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

CASE NO.: CVA1 07-67
Lower Court Case No.: 2005-CC-19207

INJURY, HEALTH AND WELLNESS, INC., as assignee of DR. MARK E. BOYLAN, d/b/a BOYLAN CHIROPRACTIC CLINIC,
Appellant,

vs.

PROGRESSIVE EXPRESS INSURANCE COMPANY, a corporation authorized and doing business in the State of Florida,
Appellee.
_____/

On Appeal from the County Court
for Orange County,
Wilfredo Martinez, Judge.

Kevin B. Weiss, Esquire,
for Appellant.

Andrew P. Rock, Esquire,
for Appellee.

Before McDonald, Whitehead and Munyon, JJ.

PER CURIAM

ORDER REVERSING FINAL JUDGMENT GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS, DENYING MOTIONS FOR COUNSEL FEES and DENYING MOTION FOR SANCTIONS

I. INTRODUCTION

In this case, the Plaintiff/Appellant, Injury, Health and Wellness, Inc. ("IHW" or "Appellant"), as assignee of Dr. Mark E. Boylan, d/b/a Boylan Chiropractic Clinic ("Boylan")[1],

[1] In addition to Dr. Boylan, individually, we also utilize "Boylan" as reference to the entity by which Dr. Boylan conduced business, Boylan Chiropractic Clinic.

appeals the Final Order of the County Court granting the motion of Defendant/Appellee, Progressive Express Insurance Company ("Progressive" or "Appellee"), for a judgment on the pleadings. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument, Fla. R. App. P. 9.320, and reverse.

II. FACTS

This case has its genesis in a motor vehicle accident in which Linda Sheldon ("Sheldon") was injured. Sheldon sought treatment with Boylan to whom she assigned her "rights and benefits" under an auto insurance policy issued by Progressive. The carrier paid Boylan PIP benefits related to his treatment of Sheldon. Boylan believed Progressive improperly reduced or denied benefits and, in March 2002, filed suit in County Court to recover the money he claimed was owed to him.[2] In February 2004, Progressive confessed judgment for $985.90.

In July 2002 and September 2003, Boylan filed Civil Remedy Notices pursuant to section 624.155, Florida Statutes alleging that Progressive had failed to settle his PIP claim in good faith.

In April 2005, Boylan assigned to IHW "all rights and causes of action ... per the laws of the State of Florida against Progressive Express Insurance Company" in connection with its alleged failure to pay benefits for Boylan's treatment of Sheldon. (Compl. Ex. A.) More specifically, the Boylan-to-IHW assignment mentioned "any and all claims for consequential damages suffered as a result of the conduct of Progressive Express Insurance Company." (Compl. Ex. A.)

In December 2005, IHW, as Boylan's assignee, filed a two-count complaint in this suit

[2] None of the pleadings in the County Court collection case have been made part of the record. In its Motion for Judgment on the Pleadings in this case, Progressive asserted that the Complaint in the collection case was filed by Boylan. (Mot. J. on Pleadings ¶5.) Boylan does not contest this and we accept it as true.

alleging that Progressive violated section 624.155, Florida Statutes, by not attempting to settle claims for benefits related to Boylan's treatment of Sheldon. The Complaint also alleged a violation of section 626.9541(1)(i) which proscribes unfair claims settlement practices.

The court below found that IHW lacked standing to bring this suit because the original assignment from Sheldon to Boylan was "not an unqualified and complete assignment." (Tr. Mot. J. on Pleadings 35:18-19, Dec. 18, 2006.) The trial court judge also commented that "even if it had been an assignment, we do get into problems with the prospective cause of action that arises so it's just too full of problems, it's just too full of problems in this particular case under these particular circumstances." (Tr. Mot. J. on Pleadings 35:21-25.)

