IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2009

DAVID SHAW, DAVID G. SHAW D.C., P.A., ETC., ET AL.,

Appellants,

v. Case No. 5D07-3136

STATE FARM FIRE AND CASUALTY COMPANY, ET AL.,

Appellees.

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Opinion filed October 23, 2009

Appeal from the Circuit Court for Seminole County,
James E.C. Perry, Judge.

Christopher V. Carlyle and Shannon McLin Carlyle, of The Carlyle Appellate Law Firm, The Villages, for Appellant.

Kenneth P. Hazouri of De Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, Orlando, and Dale T. Gobel, of Masten, Lyerly, Peterson, Denbo & Gobel, LLC, Maitland, for Appellees.

SAWAYA, J.

The issue we must resolve is whether an Examination Under Oath (EUO) clause in an insurance policy is binding on an assignee of the No-Fault benefits and the cause of action to recover those benefits, thereby prohibiting a noncompliant assignee from making a claim or seeking payment under the policy. The clause provides in pertinent

part that "any person or organization making claim or seeking payment . . . must, at our option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as we require." (Emphasis omitted). The trial court held that this EUO provision is a condition precedent with which the assignee must comply in order to make a claim and file suit. Because the assignee refused to comply, the trial court rendered summary judgment in favor of the insurer. We affirm.

Introduction of the parties is appropriate here. State Farm Fire and Casualty Company issued the insurance policy containing the EUO provision to its insured, Renard St. Louis, who subsequently assigned the No-Fault benefits and the cause of action to recover those benefits to appellants, David Shaw, David G. Shaw, D.C., P.A., d/b/a Central Florida Chiropractic Center, DC Services, LLC, DC Supply, LLC, and Charles Machler (collectively "Appellants").

The facts are not in dispute and are not complicated. Therefore, we will not dwell too much upon them other than to present them in summary fashion. After St. Louis was involved in a motor vehicle accident, he received medical care from Appellants. He executed two assignment forms assigning his No-Fault benefits and his cause of action to recover those benefits to Appellants. One assignment specifically assigned both the policy benefits and the cause of action to recover those benefits to David G. Shaw, D.C., P.A., d/b/a Central Florida Chiropractic Center[1] and the other specifically assigned

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[1] This assignment provides as follows:

ASSIGNMENT OF BENEFITS

> I hereby authorize and direct you, my insurance company and/or my attorney, to pay directly to **DAVID G. SHAW, DCPA d/b/a CENTRAL FLORIDA CHIROPRACTIC**

both the policy benefits and the cause of action to recover those benefits to DC Services, LLC.[2]

> **CENTER** ("Assignee"), such sums as may be due and owing Assignee for the services rendered to me, both by reason of accident or illness, and by reason of any other bills that are due Assignee, and to withhold such sums from any disability benefits, medical payment benefits, No-Fault benefits, or any other insurance benefits obligated to reimburse me or from any settlement, judgment or verdict on my behalf as may be necessary to adequately protect said Assignee. In the event that I do not have insurance coverage, I understand that I remain personally responsible for payment of services rendered. I hereby further give an irrevocable lien to said assignee against any and all insurance benefits named herein and any and all proceeds of any settlement, judgment or verdict which may be paid to me as a result of the injuries or illness for which I have been treated by the Assignee. This is to act as an assignment of my rights and benefits to the extent of the Assignee's services provided.
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> **ASSIGNMENT OF CAUSE OF ACTION**
>
> In the event my insurance company is obligated to make payments to me upon charges made by the Assignee for its services [but] refuses to make such payments, upon demand by me or Assignee, I hereby assign and transfer to Assignee any and all causes of action, and proceeds from such causes of action, that I might have or that might exist in my favor against such insurance company and authorize the Assignee to prosecute said cause of action either in my name or Assignee's name and further I authorize Assignee to compromise, settle or otherwise resolve said claim of action as they see fit.

