

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

OPEN MRI OF ORLANDO, INC.,
a/a/o RAQUEL RAMOS

CASE NO.: CVA1 07-73
LOWER COURT CASE NO.
2005-SC-5270

Appellant,

v.

STATE FARM,

Appellee.

Appeal from the County Court,
in and for Orange County, Florida,
Judge Wilfredo Martinez.

Bruce H. Kauffman, Esquire,
for Appellant.

Hinda Klein, Esquire,
for Appellee.

Before SHEA, TURNER, and THORPE, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT'S JUDGMENT

Appellant, Open MRI of Orlando, Inc. ("Open MRI"), as assignee of Raquel Ramos, brought an action to recover Personal Injury Protection ("PIP") benefits for treatment rendered to Raquel Ramos, an insured of Appellee, State Farm Fire and Casualty Company ("State Farm"). Open MRI filed a timely appeal of the trial court's order granting State Farm's motion for final summary judgment. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Raquel Ramos, an insured of State Farm, was involved in a car accident in August 2002 in which she sustained personal injuries. At the time of the accident, Appellant's insurance policy provided \$10,000 in PIP benefits and \$10,000 in medical payments benefits. Ramos was referred to Open MRI in November 2004. Upon her visit to Open MRI, Ramos filled out and signed a Patient Registration form that included a section entitled "Assignment and Release." Open MRI performed services to Ramos and billed State Farm for the amount. Open MRI submitted the bill to State Farm who refused payment.

In April 2005, pursuant to section 627.736(11), Florida Statutes, Open MRI sent a pre-suit demand later to State Farm demanding payment for the November office visit. State Farm continued its refusal to pay noting that Open MRI failed to include a copy of the assignment of benefits with the demand letter as required by section 627.736(11). As a result, Open MRI sued State Farm for breach of contract and a violation of section 627.736. In its answer and affirmative defenses, State Farm raised Open MRI's lack of standing based on the assignment of benefits attached to the complaint.

Subsequently, State Farm moved for summary judgment arguing, among other things, that the assignment of benefits was not an assignment of Ramos' rights under the policy, but merely a direction to pay Open MRI directly for services rendered. As such, State Farm argued that Ramos did not confer upon Open MRI the standing to sue for breach of her insurance policy. In response, Open MRI moved for partial summary judgment on State Farm's affirmative defense of lack of standing.

At the hearing, State Farm argued that by its terms, the assignment of benefits did not vest Open MRI with Ramos' right to sue, but only directed State Farm to make payment directly to Open MRI. Open MRI stipulated that the assignment of benefits was not ambiguous. State

Farm agreed that the assignment of benefits was clear and unambiguous, thus making the introduction of parol evidence unnecessary. After the hearing, the county court granted State Farm's motion for summary judgment and denied Open MRI's motion for partial summary judgment. The county court also denied Open MRI's motion for clarification/reconsideration. Open MRI timely filed its notice of appeal from the final summary judgment.

The issue in this case is whether the trial court erred in granting State Farm's Motion for Final Summary Judgment. The standard of review for summary judgment is de novo. *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001). Accordingly, this 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. *Id.* at 491-92, citing Fla. R. Civ. P. 1.510(c).

On appeal, Open MRI makes five arguments: 1) that the trial court erred by allowing State Farm to challenge an agreement to which it was not a party; 2) that the trial court failed to appreciate the historical development of assignment law in Florida; 3) that the trial court erred by failing to find that the express language of the agreement assigned Ramos' benefits to Open MRI; 4) that the trial court erred by failing to find an equitable assignment of benefits existed; and 5) that the entry of final summary judgment was reversible error because the merits of the case were not decided. Conversely, State Farm argues that the trial court correctly found that the assignment of benefits was merely a direction to pay Open MRI which did not give Open MRI the standing to sue. Additionally, State Farm argues that the trial court did not err in failing to find that Open MRI had an equitable assignment, as that issue was never raised in the motions or pleadings prior to the summary judgment hearing.

While Open MRI makes many arguments on appeal, the Court finds that the dispositive issue is whether the trial court correctly found that the assignment of benefits did not confer the

right to sue. The Court agrees with State Farm that the assignment of benefits was only a direction to pay Open MRI directly for services rendered to the insured, Ramos. Both Open MRI and State Farm do not contest the content of the assignment of benefits. In fact, at the hearing both parties agreed that the language of the assignment of benefits was unambiguous. As such, parol evidence was not necessary then, or now, to determine any intent of the parties at the time the agreement was made.

