IN THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER, COUNTY FLORIDA

KP ENTERPRISES, INC. D/B/A,
FIRST RESPONSE DISASTER TEAM,
a/a/o Maria Radojkovic

Appellant,

v.

FIDELITY FIRE & CASUALTY COMPANY
D/B/A HOMEOWNERS
INSURANCE

Appellee.
_____/

Case No.: 2015-AP-6
L.T. Case No.: 2011-CC-560

INITIAL BRIEF

ON APPEAL FROM
THE HON. MELISSA MOORE STENS
SEVENTH JUDICIAL CIRCUIT, FLAGLER COUNTY, FLORIDA

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INTRODUCTION AND QUESTIONS PRESENTED

KP Enterprises ("KP") appeals the lower court's order granting summary judgment. It proceeds as assignee of the insurance benefits for water remediation covered under an insurance policy from Fidelity Fire and Casualty Company ("Frontline").

Frontline issued a total of three payments for services rendered by KP. The first two payments were in the form of checks made payable jointly to KP ("KP"), the named insured, and her public adjuster, who did not adjust KP Enterprise's services. The final payment was initially mingled with moneys due the named insured and made payable to the named insured and her public adjustor. After suit was filed, Frontline issued a check payable solely to KP for the portion of the third payment attributable to its services. However, KP never received any portion of the first two checks and the insurer did not reissue payment directly to KP. Additionally, the payments issued for KP's services were $2,320.30 less than the invoices.

The questions presented in this case are:

1) Does an insurance company discharge its obligation to pay an assignee of benefits when, with notice of the assignment, it delivers a check to the insured payable jointly to the assignee and other parties?

2) Did the circuit court err by granting summary judgment where the amounts paid were less than the amounts invoiced, and the insurance company presented no evidence that the invoices should not be paid in full?

STATEMENT OF THE CASE AND FACTS

On March 8, 2011, a water loss event occurred at the residence of Maria Radojkovic. (R. 480). In the complaint, KP alleged that it "provided necessary, emergency water removal services and construction services;" in exchange, Ms. Radojkovic assigned her post-loss insurance benefits to KP. (R. 480). The assignment, entitled "Contract for Services, Assignment of Benefits, Direct Payment Authorization, and Hold Harmless Agreement," (AOB) provided in relevant part:

> I, the Owner/Agent for the job site listed below, authorize FIRST RESPONSE DISASTER TEAM (hereinafter referred to as FRT) to enter my property, furnish materials, supply all equipment and perform all cleaning and restoration services necessary to preserve and protect my property for further damage ant to repair and restore the flooring, all furnishings, and structure.
> . . . .
> I hereby assign any and all insurance rights, benefits, and proceeds under this or any applicable insurance policies to [KP].
>
> If payment is made directly to the Owner/Agent by an insurer, it shall be endorsed over to [KP] within three business days.
> I hereby authorize direct payment of any benefits or proceeds to [KP]. I make this assignment and authorization in consideration of [KP]'s agreement to perform services and supply materials and otherwise perform its obligations under this contract, including not requiring full payment at the time of service.

(R. 532).

KP submitted a copy of the AOB and invoices as follows: $3,337.13 for materials removal and demolition (R. 541), $4,198.48 for mold remediation (R. 538); $7,026.12 for dwelling dryout (R. 534); and $214.76 for contents dryout. (R. 535). The total amount was $14776.49.

It became apparent that Frontline admitted most of the losses were covered, but had not paid KP directly. In its motion for summary judgment, Frontline showed that it had sent out a total of three payments for services rendered by KP. The first two payments were checks in the amounts of $7,240.88 (R. 977) and for $3,337.13 (R. 978), which had been mailed to Ms. Radojkovic's public adjustor. These checks bore the name of the insured, the public adjustor, and KP. On May 17, 2011, a third check that did not bear KP's name was sent to the homeowner for $1,878.18. (R. 1030). Frontline re-issued a check for that amount on August 24, 2011 which included only KP as a payee. (R. 895-96 and exhibits (R. 1041-42)).

In total, Frontline issued payments $2320.30 less than the invoices KP submitted.