[2]This assignment provides as follows:

> Assignment of Benefits / Cause of Action
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> I hereby assign from any and all automobile policies which provide medical benefits or no-fault benefits, all rights, title and interest to DC Services, LLC. ("Assignee") for payment for services rendered unto me both by reason of accident or illness. In the event the insurance company fails to pay

When Appellants presented a claim to State Farm for the services rendered to St. Louis, State Farm requested that Appellants appear for an EUO pursuant to the clause previously quoted. State Farm requested the EUO to investigate suspected fraudulent claims made by Appellants. Appellants refused to attend the EUO and State Farm refused payment. Appellants subsequently filed the instant declaratory action seeking a judgment declaring that they are not required under the policy provisions to attend the EUO. In response, State Farm filed an answer, affirmative defenses, and counterclaim. In the answer, State Farm denied that Appellants had complied with conditions precedent to making a claim for policy benefits and specifically alleged that they failed and refused to submit to the EUO as required by the policy. Among the several affirmative defenses alleged, State Farm asserted this refusal and failure and that Appellants had committed fraud by performing unnecessary diagnostic services solely for personal gain. The counterclaim filed by State Farm included several counts alleging unlawful patient brokering, unnecessary diagnostic testing, deceptive and unfair trade practices, and unjust enrichment. An amended counterclaim was subsequently filed by State Farm adding other counts based on fraud and conspiracy to commit fraud.

State Farm filed a motion for summary judgment. The trial court subsequently entered a final summary judgment concluding that the Appellants failed and refused to

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> Assignee the full amount owing to Assignee after proper statutory notice, I hereby also assign this instrument, all rights and causes of action in tort, in contract and the laws of Florida, against the personal injury protection carrier for the above named insured/patient for its failure to pay for services rendered unto me by Assignee in relation to my accident or illness. This assignment may only be rescinded [or] reassigned by the mutual consent of the patient/insured/ assignor and Assignee.

comply with the EUO provision of the policy, which is a condition precedent to making a claim and filing suit to recover policy benefits, and that this non-compliance rendered the bills submitted by Appellants non-compensable.

The courts have consistently held that an EUO provision in an insurance policy is a condition precedent that must be complied with in order to maintain an action to recover policy benefits. See Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995), review denied, 670 So. 2d 938 (Fla. 1996); see also Starling v. Allstate Floridian Ins. Co., 956 So. 2d 511, 513 (Fla. 5th DCA 2007) (recognizing an EUO as a condition precedent and analogizing it to a condition precedent in a policy requiring submission of a sworn proof-of-loss statement); Fassi v. Amer. Fire & Cas. Co., 700 So. 2d 51 (Fla. 5th DCA 1997) (affirming summary judgment in favor of insurer when the insured failed to timely appear for an EUO). Courts in other jurisdictions also interpret EUO provisions to be conditions precedent to making a claim and filing suit to recover the claim under the policy. See Pervis v. State Farm Fire & Cas. Co., 901 F.2d 944, 947 (11th Cir.) ("Appellant entered into a contract which required that he submit to an examination under oath as a condition precedent to suit. The contractual provision is commonly used in insurance policies and has been upheld by many courts."), cert. denied, 498 U.S. 899 (1990). We note that during oral argument, Appellants conceded that the EUO provision is a condition precedent to making a claim and filing suit under the policy.

Here, the policy issued by State Farm clearly and specifically provides: "There is no right of action against us . . . until all the terms of this policy have been met . . . ." One of those terms is the EUO provision in the policy that requires "any person or

organization making claim or seeking payment . . . must, at our option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as we require." (Emphasis omitted). Appellants are certainly any person or organization; they are making claim or seeking payment; and they should, therefore, be bound by the EUO provision as a condition precedent to making claim or seeking payment through litigation. This comports with Florida law, which has provided for some time that an assignment of benefits or a cause of action to recover those benefits under a contract does not remove from the assignee the burden of compliance with contract conditions. In Shreve Land Co. v. J & D Financial Corp., 421 So. 2d 722 (Fla. 3d DCA 1982), the assignor assigned its interest in the purchase price due under a contract to the assignee. The assignee subsequently recovered a judgment against the original purchaser under the contract. In reversing that judgment, the court held:

> The law is well settled that an assignee succeeds to his assignor's rights under the assignment of a contract and takes it with all the burdens to which it is subject in the hands of the assignor. If the assignee seeks to enforce the contract, he must show that all conditions have been performed either by himself or the assignor.

