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

BETHANY ARREDONDO,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellee.
_____/

CASE NO.: CVA1-09-41

Lower Case No.: 2006-CC-4393

Appeal from the County Court, for Orange County,
Antoinette D. Plogstedt, County Judge.

Peter A. Shapiro, Esquire, for Appellant.

Kenneth P. Hazouri, Esquire, for Appellee.

Before MIHOK, LAUTEN, SHEA, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART TRIAL COURT

Appellant, Bethany Arredondo ("Arredondo") brought an action for a declaratory judgment and for negligence against State Farm Mutual Automobile Insurance Company ("State Farm") pertaining to medical payments coverage. Arredondo filed a timely appeal of the trial court's "Order on Defendant's Motion to Amend Answer and Affirmative Defenses" rendered on June 29, 2009 and "Order of Dismissal Without Prejudice" rendered on August 12, 2009 (granting Defendant's Motion for Summary Judgment and denying Plaintiff's Amended Motion for Partial 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). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

On July 14, 2005, Arredondo was involved in a motor vehicle accident in which she sustained injuries. On the date of the accident Arredondo had a policy in effect with State Farm which included medical payments coverage ("Med Pay"). Arredondo incurred expenses for medical treatment and as a result, State Farm paid $10,000 in PIP benefits and $5,000 in Med Pay benefits under the policy. However, Arredondo's medical expenses exceeded the $15,000 paid by State Farm. Arredondo alleged that prior to the accident she contacted State Farm to add an additional vehicle to the policy and to increase her current Med Pay coverage from $5,000 to $10,000 on her current vehicle (the vehicle involved in the accident). She further alleged that State Farm's agent did not follow through with processing the Med Pay increase.

On March 18, 2006, Arredondo, through her attorney requested that State Farm provide $10,000 in Med Pay coverage by March 24, 2006, or a suit for declaratory judgment would be filed. State Farm did not respond to Arredondo's letter. On March 30, 2006, Arredondo filed the instant law suit for a declaratory judgment under Chapter 86, Florida Statutes, and for negligence due to State Farm' agent's failure to increase the Med Pay coverage as promised. On June 4, 2008, after much discovery, Arredondo noticed the case for trial. At the Case Management Conference on January 15, 2009, State Farm submitted its Second Motion for Leave to file its Second Amended Answer and Affirmative Defenses. The basis for State Farm's motion was to assert as an additional affirmative defense that Arredondo failed to comply with the Med Pay demand letter condition precedent prior to filing the law suit. Arredondo opposed State Farm's motion asserting the State Farm had waited too long to assert this defense and that the amendment would be prejudicial to her.

On February 18, 2009, State Farm filed its Motion for Summary Judgment asserting that Arredondo failed to comply with the policy condition precedent requiring a Med Pay demand letter prior to filing suit. Arredondo filed her competing Motion for Partial Summary Judgment contending that a Med Pay demand letter was not a condition precedent to filing a law suit for a declaratory judgment or for negligence and that State Farm waived its right to assert the defense. A hearing was held on June 2, 2009 to address State Farm's Second Motion to Amend Answer and Affirmative Defenses. The trial court granted the motion and entered an order on June 29, 2009 providing Arredondo 20 days to reply to the amended pleading. On July 27, 2009, the court heard State Farm's Motion for Summary Judgment and Arredondo's Motion for Partial Summary Judgment. The trial court treated State Farm's Motion for Summary Judgment as a motion to dismiss and found that Arredondo failed to comply with the contractually imposed condition precedent of sending a Med Pay demand letter prior to bringing the lawsuit. The trial court entered the order on August 12, 2009 dismissing the action.

Standard of Review

The standard of review of the order granting a motion to amend an answer and affirmative defenses is abuse of discretion. *Overnight Success Const., Inc. v. Pavarini Const. Co., Inc.*, 955 So. 2d 658 (Fla. 3d DCA 2007). The standard of review is *de novo* for a summary judgment including a dismissal of a complaint. *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001); *City of Gainesville v. State, Dep't of Transportation*, 778 So. 2d 519, 522 (Fla. 1st DCA 2001).