Frontline argued in relevant part that it had not breached the contract because it had issued payment jointly. (R. 889-90). Frontline argued that it had "fully paid plaintiff's invoice" by making the three separate payments,

two of which included the insured and the public adjuster as payees. (R. 894, 910-11). Frontline argued that KP's remedy was against the insured, who had agreed in the AOB form to sign over checks to KP in the event of issuance to the incorrect payee. (R. 901-03, 905).

KP filed its own motion for summary judgment.[1] (R. 1179-1216). Its basic argument was that Frontline did not dispute that it had performed covered emergency services worth $12,456.19 but nevertheless failed to tender payment directly to KP. (R. 1180-81). KP also argued that Frontline had waived any argument that the AOB was invalid by issuing the third check directly to it. (R. 1181). KP maintained that under Florida law, the obligor was bound to pay only the assignee after notice of the assignment. (R. 1182-83). Frontline had failed to discharge its obligations because had "knowingly sent [the first two checks] to a party that no longer had any interest or right to the payment Defendant sent." (R. 1184). KP also argued generally that an AOB gave its holder standing to sue to collect proceeds owed, (R. 1185-88) and that the AOB executed in this case was valid. (R. 1188-91).

[1] KP's conduct at the hearing indicates that its motion for summary judgment was also intended as a response to Frontline's motion, and was treated as such by the court. (R. 1283).

On May 29, 2015, the county court judge held a hearing on the motions for summary judgment. Frontline argued that the affidavit demonstrated that the entire amount of KP's bill had been paid. (R. 1283). According to Frontline, the document was a mere direction to pay, which rendered joint payment appropriate. (R. 1285). KP contended that Frontline had recognized the AOB by making the May 17, 2011 check payable solely to KP. (R. 1289-90). KP also cited cases for the proposition that an assignment is binding after notice to the debtor. (1293-95) ("paying the party that assigned their right to payment" not effective to discharge debt when "landlord knew that that person had assigned that right to payment")).

KP stated it was still owed $12,683.45, including $10,578.01 that was tendered to the homeowner and public adjustor jointly. (R. 1295-96, 1305). That left $2,105.44 in dispute. (R, 1296).[2] Frontline had not asserted in its answer that the amount was unreasonable or unnecessary. (R. 1297), or that the other checks had ever been negotiated. (R. 1296).

The judge stated that "If they've chosen not to cash a check and your client is suing on behalf of the homeowner, if the homeowner's been

[2] The precise amount would have to be settled after further discovery. (R. 1303). The Court did have a problem with the failure to include precise invoices; however, KP Enterprises offered to stipulate that the amount due was the amount that had been paid in the first two checks. (R. 1312).

uncooperative, that's not the defendant's fault." (R. 1304). KP replied that while that might generally be true, here "the defendant had notice of the assignment, the duty to pay was not to the homeowner. It was my client. And the issue is that when they sent a payment to a party that . . . didn't have a right to receive that money . . . they don't . . . discharge their duty to pay KP." (Id.). KP's counsel stated that "this is an issue that's common with these types of cases because the insurance industry doesn't want to believe in assignments of benefits. And this creates these ancillary problems that would never have arose had they just simply directed payment to the proper party." (R. 1305).

Frontline contended that it had no choice except to issue the payment jointly because of "the policy, [and] the public adjustor's agreement." (R. 1306). KP pointed out that when Frontline reissued the final check for $1,887.18, "they didn't put the [public adjustor] on that check. They didn't put the homeowner on that check." (R. 1310).

The court observed that KP had "now been provided proof that these checks were issued and sent to Claim Tech [the public adjustor]." (R. 1311). The court focused on "Where is this money?" (R. 1312). There was no proof that the first two checks had ever been cashed. (Id.) Frontline contended that KP was merely suing "for something for which my client

paid because they put them on the check" and delivered it to the public adjuster. (R. 1318). KP observed that Frontline had also issued payments in excess of $35,000 to Claim Tech and the insured, and should have just cancelled and reissued the two checks totaling $10,578.01 for services KP rendered. (R. 1320). "And putting multiple payees on a check and sending it to a third party and saying, all right, you guys fight about it now and you guys figure it out, that's not how you pay a debt and that's the problem." (R. 1321). The judge responded "Well, that's where you all go for a dec action to have a judge decide who gets the money if that's what it boils down to." (R. 1321-22, 1324).

