

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED**  
**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT**  
**IN AND FOR PINELLAS COUNTY, FLORIDA**  
**APPELLATE DIVISION**

**MICHAEL M. WILSON,**  
**Appellant,**

Case No. 14-000022AP-88A  
UCN: 522014AP000022XXXXCV

**v.**

**KRISTINA L. VICHETO,**  
**Appellee.**

\_\_\_\_\_  
Opinion Filed \_\_\_\_\_

Appeal from Final Judgment  
Pinellas County Court  
Judge Walt Fullerton

David D. Neiser, Esq.  
Attorney for Appellant

Mark D. Tinker, Esq.  
Charles W. Hall, Esq.  
Attorneys for Appellee

**PER CURIAM.**

Appellant/Plaintiff, Michael M. Wilson, appeals the Final Summary Judgment entered in favor of Appellee/Defendant, Kristina L. Vicheto, on March 3, 2014. Upon review of the briefs and the record on appeal, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We reverse and remand for further proceedings.

On December 19, 2012, Mr. Wilson filed an action in County Court, Case No. 12-11564CO-35. In the complaint, it is alleged that on February 26, 2010, Mr. Wilson and

Ms. Vicheto were involved in a motor vehicle accident. Mr. Wilson states that although his vehicle has been repaired, Ms. Vicheto has refused to pay for the diminished value of the motor vehicle.

The record on appeal reveals that on October 17, 2013, Ms. Vicheto filed "Defendant's Notice of Admission of Fault" admitting fault without admitting causation or damages. On December 6, 2013, Ms. Vicheto filed her Motion for Summary Judgment in which she raised the following arguments: (1) Ownership: Mr. Wilson has failed to provide proof of ownership, original purchase price, and financing or payment information. Further, Mr. Wilson lacks standing because he sold the vehicle and no longer is the owner; (2) Damages: Following the accident at issue, Mr. Wilson continued to use the vehicle and was involved in a subsequent accident. Mr. Wilson claims diminished value in excess of \$5,000.00 but does not take into account other variables such as the subsequent damage to the vehicle; (3) Damages: Under the "certainty rule" recovery is denied where fact of damages and extent of damages cannot be established with certainty; (4) Damages: If the cost of restoring property to its condition prior to injury is less than the diminished value, the law generally requires that damages for wrongful injury of property be measured by the cost of repairs. Mr. Wilson elected the recovery of the cost of repairs and cannot recover diminished value.

At the hearing the Court questioned counsel for Mr. Wilson about the amount the expert attributed to the diminution of value when the expert was unaware of the second loss; why the recovery of diminished value was not a double recovery. Although not raised in the motion for summary judgment, the Court questioned how Ms. Vicheto was to defend this action when the vehicle was not available as it had been sold.

The Court orally granted the motion for summary judgment without stating the basis for the ruling.

On February 13, 2014, the trial court entered an order summarily granting summary judgment for Ms. Vicheto. The trial court did not specify the grounds or the basis upon which summary judgment was granted. Mr. Wilson's motion for rehearing was denied without comment. On March 3, 2014, the trial court summarily entered the Final Summary Judgment for Ms. Vicheto and that Mr. Wilson take nothing by this action. This appeal followed.

### **Analysis**

Summary judgment is not a substitute for trial. When a defendant moves for summary judgment, the Court is not called upon to determine whether the plaintiff can actually prove its cause of action. Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC, 75 So. 3d 865, 869 (Fla. 2d DCA 2011). The trial court's function is solely to determine whether the record conclusively shows that a plaintiff's claim cannot be proved as a matter of law and the defendant is entitled to judgment. Jennaro v. Bonita-Fort Myers Corp., 752 So. 2d 82, 83 (Fla. 2d DCA 2000).

### **Analysis**

In the present case, the motion for summary judgment was brought by the Defendant, Ms. Vicheto, not by the Plaintiff, Mr. Wilson. The fact that there was a dispute concerning the diminished value of the vehicle did not support summary judgment for Ms. Vicheto. In order to prevail on a defense motion for summary judgment, Ms. Vicheto was required to conclusively prove that Mr. Wilson's claim cannot be proved as a matter of law. If summary judgment was granted on this basis, it was error.