Id. at 724.

This general principle was adopted by the Florida Supreme Court long ago in Florida East Coast Railway Co. v. Eno, 128 So. 622 (Fla. 1930), wherein a contractor, Eno, assigned to a bank his rights to proceeds due under a contract from the owner of certain property. An interpleader action was filed by the owner after the bank, as assignee, and other claimants made competing claims to those funds. The court held that

> [t]he bank, as Eno's assignee, occupies the same position as did Eno with respect to the moneys, having the same rights, and being subject to the same equities, conditions, and defenses, the assignment not being a negotiable instrument. The mere assignment "of all sums due and to become due the contractor" in and of itself creates no different or other liability of the owner to the assignee than that which existed from the owner to the assignor.

Id. at 626. This rule has been reaffirmed by the courts in more recent decisions. See Law Office of David J. Stern, P.A. v. Sec. Nat. Servicing Corp., 969 So. 2d 962, 968 (Fla. 2007) ("As a general rule, the assignee of a nonnegotiable instrument takes it with all the rights of the assignor, and subject to all the equities and defenses of the debtor connected with or growing out of the obligation that the obligor had against the assignor at the time of the assignment." (quoting State v. Family Bank of Hallandale, 667 So. 2d 257, 259 (Fla. 1st DCA 1995))); Farkus v. Fla. Land Sales & Dev. Co., 915 So. 2d 688, 689 (Fla. 5th DCA 2005); Family Bank of Hallandale, 667 So. 2d at 259 ("The law is well established that an unqualified assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned. The assignee steps into the shoes of the assignor and is subject to all equities and defenses that could have been asserted against the assignor had the assignment not been made." (citing Dependable Ins. Co. v. Landers, 421 So. 2d 175, 179 (Fla. 5th DCA 1982))); Fred S. Conrad Const. Co. v. Exch. Bank of St. Augustine, 178 So. 2d 217, 219 (Fla. 1st DCA 1965) ("It is fundamental that the assignee of a contract or non-negotiable chose in action occupies the same position as its assignor and is subject to the same equities, conditions and defenses that could have been asserted against the assignor."); Nusbaum v. Riskin, 136 So. 2d 1, 3 (Fla. 2d DCA 1961) ("It is true that an assignee takes the assignment of a non-negotiable chose subject to any defenses the debtor has against the assignor.").

Appellants argue that the decisions in Marlin Diagnostics v. State Farm Mutual Automobile Insurance Co., 897 So. 2d 469, 469 (Fla. 3d DCA 2004), and Advanced Diagnostics Testing, Inc. v. State Farm Insurance Co., 11 Fla. L. Weekly Supp. C964, C965 (Fla. 11th Cir. Ct. Aug. 17, 2004), support their argument that they are not bound by the condition precedent requiring that they attend an EUO. We disagree. The EUO clause in the instant case is much different from the EUO clauses at issue in Marlin, 897 So. 2d at 469, which provided that "a **person** who suffers a bodily injury and makes a claim under the policy shall '. . . answer questions under oath . . . ,'" and in Advanced, 11 Fla. L. Weekly Supp. at C965, which provided that "[a]ny **person** who suffers a bodily injury . . . must notify us of the claim in writing as soon as reasonably possible . . . . The **person** making claim also shall: . . . be examined [and] . . . answer questions . . . ." The circuit court noted in Advanced that the policy specifically defined "person" as "a human being." 11 Fla. L. Weekly Supp. at C965. Under these specific provisions, unlike the EUO provisions in the instant case, only the person (the human being) who suffered the bodily injury must attend the EUO and this is why the court in Advanced held that "it is clear under the terms of the insurance policy drafted by State Farm, that neither Advanced nor the treating physician was required to attend an EUO as a condition precedent to filing suit." Id. Contrary to the assertion made by Appellants, we believe that the specific policy provisions led the courts in Marlin and Advanced to hold that despite the assignment of policy benefits, the obligation to attend the EUO remained with the insured. In response to the holdings in Advanced and Marlin, State Farm amended its insurance policies to require that "any person or organization making claim or seeking payment" be examined. Therefore, unlike the assignees in Advanced and

Marlin, the assignees in the instant case are clearly any person or organization that fall squarely within the meaning of the EUO clause provisions.