The court's subsequent order granting Frontline's motion for summary judgment merely noted that the motion was "granted" without setting forth any specific grounds. (R. 1253).

On June 8 2015, KP filed a motion for rehearing, reconsideration, and/or clarification. (R. 1255). KP observed that Frontline had "received actual notice of the Assignment of Benefits," and that Frontline had acknowledged the validity of the assignment by issuing the third check directly to KP. (R. 1256). KP "requested [the court] rule as a matter of law that the Defendant is a debtor that has not discharged its duty to pay the

creditor, KP, as the assignee of the homeowner-assignor's post-loss right to recover benefits for services performed by KP." (R. 1257).

The court's July 2, 2015 order notes only that the motion was "denied." (R. 1328).

KP appeals.

SUMMARY OF ARGUMENT

An AOB vests title to insurance proceeds in the assignee. If an insurer pays the named insured without notice that an AOB has occurred, the assignee must pursue the insured. After an insurer has notice of a post-AOB, however, the only way the insurer can discharge its obligation to the assignee is to pay him directly. If the insurer must pay twice, this result is not punitive, but a natural consequence of an insurer's decision to ignore the AOB.

Frontline had notice of the AOB, but did not honor its terms by paying KP directly. Frontline even recognized the assignment as valid when it issued one check directly to KP after suit was filed, but nevertheless declined to correct its earlier mistake. There is no indication that the check was ever negotiated; but even if it had, under these circumstances law, equity, and good policy demand payment directly to KP.

Even if Frontline could discharge its obligation by paying someone other than KP, the lower court erred by granting summary judgment where Frontline's total payments were less than KP billed, and Frontline presented no evidence to dispute KP's allegations that it performed reasonably priced services for necessary repairs.

STANDARD OF REVIEW

This appeal presents an issue of law reviewed de novo because it involves an order granting final summary judgment; the de novo standard of review is applied to determine whether there are genuine issues of material fact and whether the trial court properly applied the correct rule of law in granting summary judgment. Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla. 2000). The facts must be viewed in the light most favorable to appellant. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985).

Rule 1.510 of the Florida Rules of Civil Procedure provides that summary judgment is appropriate when "there is no genuine issue as to any material fact," and the movant is "entitled to a judgment as a matter of law." It is well settled that a party moving for summary judgment has the burden of conclusively showing that there are no genuine issues of material fact. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985); see also Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999) (explaining that "summary judgment should not be granted unless the facts are so clear and undisputed that only questions of law remain."). "Until it is determined that the movant has successfully met this burden, the opposing party is under

no obligation to show that issues do remain to be tried." Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966).

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN RULING THAT AN INSURER DISCHARGES ITS OBLIGATION TO PAY INSURANCE BENEFITS WHEN IT IS ON NOTICE OF AN ASSIGNMENT OF SUCH BENEFITS BUT PAYS A PARTY OTHER THAN THE ASSIGNEE.

It is beyond dispute that one cannot discharge a debt by paying a party to whom it is not owed. Any qualifications to this rule exist only to protect the debtor who paid the incorrect party in good faith, without notice of an assignment. Where a debtor has notice that the debt has been assigned to another, payment must be made in accordance with the assignment. Because Frontline, with notice of the assignment, nevertheless failed to issue payment solely to KP, the lower court's order should be reversed, summary judgment should be entered for KP as to the $10,578.01 that Frontline paid to the incorrect parties, and the case should proceed to trial as to the disputed amount.

A. The assignment of benefits in this case was valid and legal.

In no uncertain terms, Florida's courts of appeal have reaffirmed that fundamental principles of law clearly establish the rule against restrictions on AOBs. See, e.g., Accident Cleaners, Inc. a/a/o Gerena v. Universal Ins. Co., Case No. 5D15-352, 40 Fla. L. Weekly D 862 (Fla. 5th DCA April 10, 2015) (holding that Florida's insurable interest statute did not invalidate

AOB); One Call Prop. Servs. v. Sec. First Ins. Co., 165 So. 3d 748 (Fla. 4th DCA May 20, 2015) (holding that AOB executed before amount due determined was valid); United Water Restoration Group, Inc. v. State Farm Fla. Ins. Co., No. 1D14-3797, 2015 Fla. App. LEXIS 10403, 40 Fla. L. Weekly D 1569 (July 8, 2015) (quashing on second-tier certiorari; county court failed to apply "clearly established law" permitting assignee "to seek recovery . . . and, if necessary, seek a coverage determination.").