III. STANDARD OF REVIEW

On an appeal from an order granting a defendant's motion for judgment on the pleadings, "all well-pled allegations of the complaint must be accepted as true and all allegations in the answer which are denied must be accepted as false." *Plumbing Serv. Co. v. Progressive Plumbing, Inc.*, 952 So. 2d 1211, 1212 (Fla. 5th DCA 2007). The applicable standard of review is de novo. *Id*.

IV. DISCUSSION

A. Judgment On The Pleadings

It appears that the County Court accepted Progressive's argument that the original assignment was "incomplete" because it did not expressly assign Sheldon's potential statutory claims for bad faith and unfair insurance practices. Indeed, Progressive contended that any assignment of these causes of action by Sheldon would have been ineffectual because her assignment to Boylan "could [not] confer prospective rights even if it had referenced any extra-contractual cause of action." (Appellee's Ans. Br. 11.)

The parties do not cite, nor do we find, any Florida case concerning the precise issues raised in this appeal.

Sheldon's assignment to Boylan transferred to him "the right to recover the benefits under the insurance policy relative to the accident." (Appellee's Ans. Br. 7.) It follows, then, that Boylan acquired the right to bring an action against Progressive to recover PIP benefits for services rendered to Sheldon.

While we recognize it is not binding on us, we find persuasive the federal case of *Champlost Family Medical Practice v. State Farm Insurance Company*. In that case, the United States District Court for the Eastern District of Pennsylvania considered an assignment by an insured to a medical provider which read:

> I assign my rights to [Champlost], which maybe [sic] granted to me under the laws of any state to bring in my stead on my behalf any legal action(s) as maybe [sic] necessary to recover payment for services rendered to me.

Champlost Fam. Med. Prac. v. State Farm Ins. Co., No. CIV. A. 02-3607, 2002 WL 31424398 at *2 (E.D. Pa. Oct. 29, 2002).

Similarly, Sheldon's assignment to Boylan gave him the right to bring such actions as he deemed necessary to collect the benefits he was owed by Progressive. Like the Appellee here, the insurer in *Champlost* argued that because "the assignment[ ] do[es] not specifically mention claims under the bad faith statute, Plaintiff is not entitled to pursue such claims in this action." *Id*. In the matter sub judice, Progressive likewise argues that "[t]here was no reference to any manner of extra-contractual cause of action" in the original Sheldon-Boylan assignment and that "Mrs. Sheldon's assignment to Boylan involved only benefits under the insurance policy relative to the accident." (Appellee's Ans. Br. 10.)

Progressive misconstrues the original assignment. Sheldon transferred not only her

benefits under the policy but her *rights* with respect to it as well. The document, itself, says so explicitly. While the assignment in *Champlost* mentions actions to collect benefits for services rendered, the Sheldon-to-Boylan assignment had the same effect. Sheldon's assignment to Boylan of her "rights" under her Progressive policy included her right to maintain an action to collect PIP benefits.

The federal district court in *Champlost* found the breadth of the assignment there to evince an intent to include statutory bad faith claims against carriers. We read the assignment here in the same way. At oral argument below, Appellant's counsel stated that "while [Progressive's counsel] might characterize the [Sheldon] assignment as sparse, in reality it is so sparse as to be broad. It does not define specifically the rights [assigned] and therefore includes all rights as being assigned from the patient to Mark Boylan, the chiropractor." (Tr. Mot. J. on Pleadings 15:9-14.) We agree.

The *Champlost* court also observed that statutory

> bad faith actions, by providing for awards of attorney's fees, interest, and punitive damages, grant plaintiffs substantial legal leverage-leverage often necessary for the recovery of benefits owed by insurers. As such, claims [for bad faith pursuant to state statute] are legal actions "necessary to recover payment" as employed in the expansive language of the assignments.

Champlost Fam. Med. Prac. v. State Farm Ins. Co., No. CIV. A. 02-3607, 2002 WL 31424398 at *2 (E.D. Pa. Oct. 29, 2002).

We find that Sheldon's broad assignment to Boylan of her rights and benefits under her Progressive policy necessarily included her right to exert "leverage," as permitted by statute, to secure payment of benefits under that policy.