At the hearing, on Ms. Vicheto's motion for summary judgment, counsel for Ms. Vicheto argued that after the accident in 2010, Mr. Wilson was involved in a "subsequent loss" not involving a collision that resulted in over \$6,000 in repairs. It was asserted that Mr. Wilson was seeking diminished value damages for the vehicle based on the accident with Ms. Vicheto, without taking any consideration the subsequent loss that may have also contributed to the diminished value, if any. (R. 42-44). By her very argument, Ms. Vicheto admitted that there was a factual issue to be resolved concerning diminished value of the vehicle.

Mr. Wilson's expert, Jeff Carpinski, was deposed by Ms. Vicheto's attorney. The deposition was filed with the Court and discussed at the hearing on the motion for summary judgment. Counsel for Ms. Vicheto points to the testimony in Mr. Carpinski's deposition that demonstrates that he was unaware of the loss subsequent to the February 2010 accident. It is argued that in the deposition Mr. Carpinski conceded that the subsequent loss could have affected his finding of the diminished value to the vehicle. Ms. Vicheto asserts that the diminished value claim based on Mr. Carpinski's

report "is not reliable." This argument demonstrates that here is an issue of fact to be determined. If summary judgment was entered on this basis it was improper.

Counsel for Ms. Vicheto asserted that Mr. Wilson was seeking a double recovery because his vehicle had been repaired. Counsel argued that if Mr. Wilson wanted diminished value "he should have determined it was diminished value instead of the cost of repairs, not both." Counsel argued there was no legitimate claim for diminished value and there were no material issues.

In response counsel for Mr. Wilson directed the Court to Standard Jury Instruction 501.2(h) which sets out the instruction for "Personal Injury and Property Damage Elements" which states:

*h. Property damage:*

**Any damage to [his] [her] [its] (identify automobile or other personal property).  
The measure of such damage is:**

**[the difference between the value of the (name property) immediately before (incident complained of) and its value immediately afterward.]**

**[the reasonable cost of repair, if it was practicable to repair the (name property), with due allowance for any difference between its value immediately before the (incident complained of) and its value after repair.]**

**You shall also take into consideration any loss to (claimant) [for towing or storage charges and] by being deprived of the use of [his] [her] [its] (name property) during the period reasonably required for its [replacement] [repair].**

Counsel for Mr. Wilson explained that the first election in the instruction relating to the value before and after the accident involves instances when a vehicle cannot be repaired. The second election involves an incident, as in the present case when the vehicle can be repaired. The damages are the "cost of repair . . . with due allowance for any difference between its value immediately before the (incident complained of) and its value after repair." If summary judgment was entered based on a finding there can be no diminished value claim as a matter of law, this was error.

In the motion for summary judgment Ms. Vicheto did not argue that there was spoliation of evidence. The trial court is limited to the issues raised in a written motion for summary judgment and cannot grant summary judgment on an issue not raised in

the written motion. Gee v. U.S. Bank Nat. Ass'n, 72 So. 3d 211, 215 -216 (Fla. 5th DCA 2011); see State Farm Mut. Auto. Ins. Co. v. Mashburn, 15 So. 3d 701, 706 (Fla. 1st DCA 2009)(reversing summary judgment entered against insurer based on notice issue, which was not raised with particularity in summary judgment motion; raising issue in attached affidavits was insufficient); Deluxe Motel, Inc. v. Patel, 727 So. 2d 299, 301 (Fla. 5th DCA 1999)(reversing summary judgment that was based on arguments made at hearing but not in motion); City of Cooper City v. Sunshine Wireless Co., 654 So. 2d 283, 284 (Fla. 4th DCA 1995)(reversing summary judgment for insufficient notice of issues to be addressed and noting that particularity rule was designed to prevent "ambush" by allowing nonmoving party to be prepared for issues that will be argued at summary judgment hearing). If summary judgment was entered on this basis it was improper.

The Final Summary Judgment is reversed and this matter is remanded for further proceedings.

**DONE AND ORDERED** in Chambers in Clearwater, Pinellas County, Florida, this  
17<sup>th</sup> day of February, 2015.

Original Order entered on February 17, 2015 by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia Muscarella.

Copies furnished to:

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Hon. Walt Fullerton