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

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Appellant,

v.

CASE NO.: CVA1 08-76
Lower Court Case No.: 2004-SC-1811-O

JEAN FRANSCO BREVIL, parent and guardian of MARIE ROSEMENE BREVIL,

Appellee.
_____/

Appeal from the County Court,
for Orange County,
Deb S. Blechman, Judge.

Betsy E. Gallagher, Esquire and
George Milev, Esquire,
for Appellant.

Todd E. Copeland, Esquire,
for Appellee.

Before SHEA, THORPE, and STRICKLAND, J.J.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant Progressive Express Insurance Company ("Progressive") timely appeals the trial court's "Order Granting Plaintiff's Motion for Partial Summary Judgment for Failure to Pay PIP Benefits for Dates of Service 8/19/2003 – 8/22/2003" in favor of the Appellee, Jean Fransco Brevil ("Mr. Brevil"), parent and guardian of Marie Rosemene Brevil ("Marie"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Facts and Procedural History

Mr. Brevil sued Progressive on behalf of his daughter, Marie, seeking damages for Marie's unpaid PIP claims, interest on any overdue payments, and attorney's fees and costs. The PIP claims arose from a motor vehicle accident, during which Marie sustained injuries.

The motor vehicle accident occurred on August 17, 2003, and Marie received medical treatment for those injuries between August 18, 2003 and October 17, 2003. At the time of the accident, and throughout her resulting medical treatment, Marie was a minor child of seventeen years old. However, Marie's eighteenth birthday occurred on December 3, 2003. Thereafter, Marie, through her counsel, sent Progressive a statutory pre-suit demand letter, demanding payment in full of her PIP claims. Progressive acknowledged receipt of the demand letter and issued payments in an attempt to settle the claims. However, the parties could not resolve the matter.

On February 26, 2004, Mr. Brevil filed the complaint in this action on behalf of Marie, in his alleged representative capacity as her "parent and guardian," contending that there is still an unpaid balance of less than $100.00. The balance of the significant procedural history is as follows. Progressive filed a motion for final summary judgment, alleging that Mr. Brevil failed to satisfy a condition precedent to filing suit because the statutory pre-suit demand letter was incomplete and insufficient. The trial court denied the motion. Later, Mr. Brevil filed a motion for partial summary judgment on the issue of his entitlement to an award of $30.00 in damages for Progressive's failure to pay PIP benefits for medical treatment from August 19, 2003 through August 22, 2003. Progressive also filed another motion for final summary judgment, this time alleging that Mr. Brevil lacked standing to sue on behalf of Marie because she turned eighteen years old before he filed the complaint. On December 2, 2008, the trial court heard both parties'

motions. It denied Progressive's motion and granted Mr. Brevil's motion. This appeal followed.

Though the trial court granted partial summary judgment in favor of Mr. Brevil, this Court issued an order on April 9, 2009 determining that the trial court's order ended the judicial labor in this case, and thus it functioned as a final order. Therefore, we have jurisdiction to hear this appeal.

Discussion of Law

We find that this action should be dismissed because Mr. Brevil did not have the right or standing to file a lawsuit as the parent or guardian of his adult daughter, Marie. Therefore, the trial court erred in granting summary judgment in favor of Mr. Brevil, and we reverse.

Mr. Brevil's Lack of Standing

Under Florida Rule of Civil Procedure 1.210(b), when a minor or incompetent person has a representative, such as a parent or guardian, the representative may sue or defend on behalf of the minor or incompetent person. However, when a minor child sues by her parent, guardian, or "next friend," that representative is *not* a party to the litigation, and the minor child is the "real party in interest." Buckner v. Family Servs. of Cent. Fla., 876 So. 2d 1285, 1286 (Fla. 5th DCA 2004) (citing Youngblood v. Taylor, 89 So. 2d 503, 505-506 (Fla. 1956)). Furthermore, when a child reaches the age of eighteen, the disability of nonage is removed, and, if she is under no other legal disability, she has the right to choose to enforce, or not enforce, her own legal rights. Compare §743.07, Fla. Stat. (2003) ("The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older . . . ."), with Robert S. Thurlow, P.A. v. LaFata, 915 So. 2d 737, 739 (Fla. 5th DCA 2005) (holding that a child of legal age, and under no legal disability, has the right to choose to enforce, or not enforce, his own legal rights). Therefore, the parent of an emancipated adult has no *right or standing* to file a lawsuit to enforce his child's

cause of action. LaFata, 915 So. 2d at 739; Thomas v. Lopez, 982 So. 2d 64, 68 (Fla. 5th DCA 2008).