Arguments on Appeal

On appeal, Arredondo argues that the trial court committed reversible error by abusing its discretion in allowing State Farm to amend its affirmative defenses to assert a Med Pay condition

precedent defense and that she was prejudiced due to the length of time that had passed before bringing the defense. She also argues that the trial court erred by dismissing her suit because the asserted condition precedent does not apply to her declaratory judgment claim nor to her negligence claim since neither claim is an action based on the contract.

Conversely, State Farm argues that Arredondo was not prejudiced by the trial court allowing the amended affirmative defense because the case, although noticed for trial, was not set for a time certain. State Farm also argues that the trial court correctly dismissed the lawsuit based on her failure to serve State Farm with a Med Pay demand letter as required under the plain language of the policy.

Discussion

Order on Defendant's Motion to Amend Answer and Affirmative Defenses

This Court first addresses the trial court's Order granting State Farm's Second Motion to Amend Answer and Affirmative Defenses rendered June 29, 2009. Upon review of the record including the transcript from the hearing held on June 2, 2009, this Court finds that the trial court did not abuse its discretion in granting State Farm's Second Motion to Amend Answer and Affirmative Defenses.

Order of Dismissal Without Prejudice – Jurisdiction

In addressing the trial court 's August 12, 2009 Order of Dismissal Without Prejudice, this Court must first determine whether it has jurisdiction to review the order as it includes language that it is "without prejudice".[1] In general, court orders entered without prejudice are non-final orders that preclude review by the appellate court.

[1] Because the trial court's order stated that the action was dismissed "without prejudice", an order to show cause as to the appellate court's jurisdiction was issued by this Court and Appellant filed a response.

However, a narrow exception to this general rule exists when an order dismissing a complaint without prejudice disposes of the case. *See Hinote v. Ford Motor Co.*, 958 So. 2d 1009, 1010 (Fla. 1st DCA 2007). For example, if an order dismisses a case without prejudice and the case can only be pursued by filing a new complaint, then the order is a final appealable order. *Delgado v. J. Byrons, Inc.*, 877 So. 2d 822 (Fla. 4th DCA 2004). Whether an order is final can be determined by examining the context of the order. *Hinote*, 958 So. 2d at 1010.

In examining the context of the order, this Court reviewed the transcript from the hearing held on July 27, 2009 where the trial court stated: "It is an order of dismissal without prejudice, which means that when and if the plaintiff complies with the pre-suit demand letter or notice, the plaintiff is free to refile this cause of action." This Court finds that the order requires Arredondo to file a new complaint as opposed to an amended complaint in the pending action. Accordingly, this Court considers the order to be a final appealable order and will now review the order on its merits.

Order of Dismissal Without Prejudice - Review of Merits

This Court finds that the Med Pay demand letter was not a condition precedent for bringing a claim for a declaratory judgment or for the claim of negligence. *Acosta v. Mercury Insurance Co. of Florida*, 15 Fla. L. Weekly Supp. 868a (Fla. 9th Cir. Ct. May 7, 2008) provides guidance. In *Acosta*, the insured brought an action for a declaratory judgment to determine whether there was PIP insurance coverage and the trial court dismissed the action for failure to meet a demand letter requirement. This Circuit in its appellate capacity reversed the trial court and held that a demand letter was not required prior to initiating the action because Acosta did not file an action to recover PIP benefits, but instead sought a declaration as to coverage. Therefore, the Court concluded that the trial court should have entered a judgment declaring that

coverage either existed or did not exist, instead of entering a dismissal.[2] In the instant case, the Med Pay demand letter had no application to the action for a declaratory judgment because Arredondo was seeking a declaration that she was entitled to $10,000 of Med Pay coverage for the subject loss, not payment of an overdue medical bill. Also, this Court concurs with Arredondo that it would be problematic for her to submit a sufficiently detailed Med Pay demand letter before the trial court determines whether she has $5,000 or $10,000 of Med Pay coverage.