The dissent contends that because the EUO provision is included in a section of the policy captioned "Reporting A Claim - Insured's Duties," only the insured is required to attend an EUO. We note that is an argument that the Appellants did not assert. In any event, the dissent further contends that, therefore, the assignees must specifically agree to be bound by that duty or take an assignment of the entire policy. We disagree. The plain language of the EUO provision states that "any person or organization making claim or seeking payment" may be required to attend the examination. "An assignment is a transfer of all the interests and rights to the thing assigned." Lauren Kyle Holdings, Inc. v. Heath-Peterson Const. Corp., 864 So. 2d 55, 58 (Fla. 5th DCA 2003); see also Price v. RLI Ins. Co., 914 So. 2d 1010, 1013 (Fla. 5th DCA 2005); Rose v. Teitler, 736 So. 2d 122, 122 (Fla. 4th DCA 1999) ("[I]t is well established that an 'assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned." (quoting Family Bank of Hallandale, 667 So. 2d at 259)). Once assigned, the assignor has no right to enforce the right or interest. Price, 914 So. 2d at 1013-14; Lauren Kyle Holdings, 864 So. 2d at 58. In Continental Casualty Co. v. Ryan Inc. Eastern, 974 So. 2d 368 (Fla. 2008), the court more fully explained these principles of assignment:

> An assignment has been defined as "a transfer or setting over of property, or of some right or interest therein, from one person to another." Black's Law Dictionary 128 (8th ed. 2004) (quoting Alexander M. Burrill, A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors § 1, at 1 (James Avery Webb ed., 6th ed. 1894)). Essentially, it is the "voluntary act of transferring an interest." DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224,

> 227 (Fla. 3d DCA 1966); accord Fla. Power & Light Co. v. Road Rock, Inc., 920 So. 2d 201, 204 (Fla. 4th DCA 2006); 3A Fla. Jur. 2d Assignments § 1 (2007); 6 Am. Jur. 2d Assignments § 1 (2007). Importantly, once transferred, the assignor no longer has a right to enforce the interest because the assignee has obtained all "rights to the thing assigned." Price v. RLI Ins. Co., 914 So. 2d 1010, 1013-14 (Fla. 5th DCA 2005) (quoting Lauren Kyle Holdings, Inc. v. Heath-Peterson Constr. Corp., 864 So. 2d 55, 58 (Fla. 5th DCA 2003)).

Id. at 376. Hence, when the insured assigned to Appellants his rights to the No-Fault benefits and his cause of action to collect those benefits, the insured could no longer be "any person or organization making claim or seeking payment" because all of those rights were transferred to Appellants via the assignment. Once the assignment was made, State Farm could no longer require the insured to attend the EUO—it could only require Appellants, as assignees, to do so. But if, as Appellants contend, State Farm may not require the assignees to attend an EUO, State Farm loses the right it bargained for in the policy to require the person or organization making claim or seeking payment to attend the EUO through the mere expediency of an assignment. This is wrong. We believe that had the courts in Marlin and Advanced reviewed the policy provision we now consider, a different decision would have been rendered.

If we consider all of the pertinent policy provisions in the section of the policy relating to the EUO requirement, we see that those provisions belie the argument that the caption "Reporting A Claim - Insured's Duties" conclusively indicates that the EUO requirement only applies to the named insured as opposed to an assignee of the insured. "A single policy provision should not be considered in isolation . . . ." The Doctors Co. v. Health Mgmt. Assocs., Inc., 943 So. 2d 807, 809 (Fla. 2d DCA 2006), review denied, 956 So. 2d 455 (Fla. 2007). "[I]n construing insurance policies, courts

should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000); see also § 627.419(1), Fla. Stat. (2002) ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy . . . ."). The pertinent section in the policy provides:

REPORTING A CLAIM - INSURED'S DUTIES

. . . .