Because Mr. Brevil filed the present lawsuit on behalf of Marie, in his alleged representative capacity as her "parent and guardian," and he has not been joined as a party in his individual capacity, he is not a party to this lawsuit. Furthermore, because Marie reached the age of eighteen years before Mr. Brevil filed this lawsuit on her behalf, she was entitled to choose to enforce, or not enforce, her own legal rights, and Mr. Brevil had no right or standing to file this lawsuit to enforce her cause of action.[1] Thus, Mr. Brevil had no standing to file this lawsuit in a representative capacity as the "parent and guardian" of his adult daughter, Marie. Therefore, we find that this action should be dismissed without prejudice.

Nevertheless, attempting to avoid this result, Mr. Brevil forwards the following two arguments. First, Mr. Brevil argues that Progressive waived the issue of lack of standing by failing to plead it as an affirmative defense. Second, Mr. Brevil argues that he has standing, in his individual capacity, to bring this action against Progressive.

Waiver of the Defense of Lack of Standing

A party must raise the defense of lack of standing before the trial court to avoid waiver of the defense. See Maynard v. Fla. Bd. of Educ., 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009). However, the law does not necessitate that lack of standing be raised only by means of an affirmative defense. Id. When an appellate court considers whether the defense of lack of standing has been waived, "the pertinent question is whether the issue was raised at the trial court, not how it was raised." Id.

In its argument in opposition to waiver, Progressive relies on the decision of the Second

[1] In its motion for final summary judgment, based on Mr. Brevil's lack of standing, Progressive alleged that Marie was not legally incompetent at the time of the filing of the present lawsuit. Mr. Brevil does not refute or deny this, nor is there any evidence in the record to the contrary.

District Court of Appeal in Maynard. In that case, the counter-defendant filed a motion to set aside the verdict and judgment on a counterclaim, alleging that the counter-plaintiff lacked standing to file the claim. Id. at 1203. In response, the counter-plaintiff argued that the counter-defendant waived the issue of standing because he failed to plead it as an affirmative defense. Id. at 1204. The trial court denied the motion, and the counter-defendant appealed. Id.

On appeal, the counter-plaintiff again argued waiver, relying on Krivanek v. Taking Back Tampa Political Comm., 625 So. 2d 840 (Fla. 1993), in which the Florida Supreme Court held that a party waived the defense of lack of standing because she raised the issue for the first time in her petition to the supreme court, after failing to raise it as an affirmative defense before the trial court. Maynard, 998 So. 2d at 1205 (citing Krivanek, 625 So. 2d at 842.) After thoroughly examining Krivanek, the Second District Court of Appeal held that the real issue is whether the defense of lack of standing was raised before the trial court, not *how* it was raised. Id. at 1206. It held that the law does not necessitate that lack of standing be raised only by means of an affirmative defense Id. Therefore, it reversed the trial court because the counter-defendant raised the defense of lack of standing in a motion before the trial court. Id.

In the present case, Mr. Brevil relies on the decision of the Fourth District Court of Appeal in Kissman v. Panizzi, 891 So. 2d 1147 (Fla. 4th DCA 2005). In Kissman, the district court held that the defendants waived the issue of the plaintiff's lack of standing because they did not raise it until closing argument. Id. at 1150. The court relied on its prior decision in Schuster v. Blue Cross & Blue Shield of Fla., Inc., 843 So. 2d 909 (Fla. 4th DCA 2003) for the proposition that "lack of standing is an affirmative defense that must be raised by the defendant and . . . failure to raise it generally results in waiver." Schuster, 843 So. 2d at 912 (citing Krivanek, 625 So. 2d at 842).

In the absence of a binding decision from the Fifth District Court of Appeal, we choose to follow the holding of the Second District Court of Appeal in Maynard, which we find to be instructive and dispositive of this issue in the present case. Though Progressive did not raise the issue of standing as an affirmative defense, it raised the issue before the trial court in a motion for summary judgment. The parties filed memoranda on the issue, they argued the issue at a hearing, and the trial court decided the issue on its merits. Therefore, we find that Progressive has not waived the defense of lack of standing.