As for the negligence action, this Court also concurs with Arredondo that the Med Pay demand letter requirement is not applicable because the negligence claim is not a contractual claim and thus is not controlled by the language in the insurance contract. Instead the agent's alleged negligent performance is extra contractual in nature. *See Randolph v. Mitchell*, 677 So. 2d 976, 978 (Fla. 5th DCA 1996) (holding that the agent's duty to the insured in performing insurance services was not solely defined by contract, but instead was extracontractual in nature). Accordingly, the trial court's Order of Dismissal Without Prejudice must be reversed.

Arredondo's Motion to Tax Appellate Attorney's Fees and Costs

Arredondo seeks an award of appellate attorney's fees and costs pursuant to section 627.428, Florida Statutes. This Court finds that Arredondo is not entitled to an award of appellate attorney's fees as the underlying actions for a declaratory judgment and negligence do not provide for such an award. In *Progressive American Insurance Co. v. Rural/Metro Corporation of Florida*, 994 So. 2d 1202 (Fla. 5th DCA 2008), a declaratory action was brought by the insurer against an ambulance service provider to determine whether certain pre-suit information was required. The trial court dismissed the action and on appeal the Fifth District reversed the trial court in favor of the insurer. Both parties sought attorney's fees and the Fifth

[2] In *Acosta*, following this Circuit's appellate decision, Mercury Insurance filed a petition for writ of certiorari with the Fifth District Court of Appeal. The petition was denied on March 16, 2009 without opinion and the mandate was issued on September 8, 2009.

District found that the award of attorney's fees under section 627.428, Florida Statutes, is only authorized when the insurer has wrongfully withheld payment pursuant to the policy. Thus, the Fifth District held that neither party was entitled to attorney's fees because the insurance proceeds were not at issue and the ambulance provider was not entitled to recover any wrongfully withheld payment. *Progressive American Ins.* at 1209.

This Court acknowledges that appellate courts in Florida vary on the issue whether attorney's fees should be awarded to the prevailing party in a declaratory action involving insurance contracts. *See Bassette v. Standard Fire Insurance Co.*, 803 So. 2d 744, 746 (Fla. 2d DCA 2001)(holding that the declaratory action involved a dispute as to whether insured would be covered by policy, thus, the action was within the scope of section 627.428 and the insured was entitled to attorney's fees). Also, in *Acosta*, addressed above, the Court on July 23, 2008 granted rehearing as to Acosta's motion for attorney's fees and awarded the fees citing the *Bassette* case. Lastly, although *Progressive American Ins.* differs from the instant case in that the insurer, not the insured, brought a declaratory action, this Court is bound by the Fifth District's ruling in *Progressive American Ins.* as the Fifth District clearly addressed the parameters as to attorney's fees under section 627.428, Florida Statutes. [3]

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The trial court's "Order on Defendant's Motion to Amend Answer and Affirmative Defenses" rendered on June 29, 2009 is **AFFIRMED**.

2. The trial court's "Order of Dismissal Without Prejudice" rendered on August 12, 2009 is **REVERSED** and this cause is **REMANDED** for further proceedings consistent with this opinion.

[3] The Fifth District's ruling in *Progressive American Ins.* was issued on November 14, 2008 after this Circuit's appellate ruling in *Acosta*.

3. Arredondo's Motion to Tax Appellate Attorney's Fees and Costs filed December 10, 2009 is **DENIED**. Arredondo is entitled to have costs taxed in her favor by filing a proper motion with the trial court pursuant to 9.400(a), Fla. R. App. P.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 27th day of August, 2012.

/S/_____
A.THOMAS MIHOK
Circuit Judge

/S/_____
FREDERICK J. LAUTEN
Circuit Judge

/S/_____
TIM SHEA
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail to: **Peter A. Shapiro, Esquire and Jonathan D. Wilson, Esquire**, The Law Offices of Peter A. Shapiro, P.A., 211 East Livingston Street, Orlando, Florida 32801; **Kenneth P. Hazouri, Esquire**, de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, 332 North Magnolia Avenue, P.O. Box 87, Orlando, Florida 32801; and **John Morrow, Esquire,** Conroy, Simberg, et al., Two South Orange Avenue, Suite 300, Orlando, Florida 32801 on this 27th day of August, 2012.

/S/_____
Judicial Assistant