Pursuant to well-settled law, KP obtained a valid assignment of the insurance benefits associated with the work it performed for Ms. Radojkovic. Citizens Prop. Ins. Corp. v. Ifergane, 114 So. 3d 190, 195 (Fla. 3d DCA 2012) (identifying intent and consideration as the elements of assignment (citation omitted)). KP stood in her shoes and was entitled to be paid directly. Contrary to their arguments below, Frontline cannot defeat the AOB through the anti-assignment clause or through contract terms purporting to require the insured to file or to settle claims personally. (R. 896-898). As the legal assignee of the benefits for covered services from Ms. Radojkovic's insurance policy, KP stands in her shoes for all intents and purposes. As discussed in Section III, because Frontline had actual notice of the assignment, it was bound to tender payment to KP.

B. Even if the assignment were defective, KP Enterprises would hold an equitable assignment of the insurance benefits for its services.

Assuming *arguendo* there were some technical defect in the assignment, KP would still hold an equitable assignment in the insurance benefits associated with the work it performed. No particular verbal formula is necessary for an equitable assignment. McClure v. Century Estates, 96 Fla. 568, 583 (Fla. 1928); SourceTrack, LLC v. Ariba, Inc., 958 So. 2d 523, 526 (Fla. 2d DCA 2007). If words or actions demonstrate an intent on one side to assign a right, and intent on the other to receive, an equitable assignment occurs if there is consideration. Giles v. Sun Bank, N.A., 450 So. 2d 258, 261 (Fla. 5th DCA 1984). The contract itself demonstrates the requisite intent, and KP provided consideration by rendering services in exchange for the assignment. There is no question that Frontline knew of the intent to assign. Equity – indeed, fundamental fairness – demands that KP have the legal right to seek payment for its emergency services to Frontline's insured homeowner, Ms. Radojkovic.

C. An obligor with notice can only discharge the obligation by paying the assignee pursuant to the terms of the assignment.

Whether at law or equity, KP acquired an AOB and Frontline was on notice thereof. After a valid AOB, the holder "stands in the shoes of the assignor and is able to maintain suit in its own name as the real party in interest." United Water Restoration Group, Inc. v. State Farm Fla. Ins. Co., No. 1D14-3797,40 Fla. L. Weekly D1569, slip op. at 4 (citing cases); see also Cont'l Cas. Co. v. Ryan Inc. Eastern, 974 So. 2d 368 (Fla. 2008). The assignor "has no right to make any claim on the contract once the assignment is complete, unless authorized to do so by the assignee." Livingston v. State Farm Mut. Auto. Ins. Co., 774 So. 2d 716, 718 (Fla. 2d DCA 2000)).

KP's position in this case is likewise well established: because the assignee owns the right to payment, the debt cannot be discharged except through payment to the assignee.

The only exception to this maxim would be lack of notice. It would be unjust for a debtor who was never notified of assignment to suffer adverse consequences after a good-faith attempt to discharge the debt with the original obligee. Accordingly, the law recognizes that an obligor without notice of an assignment may discharge the obligation by paying the assignor. See, e.g., Buffalo Pipeline Co. v. Bell, 694 S.W.2d 592, 596 (Tex. App.

1985) (quoting 4 Corbin on Contracts Section 890, p. 577) ("'A payment made by the obligor to his original creditor is fully operative in defense against an assignee if it was made in good faith without notice, actual or constructive, of the assignment.'"); Conway v. Cutting, 51 N.H. 407, 409 (1871) (explaining that "the trustee was under no obligation to pay the assignee until notice received of the assignment"). In this case, the assignment is still valid. Clark v. Wheeler, 121 A. 588, 592 (1923) ("The assignee's title is perfect without notice of the assignment to the debtor. Notice to him is essential only to the assignee's protection against a *bona fide* payment to the assignor."). However, fairness demands that the assignee recover against the assignor because the obligor did no wrong in issuing payment. United States v. Bowery Sav. Bank, 297 F.2d 380, 383 (2d Cir. 1961) (observing "general principle that an assignee may not recover against an obligor who thereafter pays the assignor without notice of the assignment) (citing Restatement, Contracts § 170(2)(a)).