Boylan specifically assigned to IHW

> all rights and causes of action . . . per the laws of Florida against Progressive Express Insurance Company for (1) its failure to pay Doctor Mark E. Boylan, d/b/a Boylan Chiropractic, for services rendered to Linda Sheldon, and (2) as may otherwise be held by Dr. Mark E. Boylan d/b/a Boylan Chiropractic Clinic pursuant to Florida law, including without limitation, any and all claims for consequential damages suffered as a result of the conduct of Progressive Express Insurance Company.

(Resp. to Mtn. J. on Pleadings, Pl. Ex. 1, Tab 3.)

Inasmuch as we have found that Sheldon effectively transferred to Boylan any section 624.155 and section 626.9541 claim, it follows that Boylan also assigned these claims to IHW.

Progressive also appears to argue that Sheldon could not have transferred a bad faith or unfair practices claim to Boylan because that claim had yet to accrue at the time of the assignment. A case from another jurisdiction is instructive.

In *Loyola University Medical Center v. Med Care HMO*, an Illinois appellate court considered the same argument raised by Progressive. There, the insurance carrier argued that a claim under a statute prohibiting "vexatious and unreasonable" failure to settle claims could not have been assigned at the time the insured received medical care because, at that time, she had no such claim to assign. *Loyola Univ. Med. Ctr. v. Med Care HMO*, 535 N.E. 2d 1125, 1130 (Ill. App. Ct. 1989). The *Loyola University Medical Center* court first observed that "courts considering the specific issue of whether a [statutory bad faith] claim is assignable under a general assignment of benefits have answered in the affirmative." *Id.* It further held that "the present transfer of rights that are not yet due or may never become due is effective if it appears that there is an existing contract out of which the debt may arise." *Id*. In obtaining an assignment from the insured,

> the [medical provider] has acquired the full bundle of contract and

> incidental rights possessed by the insured. The identity of interest between the [medical provider] and the insured and the obvious efficacy of a direct payment mechanism, make clear that the [provider], if it is an assignee of the insured's right to payment, should be permitted the full panoply of statutory and common law recourse to effectuate the important policy that legitimate health insurance claims can be settled expeditiously and fairly.

Id. (*quoting McHenry Hosp. v. Metro. Life Ins. Co.*, 578 F. Supp. 122, 126 (N.D. Ill. 1983)).

In the absence of any Florida authority to control our decision, we are persuaded by the approach taken in the *Champlost* and *Loyola University Medical Center* cases which we find commonsensical and consistent with fundamental doctrine of the law of assignments and contracts.

Appellant asserts that

> if this Court were to adopt the position urged by Progressive, it would encourage insurance companies to act contrary to the best interests of their insureds. It would also create a second class citizenship status for medical providers and other assignees who no longer enjoy protection from bad faith insurance practices.

(Appellant's Br. 15-16.)

We agree.

Appellant correctly notes that insureds routinely assign PIP benefits to providers. When an insured executes an assignment of benefits, "it has been ruled an unqualified assignment which removes the insured's standing to bring a direct action against the insurer, even though the insured remains liable for any medical bills not aid by the insurer." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 893 n.3 (Fla. 2003) (*citing Oglesby v. State Farm Mut. Auto. Ins. Co.*, 781 So. 2d 469 (Fla. 5th DCA 2001)). *See also Livingston v. State Farm Mut. Auto. Ins. Co.*, 774 So. 2d 716, 717 (Fla. 2d DCA 2000) ("As a general rule, if an insured has assigned her

right to receive personal injury protection (PIP) benefits to a health care provider, the insured may not file a lawsuit to collect the assigned benefits.").