The Court agrees that this assignment of benefits is unambiguous. The assignment language simply assigns all benefits due under the policy, but fails to transfer to Open MRI the insured's rights in her insurance contract. *See Fla. Emergency Physicians Kang & Assoc., M.D., P.A., a/a/o Chris Schrack v. Progressive Express Ins. Co.*, 12 Fla. L. Weekly Supp. 479a (Fla. Orange Cty. Ct. Mar. 2, 2005) (finding that the document signed by the insured was not an assignment, but merely a direction to pay) (citing *Bohica Orthopedics & Rehabilitative Med. a/a/o Leanne Seals v. Progressive Southeastern Ins. Co.*, 10 Fla. L. Weekly Supp. 851b (Fla. 7th Cir. Ct. 2003)). Additionally, all of the cases cited by Open MRI finding the express language of an assignment are distinguishable from this case. Because the assignment was merely a direction to pay Open MRI directly, Open MRI did not have standing to sue on behalf of Ramos. Thus, the trial court was correct in granting summary judgment in favor of State Farm based on Open MRI's lack of standing.

Next, the Court will address Open MRI's other arguments on appeal. The Court finds the additional arguments without merit. First, Open MRI argues that the trial court erred in allowing State Farm to challenge the assignment of benefits as it was not a party to the agreement. The Court finds that State Farm was not challenging the validity of the agreement between Ramos and Open MRI. Instead, State Farm was contesting Open MRI's standing to sue. As noted by

State Farm in its Answer Brief, the Court can find no cases which hold that an insurer cannot question a party's standing to sue. Thus, the trial court did not err in allowing State Farm to proceed with its motion for summary judgment.

Next, Open MRI argues that the trial court failed to appreciate the law of assignments in Florida. As evidenced in the cross-motions for summary judgment, the Order and Final Judgment, and the hearing transcript, the trial court judge was presented with the law from both sides of the issue. Although the trial court ultimately did not agree with the position advanced by Open MRI, there is no indication that the trial court failed to appreciate the historical developments of assignment law in Florida.

Third, Open MRI argues that the trial court failed to find an equitable assignment between Ramos and Open MRI. As State Farm correctly notes, Open MRI failed to plead equitable assignment in its complaint, and the complaint was never amended to add equitable assignment. In fact, the first time equitable assignment is mentioned is at the summary judgment hearing. If it wanted to proceed under both theories, Open MRI should have pled both written and equitable assignment in the complaint. It is well established that an issue not presented at the trial level will not be considered for the first time on appeal. *Jackson v. Whitmire Constr. Co.*, 202 So. 2d 861, 862 (Fla. 2d DCA 1967). *See also Augustin v. State Unemployment Appeals Comm'n*, 906 So. 2d 1238, 1239 (Fla. 4th DCA 2005); *Sparta State Bank v. Pape*, 477 So. 2d 3, 4 (Fla. 5th DCA 1985) (citing *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981)). As the equitable assignment argument was not properly advanced below, it would be improper for the Court to consider it now on appeal.

Last, Open MRI argues that the trial court committed reversible error when it entered final summary judgment. Open MRI argues that the trial court should have granted dismissal

without prejudice. However, Open MRI failed to make this argument in its motion for summary judgment or at the summary judgment hearing. In fact, Open MRI improperly argues this issue for the first time on its motion for reconsideration/clarification. Because this argument was not properly preserved below, it cannot now be decided on appeal. *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002) (finding that an issue not preserved for review by a timely motion or objection in the trial court will not be considered on appeal).

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The trial court's "Order and Final Judgment on Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment" is **AFFIRMED**.
2. Appellant's motion for appellate attorney's fees pursuant to section 627.428, Florida Statutes, is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this _16_ day of ____April_____, 2010.

_____/S/_____
TIM SHEA
Circuit Judge

_____/S/_____
THOMAS W. TURNER
Circuit Judge

_____/S/_____
JANET C. THORPE
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 to **Bruce H. Kauffman, Esq.**, The Law Office of Bruce H. Kauffman, P.A., 698 North Maitland Ave., Suite 200, Maitland, FL 32751; **Hinda Klein, Esq.**, Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A., 3440 Hollywood Blvd., 2nd Floor, Hollywood, FL 33021 on the 16 day of April , 2010.

_____/S/_____
Judicial Assistant