, not to merely secure child support.

As to Issue Four: The Court's own statements in the hearing of [REDACTED], on which the appeal herein is based, indicate fundamental error. Court made legal rulings without factual basis and without hearing evidence which would provide such factual basis. This is fundamental error.

The Court misapplied the law to the facts by adding the statement "matter of support²⁰" to the plain reading of Paragraph 7 of the Martial Settlement Agreement. The MSA had no such terms or clauses to tie the insurance obligation to the child support obligation. The record shows the parties agreed²¹ that the insurance proceeds were for the child's care after 18, like school, weddings, etc. The Court appeared to make statements of bias during the hearing of [REDACTED]. To-Wit: Page 21; Line 18: "Whatever" when referring to valid causes of action filed²², but not yet considered by the Court. The Court agrees to the position²³ that a hearing should be held on the issue of what should be done as to the mistake-in-fact²⁴, yet, without a

²⁰ Page 6 on Lines 1 & 2 of the Transcript of the [REDACTED] hearing before Judge Carithers.

²¹ See the Transcript of the [REDACTED] hearing before Judge [REDACTED].

²² These alleged causes of action against Third-Party [REDACTED], if heard at a full evidentiary hearing could show that the policy at issue can be returned, but has never been set by the Lower Tribunal.

²³ Page 19: Line 20 of the Transcript of the [REDACTED] hearing before Judge [REDACTED]

²⁴ This mistake-in-fact is that the Court granted Appellee [REDACTED] the right to allow his Prudential policy to lapse.

hearing, decides that a path²⁵ which includes indispensable third-party [REDACTED], is disposed of without any evidentiary hearings on the allegations. The Court made rulings on contested factual issues which had legal ramifications²⁶ without hearing.

STANDARD OF REVIEW

An appellate court's standard of review when reviewing a trial court's summary judgment is *de novo*. A *de novo* standard of review means that the appellate court will examine the trial court's record anew and will rule on the record evidence and law without giving any deference to the trial court. See: Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126 (Fla. 2000).

An appellate court's standard of review when reviewing the terms of a settlement (in contract), even when a marital settlement agreement, is *de novo*. Settlement agreements are governed by contract law and are to be reviewed under the *de novo* standard on appeal. See: Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985). In Management Computer Controls v.

²⁵ The Courts cannot grant summary judgment on causes of action without at least hearing new evidence when the facts are contested. Attorney Siddiqui stated there were contested facts on Page 18; Line 7 and 8, Page 20; Line 3; Page 20; Line 24, and most of Page 22 of the Transcript [REDACTED] hearing before J [REDACTED].

²⁶ Page 21; Line 16 of the Transcript of the 03/13/2017 hearing before Judge [REDACTED]. The Court concludes, without hearing, that the insurance policy in question is "unavailable to return" when during the depositions [REDACTED], it was stated that Prudential WOULD return the policy to Appellee [REDACTED] under a "waiver of premium" if the Court ordered such.

Charles Perry Constr., Inc., 743 So.2d 627, 630 (Fla. 1st DCA 1999), the First District Court stated that "Florida Courts have held that a decision interpreting a contract presents an issue of law that is reviewable by the *de novo* standard of review." (emphasis added). See also: McIlmoil v. McIlmoil, 784 So.2d 557 (Fla. 1st DCA 2001); Bayco Dev. Co. v. Bay Medical Ctr., 832 So.2d 921 (Fla. 1st DCA 2002); & Sheets v. Palmer, 917 So.2d 246 (Fla. 1st DCA 2005).

ARGUMENT

A summary judgment must be reversed if there is evidence before the court which supports a reasonable inference of a genuine dispute of material fact. See: State Dep't of Revenue v. Fackler, 843 So. 2d 994, 996 (Fla. 1st DCA 2003). The trial court may not consider "either the weight of conflicting evidence or the credibility of the witnesses in determining whether there exists a genuine issue of a material fact." See: Crepaldi v. Wagner, 132 So. 2d 222, 226 (Fla. 1st DCA 1961); see also White v. Francis, 522 So. 2d 946, 948 (Fla. 1st DCA 1988). In this case all parties contest various fact rendering summary judgment unavailable to the Court.

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CONCLUSION

The Trial Court erred in granting summary judgment to Appellee [REDACTED] because the personal jurisdiction over her as an indispensable party is error because the facts indicate that the Lower Tribunal's Order of [REDACTED] was issued without considering the actual facts²⁷ and was illegal (modification of contractual terms of marital settlement agreement is not authorized by law).

The Trial Court erred in granting summary judgment to Appellee [REDACTED] because the language of the marital settlement agreement which contractually requires Appellee [REDACTED] to provide \$300k in life insurance for the sole benefit of child [REDACTED], could be modified to a lesser amount is legally improper and error.

The Trial Court erred because there was an issue of genuine fact²⁸ which is not related to the plain language contractual construction of the marital settlement agreement of [REDACTED], rather is related to the mistake of fact²⁹ which the Court

²⁷ That "Waiver of Premium" was available to Appellee [REDACTED].

²⁸ See: Lacombe v. Deutsche Bank Nat'l Trust Co., 149 So. 3d 152, 154 (Fla. 1st DCA 2014 (borrower's denial of Bank's allegation that it had standing to foreclose made this element of the cause of action a material fact in dispute)).

²⁹ Third-Party Appellee [REDACTED] denies that the policy which she now owns was subject to a "premium waiver" rendering it "free" to maintain for Appellee [REDACTED].

improperly considered in illegally allowing modification in its order of [REDACTED].

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING HAS BEEN PROVIDED VIA EMAIL TO:

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT a this computer generated document is drafted in 12-point Courier New font as per Florida Rules of Appellate Procedure.

[REDACTED]

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