As Progressive would have it, the provider with an assignment from the patient would be the only party able to sue for benefits but the provider would have no recourse if the carrier acts in bad faith. The provider, in the Progressive way of proceeding, would have to first sue for benefits, and at some point after that, when a civil remedy notice has been filed but benefits still not paid, chase down the insured and obtain another assignment - this one of extra-contractual claims. The carrier would then likely advance the same argument as Progressive does here, i.e. the provider has no standing in a statutory bad faith/unfair practices suit because the insured had no such claims to assign.[3] Nowhere do we discern any legislative intent to leave health care providers without an effective remedy for bad faith or unfair activities by an insurance carrier and Progressive cites none.[4]

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[3] An alternative view would permit the provider/original assignee to bring direct claims of its own for statutory bad faith and unfair practices. It is, after all, only the provider/assignee which has standing to pursue the claim for PIP benefits and thus, only the provider/original assignee which is owed the statutory duties created by sections 624.155 and 626.9541(1)(i). That being the case, this approach would view Boylan as having statutory bad faith and unfair practices claims to assign to IHW. In any event, the provider must be able to bring a bad faith claim and unfair practices claim in some capacity - either as an assignee of the insured or, if not, then in its own right. Viewed yet another way, these statutory claims first accrued following the original assignment to Boylan and were properly assigned by him to IHW. But for the assignment, Sheldon would have these claims. Boylan stands in her shoes and, therefore, may assert them once Sheldon assigned her "rights and benefits" relating to the Progressive policy. The point, in the end, is that *somebody*, either Sheldon or Boylan, must have bad faith and unfair practices claims capable of assignment.

[4] We find without merit Progressive's argument that the Appellant lacks standing because it failed to file a civil remedy notice. In fact, two civil remedy notices were filed by Boylan - one in July 2002 and one in September 2003. In both, Boylan was identified as Sheldon's assignee. Both were served on Progressive which thus knew the basis of the bad faith claim. Inasmuch as we have found that Boylan possessed such a bad faith claim pursuant to 624.155, it follows that IHW later stood in Boylan's shoes as its assignee and could rely upon the civil remedy notices

B. Fees and Sanctions

Both parties move for appellate counsel fees. Appellant also seeks sanctions against Progressive. All of these motions are denied. Appellee's motion must be denied for the obvious reason that it lost. Appellant's application for counsel fees must also be denied.

Florida Rule of Appellate Procedure 9.400(b) explicitly states that a motion for attorney's fees "shall state the grounds upon which recovery is sought." IHW's fee motion, however, provides no argument or reasons for an award of fees and is of little assistance. Appellant simply states that it is entitled to fees based on Florida Rules of Appellate Procedure 9.040(d), 9.400(b) and 9.410. It also refers, generally, to sections 59.46, 627.428 and 624.155 of Florida Statutes. In the first place, the references to the several Rules of Appellate Procedure is insufficient. Rule 9.400 is procedural and not a substantive basis for an award of counsel fees. *Dept. of Highway Safety and Motor Vehicles v. Trauth*, 971 So. 2d 906, 908 (Fla. 3d DCA 2007). Florida Rule of Appellate Procedure 9.040(d) "is the appellate procedure counterpart of the harmless error statute" and also not a basis for attorney's fees. Committee Note, Fla. R. App. P. 9.040(d).

In addition, it has been held that

> an attorney who presents this court with a motion for attorney's fees should state the grounds for the motion. If a statutory ground exists, the motion should refer to the statute, *as well as specifying the appropriate sections and subsections of the statute, along with the year of the statute.*

Lehigh Corp. v. Byrd, 397 So. 2d 1202, 1205 (Fla. 1st DCA 1981) (emphasis added).

Here, IHW refers only generally to three statutes. No subsections or years are provided.

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filed by Boylan. In any event, Appellant's unfair practices claim under section 626.9541(1)(i) does not require the filing of a civil remedy notice. Even if we were to accept Progressive's argument - which we do not - that claim would not be affected.

Thus, we find Appellant's motion for counsel fees to be insufficient to support an award. Our holding in this regard is consistent with the Florida Supreme Court's strict interpretation of Rule 9.400. This Court has done substantial independent legal research with respect to the merits of this case. We will do no more on the counsel fee issue.