The rule admits of no other defenses for amounts due under the contract. "'It is the established rule in the United States that an assignment for a valuable consideration, with notice to the debtor, imposes on him an equitable and moral obligation to pay the assignee.'" Santiago v. Safeway Ins. Co., 396 S.E.2d 506, 509 (Ga. App. 1990) (citations omitted)). Cases

from other jurisdictions recognizing this well-settled principle are numerous. See, e.g., D & H Distrib. Co. v. United States, 102 F.3d 542, 547-48 (Fed. Cir. 1996) ("A complete or partial assignment of the right to be paid the proceeds of the contract imposes an obligation on the promisor, once it has received notice of the assignment, to make payments under the contract in accordance with that assignment. The promisor can be held liable on that obligation to the assignee if the promisor makes payments to the assignor, rather than to the assignee in accordance with the terms of the assignment."); Lafrance Equip. Int'l Corp. v. Reed, 20 V.I. 111, 114 (V.I. Terr. Ct. 1983) ("a payment to the assignor or any person other than the assignee is at the debtor's peril and does not discharge him from liability to the assignee"); McCallums, Inc. v. Mountain Title Co., 60 Or App 693, 697, 654 P2d 1157, 1159 (Or. App. 1982) ("[A]n obligor on a chose in action who has notice of the assignment of the beneficial interest in the chose in action is liable to the assignee if the obligation is paid other than by the terms of the assignment" (citation omitted)); Van Waters and Rogers, Inc. v. Interchange Resources, Inc., 14 Ariz. App. 414, 484 P.2d 26 (Az. App. 1971); cf. American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761, 773, (U.S. Cl. Ct. 1984) (noting absence of authority "holding that the obligation of the government to pay an assignee corporation is discharged,

under the Anti-Assignment Act or otherwise, because the assignor corporation is beneficially owned or controlled by some of the same parties who own or control the assignee").

This common-law rule extends at least through the 20th century back into the 1800's. Whitehall Mercantile Corp. v. Wellbilt Corp., 233 N.Y.S.2d 10, 11-12 (N.Y. Sup. Ct. 1962) ("After notice of the transfer, however, the debtor is put on his guard, and if he pays the assignor any money which, under the assignment, belongs to the assignee, or if he does anything prejudicial to the latter, he is liable for the resulting damage.") (citation omitted); St. Paul Fire & Marine Ins. Co. v. James I. Barnes Constr. Co., 381 P.2d 932, 938 (Cal. 1963) ("after notice of assignment a debtor pays the assignor at his peril"); Stansbery v. Medo-Land Dairy, 105 P.2d 86, 91 (Wash. 1940) ("'after notice of the assignment the debtor deals with the assignor at his peril, and can do nothing that will adversely affect the interest of the assignee.'") (quoting Peden Iron & Steel Co. v. McKnight, 128 S.W. 156 (Tex. App. 1910)); Palmer v. Palmer, 91 A. 281, 283 (Me. 1914) (holding that "after notice of the assignment the debtor cannot lawfully pay the amount assigned either to the assignor or to his attaching creditors, and if he does make such payment it is at his peril."); Conway v. Cutting, 51 N.H. 407, 409 (1871) (stating "the trustee was under

no obligation to pay the assignee until notice received of the assignment. After that a payment to the assignor would be at the peril of the trustee, who could not avail himself of such payment in defence of a subsequent action against him by the assignee.")

Commenters have likewise observed this black-letter rule of commercial law:

> When there is a valid assignment in place, performance under a contract runs to the assignee.
> . . . .
> [A]fter a debtor has received notice of a valid assignment, or obtained knowledge of it in any manner, a payment to the assignor or any person other than the assignee is at the debtor's peril and does not discharge him or her from liability to the assignee, and the debtor's settlement with and release by the assignor will not defeat the assigned right . . . .