4. **Other Duties Under No-Fault, Medical Payments, Uninsured Motor Vehicle and Death, Dismemberment and Loss of Sight Coverages**

Questioning Under Oath
Under:

a. Liability Coverage and Property Damage Liability Coverage, each ***insured***;

b. No-Fault Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage any ***person*** or organization making claim or seeking payment; and

c. Physical Damage Coverages, ***you*** or the owner of a covered vehicle, or any other ***person*** or organization making claim or seeking payment;

must, at our option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as we require. Such ***person*** or organization must answer questions under oath, asked by anyone we name, and sign copies of the answers. We may require each ***person*** or organization answering questions under oath to answer the questions with only that ***person's*** or

> organization's legal representative, or representatives and no other ***person*** present.

(Emphasis in original). This part of the insurance policy clearly provides that the "other duties" relate to the EUO requirement and the provisions specify in unambiguous terms that the particular coverage dictates who is required to attend an EUO. Claims made for No-Fault benefits under subsection b, which is the coverage involved in the instant case, allow State Farm the right to require any person or organization making a claim or seeking payment to attend the EUO, while claims made for liability and property damage liability under subsection a allow State Farm the right to require the insured to attend an EUO. Clearly, an assignee is any person or organization making a claim or seeking payment. Hence, according to the clear provisions of the insurance policy, the argument asserted in the dissent must necessarily fail when, as in the instant case, the coverage involved is No-Fault. Even if there were an ambiguity in the provisions of this section between the general caption "Reporting A Claim - Insured's Duties" and the more specific provisions identifying the person or entity whose attendance at an EUO may be required, the specific provisions must govern over the general. Herring v. Horace Mann Ins. Co., 795 So. 2d 209, 212 (Fla. 4th DCA 2001) ("We recognize the clear rule of construction that a specific provision in a policy governs over a general provision."); Hartford Accident & Indem. Co. v. Kellman, 375 So. 2d 26, 30 (Fla. 3d DCA 1979) ("There are numerous Florida cases holding that in a single contract the specific provision will govern over the general provision."), cert. denied, 385 So. 2d 755 (Fla. 1980).

What the dissent is attempting to do is utilize a caption in the policy to create an ambiguity in the EUO clause that otherwise does not exist. However, the courts have

consistently held that a caption in an insurance policy may not be used to create an ambiguity in the policy provisions. Itnor Corp. v. Markel Int'l Ins. Co., 981 So. 2d 661 (Fla. 3d DCA 2008); Winter Garden Ornamental Nursery, Inc. v. Cappleman, 201 So. 2d 479 (Fla. 4th DCA 1967). In Itnor, the insurance policy included an independent contractor exclusion that excluded bodily injury "arising out of operations performed for you by independent contractors." The caption of the clause only referred to "employees of independent contractors." The insurer denied coverage because the injured worker employed by the insured was an independent contractor. The insured and the injured independent contractor claimed that the policy failed to define the term "operations" and that the caption created an ambiguity in the exclusion clause, which required that the clause be construed most strictly against the insured to only apply to employees of an independent contractor. The court held that the clause was unambiguous because it referred to independent contractors and that "neither the caption nor a failure to define a term may be used to create an ambiguity." Id. at 663.

Similarly, in Winter Garden, an insurance policy was issued that contained the following provision:

> PASSENGER HAZARD EXCLUDED
> It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability does not apply to Bodily Injury including death at any time resulting therefrom, sustained by any person while in or upon entering or alighting from the automobile.