Finally, IHW moves for sanctions pursuant to section 57.105, Florida Statutes. We find the arguments advanced by Progressive and its counsel concerning the assignments in this case to be within the bounds of proper, zealous advocacy and deny the motion.

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that:

1) The trial court's Final Judgment granting Appellee, Progressive Express Insurance Company's Motion for Judgment on the Pleadings be and hereby is **REVERSED**;

2) Appellee, Progressive Express Insurance Company's Motion for Attorney's Fees and Costs be and hereby is **DENIED**;

3) Appellant, INJURY, HEALTH AND WELLNESS, INC.'s Motion for Appellate Fees be and hereby is **DENIED**;

4) Appellant, INJURY, HEALTH AND WELLNESS, INC.'s Second Motion for Sanctions Pursuant to Florida Statutes, Section 57.105 be and hereby is **DENIED**; and

5) This matter be and hereby is **REMANDED** to the County Court for further proceedings consistent with this Order.

DONE AND ORDERED in Chambers at Orlando, Florida, on this **2** day of **March**, 2010,

/s/
ROGER J. McDONALD
Circuit Judge

/s/
REGINALD K. WHITEHEAD
Circuit Judge

/s/
LISA T. MUNYON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to:

1) Kevin B. Weiss, Esq., 500 North Maitland Avenue, Suite 303, Maitland, Florida 32751-4822;

2) Andrew P. Rock, Esq., KINGSFORD & ROCK, 1760 Fennell Street, Maitland, Florida 32751; and

3) Donald A. Meyers, J., Esq., BAILEY & MYERS, 875 Concourse Parkway South, Suite 195, Maitland, Florida 32751

on this **2** day of March, 2010.

/s/
Judicial Assistant

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

CASE NO.: CVA1 07-67
Lower Court Case No.: 2005-CC-19207

INJURY, HEALTH AND WELLNESS, INC., as assignee of DR. MARK E. BOYLAN, d/b/a BOYLAN CHIROPRACTIC CLINIC,
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On Appeal from the County Court
for Orange County,
Wilfredo Martinez, Judge.

Donald A. Myers, Jr., Esquire,
for Appellant.

Betsy E. Gallagher, Esquire,
for Appellee.

Before McDonald, Whitehead and Munyon, JJ.

PER CURIAM

ORDER DENYING MOTION FOR REHEARING, RECONSIDERATION AND/OR CLARIFICATION

Appellant, Injury, Health and Wellness, Inc. ("IHW" or "Appellant"), as assignee of Dr. Mark E. Boylan, d/b/a Boylan Chiropractic Clinic, moves for rehearing, reconsideration and/or clarification of this Court's Order reversing the County Court's final judgment on the pleadings and denying the parties' motions for fees and sanctions. Specifically, IHW asks us to revisit

our ruling to the extent we denied its application for appellate counsel fees.

The Court having read all of the papers submitted in connection with this motion and being duly advised in the premises **ORDERS** and **ADJUDGES** that the Motion for Rehearing, Reconsideration and/or Clarification of Appellant, Injury, Health and Wellness, Inc., as assignee of Dr. Mark E. Boylan, d/b/a Boylan Chiropractic, be and hereby is **DENIED.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the _____20___ day of _____April_____, 2010.

_____/S/_____
ROGER J. McDONALD
Circuit Judge

_____/S/_____
REGINALD K. WHITEHEAD
Circuit Judge

_____/S/_____
LISA T. MUNYON
Circuit Judge

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3) Donald A. Meyers, J., Esq., BAILEY & MYERS, 875 Concourse Parkway South, Suite 195, Maitland, Florida 32751; and

4) Betsy E. Gallagher, Esq., KUBICKI DRAPER, P.A., 201 N. Franklin Street, Suite 2550, Tampa, Florida 33602.
on this **___20_____** day of _____April_____, 2010.

_____/S/_____
Judicial Assistant