Winship v. Gem City Bone & Joint, P.C., 185 P.3d 1252, 1258 (Wy. 2008) (quoting 6A C.J.S. *Assignments* § 106 (2008)); see also Ifert v. Miller, 138 B.R. 159, 167, 1992 U.S. Dist. LEXIS 2029, *20 (E.D. Pa. 1992) (quoting, *inter alia*, Arthur Corbin, 4 Corbin on Contracts § 890 (1951) ("'After notice of the assignment has been given to the obligor, or knowledge thereof received by him in any manner, the assignor has no remaining power of release. The obligor must pay the assignee.'").

Florida unsurprisingly follows this clearly established rule of American commercial law. Aldana v. Colonial Palms Plaza, Ltd., 591 So. 2d 953, 955-56 (Fla. 3d DCA 1991) ("Delivery of the notice of the assignment to the debtor fixes accountability of the debtor to the assignee." (citing Boulevard Nat'l Bank v. Air Metal Indus., 176 So. 2d 94, 98-99 (Fla. 1965))).

Perhaps because the underlying principles are so well established, cases featuring joint payment to a non-party to the debt have only appeared after the insurance companies' campaign to eviscerate the rule against restrictions on AOBs. See Fluor Corp. v. Superior Court, 354 P.3d 302 (Cal. 2015) (remarking that the "absence of express authority" on an AOB issue occurred because "the widely accepted industry practice of allowing postloss assignments of rights" prevented any such disputes "until insurers recently began to disallow and contest such assignments"). Counsel for KP is aware of only one such case, and it was decided against the insurer who issued payment jointly. In Indoor Environmental Services, Inc. a/a/o Rosanne Garcia v. Tower Hill Preferred Ins. Co., No. 15-22035-CA (Eleventh Cir. Miami-Dade County October 13, 2015), the county court judge faced a similar problem. She concluded that "the only party TOWER HILL could pay to discharge the debt owed to IES was IES." (Slip. Op. at 7 (citing

Graham's Carpet Cleaning & Restoration v. Royal Palm Ins. Co., Case No. 10-6858 CC 05 (Fla. 11th Cir. Ct. June 18, 2013)). Thus, Tower Hill was still liable to IES for monies paid jointly to the Assignee, her public adjustor, and a bank. (Slip. Op. at 2-3).

It should not seem unfair that Frontline must issue a second payment. "The double payment is not punitive but simply the legal consequence of the [obligor] county's payment to the wrong party over notice." Fulton Cnty. v. Am. Factors of Nashville, 551 S.E.2d 781, 785 (Ga. App. 2001). Frontline has created a risk of nonpayment where none would otherwise exist. Frontline has not shown that the first two checks were ever negotiated, but even if it can prove that on remand, its recourse will be against the party who negotiated the check, not KP.

Policy reasons also favor requiring the insurer to assume responsibility for its failure to honor an AOB after notice. To adopt Frontline's position would reduce the value of AOB's everywhere. Individuals are much more likely to be judgment-proof than insurance company's. Additionally, even if recovery were theoretically possible, Section 627.428, Florida Statues (requiring attorney fee award against insurer) would not apply. This would materially alter the risk contractors assume when they perform emergency repairs without advance payment in

exchange for an AOB.[3] Thus, Frontline's inexplicable refusal to issue payment to KP, if excused, would severely disrupt commerce by impairing liquidity. First Bank v. Roslovic & Partners, 712 N.E.2d 703, 706-07 (Ohio 1999) (Lundberg, J., Concurring) (outlining factors that lead Ohio's statutory version of the common-law rule to "preserve[] the goals of commercial stability and reliability").

Fortunately, here policy considerations are completely consistent with the law governing this dispute. Frontline chose to pay its debt to KP by delivering a check to parties with no legal interest in the benefits due and requiring their signatures to negotiate the check. Frontline cannot legally reap the benefits of the dispute it created. As it should have to begin with, it must pay KP in accordance with the assignment.