Id. at 480. An individual fell while exiting a truck belonging to the insured and a claim was made for damages. The injured individual had been in the truck inspecting merchandise the insured had on display for sale. The insurer denied the claim based on the clause that excluded coverage for injury to any person alighting from the

insured's vehicle. The insured claimed that the clause was ambiguous because the caption, when read with the other provisions, created an ambiguity whether it applied only to passengers and argued that this ambiguity had to be resolved in favor of the insured. The court found that the provisions of the clause were unambiguous because they clearly applied to "any person" and held that the law "does not permit use of a caption to create ambiguity where none exists." Id. at 480. Like the provisions in both Itnor and Winter Garden, the EUO provisions in the insurance contract in the instant case are unambiguous, and the attempt by the dissent to use the caption to create an ambiguity is unavailing. We must apply the guiding principle adopted by the Florida courts that "insurance contracts are construed according to their plain meaning," Taurus Holdings, Inc. v. United States Fidelity & Guaranty Co., 913 So. 2d 528, 532 (Fla. 2005), and have done so.

Moreover, we do not think that a condition precedent is the sort of defense or condition that the courts require an assignee to specifically agree to or that requires an assignment of the entire policy. In Shreve, for example, the assignee only took an assignment of the assignor's interest in the purchase price due under a contract, yet the court specifically held that the assignee was required to show that "all conditions have been performed [under the contract] either by himself or the assignor." Shreve, 421 So. 2d at 724. In Eno, the assignee only took an assignment of the money due or to become due under a contract, and yet the Florida Supreme Court held that the assignee took the assignment subject to the same equities, conditions, and defenses as the assignor. Eno, 128 So. at 626. In neither case did the assignee accept an assignment

of the entire contract or specifically agree to be bound by the conditions of the contract or defenses that may be asserted against the assignor.

The cases cited by Appellants and in the dissent do not stand for the proposition that the assignee of No-Fault benefits must specifically agree to be bound by conditions precedent in the policy. In De La Rosa v. Tropical Sandwiches, Inc., 298 So. 2d 471 (Fla. 3d DCA 1974), cert. denied, 312 So. 2d 760 (Fla. 1975), there was no assignment of anything. That case involved a sale of stock and assets of a corporation. The initial sale of stock was secured by a promissory note executed by the buyer. The buyer subsequently sold the stock to another buyer, who assumed the obligation under the note. That buyer subsequently sold the stock to yet another buyer, who did not assume the obligations under the promissory note. The Third District Court simply held that the last buyer could not be held liable under the note because it did not assume the liability under the note. Not only did this case not involve an assignment of a policy and cause of action, but also the assumption of liability at issue in De La Rosa is far different from compliance with a condition precedent to suit.

The decision in Sans Souci v. Division of Florida Land Sales & Condominiums, 448 So. 2d 1116 (Fla. 1st DCA 1984), also cited by Appellants, concerned the issue whether a novation, which requires the existence of a previously valid contract; the agreement of all the parties to a new contract; the extinguishment of the original contractual obligation; and the validity of the new contract, had occurred. Novation is not an issue in the instant case.

The other decision cited by Appellants, Dependable Insurance Co. v. Landers, 421 So. 2d 175 (Fla. 5th DCA 1982), involved an assignment of a retail installment

contract. The assignor/bank repossessed the car without proper notice to the debtor and sold it prior to its assignment of the contract. A statute in effect provided that a debtor may recover damages against the secured party if the property is improperly repossessed without proper notice. The issue was whether the assignee was liable for the damages caused by the wrongful repossession by the bank prior to the assignment. This court held that the assignee did not expressly assume that liability when it took the assignment. In so holding, this court relied on the general rule that "unless the assignee assumes the assignor's duties or liabilities, it is not liable to the debtor affirmatively, that is, beyond the point of defeating its claim. Failure to give notice in this case would be a 'shield' and not a 'sword' as regards [the assignee]." Id. at 179 (citations omitted). Here, there is no affirmative liability that Appellants were required to expressly assume through the assignment beyond the point of defeating the claim. But like the assignee in Landers, Appellants here are subject to the defenses that may be asserted by the other party to the contract to defeat the claim.