Mr. Brevil's Standing as an Individual

Mr. Brevil alleges that he has standing, in his individual capacity, to sue Progressive for payment of the PIP claims because he is personally liable for Marie's covered medical bills, which she incurred as a minor child. While this proposition may hold to be true, it has no bearing on the present case. As we have noted above, Mr. Brevil, as an individual, is not a party to this litigation. He has merely filed suit as a representative of his daughter, Marie, as her "parent and guardian." Again, when an individual sues through her parent, guardian, or "next friend," the representative is *not* a party to the litigation. Buckner, 876 So. 2d at 1286. Furthermore, even if Mr. Brevil had successfully filed suit on behalf of Marie, the trial court would not have had jurisdiction to award any relief on behalf of Mr. Brevil, because Marie would have lacked standing to enforce Mr. Brevil's cause of action. See Rinas v. Rinas, 847 So. 2d 555, 556-557 (Fla. 5th DCA 2003) (holding that the trial court lacked jurisdiction to award any relief on behalf of a minor child's mother, acting as "next friend," and the minor child lacked standing to act on behalf of her mother). Therefore, we find that Mr. Brevil's potential standing, as an individual, to file suit against Progressive fails to avoid a dismissal of this action.

Progressive's Motion for Appellate Attorney's Fees

Progressive timely filed a Motion for Appellate Attorney's Fees, pursuant to Florida Rule of Appellate Procedure 9.400, Florida Rule of Civil Procedure 1.442, and section 768.79, Florida Statutes, arguing that it is entitled to attorney's fees based on Mr. Brevil's failure to accept its Proposal for Settlement served on Mr. Brevil on February 29, 2008.

Under section 768.79, Florida Statutes, a defendant is entitled to recover reasonable attorney's fees and costs that it incurs after serving an offer of judgment upon the plaintiff if the plaintiff does not accept the offer within 30 days and the litigation results in a judgment of no liability. The provisions of section 768.79 apply to PIP cases, and a defendant's right to attorney's fees under section 768.79 applies to fees on appeal. State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1072 (Fla. 2006); David E. Disney, P.A. v. Daniel R. Vaughen, P.A., 804 So. 2d 581, 583 (Fla. 5th DCA 2002).

However, section 768.79 does not provide a basis for the award of attorney's fees and costs if a case is dismissed without prejudice. See MX Invs., Inc. v. Crawford, 700 So. 2d 640, 642 (Fla. 1997). Similarly, if an involuntary dismissal was *not* an adjudication on the merits, then it does not trigger entitlement to an award of attorney's fees and costs under section 768.79. See Tucker v. Ohren, 739 So. 2d 684, 686 (Fla. 4th DCA 1999).

Progressive's Proposal for Settlement satisfied all of the requirements of Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes, to qualify as an offer of judgment for the purposes of section 768.79. However, we direct the trial court to dismiss this action without prejudice, and this dismissal will *not* function as an adjudication on the merits. Therefore, Progressive is not entitled to an award of attorney's fees and costs.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Order Granting Plaintiff's Motion for Partial Summary Judgment for Failure to Pay PIP

Benefits for Dates of Service 8/19/2003 – 8/22/2003," entered on December 9, 2008, is **REVERSED**; the Appellant's "Motion for Appellate Attorney's Fees" is **DENIED**; "Appellee's Motion to Tax Attorney's Fees and Costs" is **DENIED**; and this case is **REMANDED** to the trial court with directions to dismiss this action without prejudice.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ____19_____ day of _____May_____, 2010.

_____/s/_____
TIM SHEA
Circuit Judge

_____/s/_____
JANET C. THORPE
Circuit Judge

_____/s/_____
STAN STRICKLAND
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: **Betsy E. Gallagher, Esq., Kubicki Draper**, 201 North Franklin Street, Suite 2550, Tampa, Florida 33602; **George Milev, Esq., Adams & Diaco, P.A.,** 1 South Orange Avenue, Suite 301, Orlando, Florida 32801; and **Todd E. Copeland, Esq., Todd E. Copeland & Associates, P.A.,** 338 North Magnolia Avenue, Suite B, Orlando, Florida 32801 on the ___19_____ day of _____May_____, 2010.

_____/s/_____
Judicial Assistant