[3]Lower courts in this circuit have concluded that AOBs benefit homeowners. Anderson Restoration & Emergency Servs., LLC a/a/o Myrna Hill v. Universal Ins. Co., No. 13-CC-2940 (Fla. Duval Cty. Ct. Sept. 23, 2013) ("If [the insured] had to wait for claims adjuster from the insurance company to arrive before beginning water extraction after a loss, additional damage from the water event could occur. The same would occur if the insured did not have the funds immediately available to pay for water extraction and water extraction companies were not able to rely on assignments of benefits…."); see also Anderson State Farm & Emergency Servs. LLC v. Fla. Peninsula Ins. Co., Case No. CC13-0550 (Fla. St. Johns Cty. Ct. June 3, 2013)

II. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER KP ENTERPRISES WAS ENTITLED TO FULL PAYMENT OF ITS INVOICES.

Rule 1.510 of the Florida Rules of Civil Procedure provides that summary judgment is appropriate when "there is no genuine issue as to any material fact," and the movant is "entitled to a judgment as a matter of law." It is well settled that a party moving for summary judgment has the burden of conclusively showing that there are no genuine issues of material fact. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985); see also Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999) (explaining that "summary judgment should not be granted unless the facts are so clear and undisputed that only questions of law remain."). "Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried." Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966).

In considering a motion for summary judgment, the trial court must draw every possible inference in favor of the party against whom summary judgment is sought. Romero v. All Claims Ins. Repairs, Inc., 698 So. 2d 605 (Fla. 3d DCA 1997). Further, where even the slightest doubt exists on the facts, the trial court should not grant summary judgment. Klein v. Robbins, 947 So. 2d 623 (Fla. 3d DCA 2007); see generally Janssen v. Alicea, 30 So.

3d 680, 681 (Fla. 3d DCA).

The attachments to the amended complaint in this case show that KP Enterrpises submitted invoices totalling $14,812.49. Frontline, however, paid only $12,456.19. (R. 534-41 (invoices); R. 977-78 (first two checks); R. 1042 (reissued checks). Frontline presented no evidence at all that would tend to show that it was not obligated to pay Frontline the remaining $2356.30, which (due to the other checks matching exactly the amound due) was apparently attributable to difference on the amount due for mold remediation. The lower court therefore erred in granting Frontline's motion for summary judgment.

III. WHETHER THE TRIAL COURT SHOULD CONSIDER ANY "TIPSY COACHMAN" ARGUMENTS IF OFFERED BY APPELLEE.

The trial court committed legal error by holding that Frontline could discharge its obligations by issuing payment jointly to uninterested parties as well as to KP, the only party with an interest in the benefits associated with its work. The Court should not consider any other issues in this appeal. In Van v. Schmidt, 122 So. 3d 243, 261-62 (Fla. 2013), the Florida Supreme Court refused to apply the doctrine when reversing an error of law because "the trial court's order . . . was premised, at least in part, on an error of law." Id. at 261-262. The Court explained that appellate courts faced with errors of law should "remand[] to trial courts for reconsideration of findings in light of the proper standard." Id. The same course should be followed here. See also One Call, slip op. at 8 (citing Stark v. State Farm Fla. Ins. Co., 95 So. 3d 285, 289 n.4 (Fla. 4th DCA 2012)).

CONCLUSION

Frontline knew better. It was on notice that Ms. Radojkovic had assigned KP the right to any insurance benefits related to KP's immediate emergency remediation, delivered without prepayment. Frontline did not just pay KP the amounts it admitted it owed, however. Instead, it deliberately interfered with KP's legal right to payment by issuing an instrument that could only be negotiated jointly with Ms. Radojkovic and her public adjustor and refusing to correct its error by writing a new check.

The law is clear. Frontline, an obligor with a legal and moral obligation to pay a known assignee, has not rendered payment in accordance with the assignment. It has taken affirmative steps to dilute KP's rights by naming uninterested parties as joint payees. There is no indication that Frontline will be harmed at all by simply cancelling the first two checks and issuing, but if the check has already been negotiated – well, Frontline knew better.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, through the e-filing portal, to: Daniel Lazaro and Elaine Walter, 420 S Dixie Hwy Coral Gables, FL, 33146-2227, at:

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this 28th day of October, 2015.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/sGray R. Proctor

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