Finally, we reject the assertion that section 627.736(6), Florida Statutes (2003), provides the exclusive means for a No-Fault insurer to obtain pre-suit discovery from a medical care provider. There is nothing in the provisions of that statute that suggests insurers are prohibited from conducting an EUO of a medical provider that is authorized by the policy, and there is nothing in the statute that provides that the statute is the sole and exclusive means by which a No-Fault insurer may obtain the pre-suit information requested in an EUO. As the courts have explained:

> The law is settled that an insurance policy provision requiring an insured to submit to an examination under oath is lawful and binding. See, e.g., Goldman v. State Farm Fire Gen'l Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995)

> (upholding summary judgment for insurer based on insured's failure to appear for examination under oath prior to filing suit); Stringer v. Fireman's Fund Ins. Co., 622 So. 2d 145 (Fla. 3d DCA 1993) (affirming judgment for insurer: the "failure to submit to an examination under oath is a material breach of the policy which will relieve the insurer of its liability to pay," quoting treatise); Pervis v. State Farm Fire & Cas. Co., 901 F. 2d 944 (11th Cir. 1990) (upholding judgment for insurer based on insured's failure to appear for examination under oath in case arising under Georgia law); see also De Ferrari v. Gov't Employees Ins. Co., 613 So. 2d 101 (Fla. 3d DCA 1993) (affirming summary judgment for insurer based on insured's failure to appear for medical examination as required by policy). As one leading treatise has put it:
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> > A provision in a policy requiring the insured to submit to examination under oath regarding the loss is reasonable and valid, and if breached, the insurer would be deprived of a valuable right for which it had contracted.
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> 5A John A. Appleman & Jean Appleman, Insurance Law & Practice § 3549 at 549-50 (1970).

Laine v. Allstate Ins. Co., 355 F. Supp. 2d 1303 (N.D. Fla. 2005).

We conclude that the policy clearly and unambiguously requires that any person or organization making claim or seeking payment for No-Fault benefits comply with the EUO provisions if requested by the insurer. Those provisions are a condition precedent to making claim or seeking payment. Appellants are persons or organizations making claim or seeking payment, and thus State Farm was within its rights under the policy to require Appellants to attend an EUO. Appellants, as assignees of the No-Fault benefits and cause of action under the policy, were not required to specifically assume this condition in order to be bound by it. Accordingly, the judgment rendered by the trial court is affirmed.

We certify to the Florida Supreme Court the following question of great public importance:

> WHETHER THE EUO PROVISION IN STATE FARM'S POLICIES IS A CONDITION PRECEDENT THAT MUST BE COMPLIED WITH WHEN A MEDICAL CARE PROVIDER TAKES AN ASSIGNMENT OF NO-FAULT BENEFITS AND CAUSE OF ACTION FROM THE INSURED WITHOUT SPECIFICALLY AGREEING TO BE BOUND BY THAT CONDITION?

JUDGMENT AFFIRMED; QUESTION CERTIFIED.

PALMER, J., concurs.
GRIFFIN, J., dissents, with opinion.

The majority is wrong for two reasons. First, under the law of assignments, State Farm, as obligor, does not have the power to create conditions with which an assignee of the obligee's right to payment must comply. Second, even if such were possible, the language of the policy does not accomplish what State Farm claims.

My principal view of this case is based on my understanding of the law of assignments. If my understanding is wrong, then perhaps my conclusion is wrong, but to borrow from Gertrude Stein, "If not, not."

Starting with the basics, I do not think the following general principles can reasonably be disputed: A contract right is assignable unless the contracting parties have agreed otherwise. The extent of an assignment is defined by its terms. The assignment of a contract right does not entail the delegation of any duty unless the assignee assents to assume the duty. An assignee is subject to all equities and defenses that could have been asserted by the obligor against his assignor. A third party is not liable to performance under a contract unless he was a party to the agreement or has become a party by subsequent agreement. The assignment of a contract right does not give to the obligor a right of action against the assignee for breach of the contract unless he has expressly agreed to be bound by the contract. In other words, the assignee of a contract right owes no duty of performance to the obligor.[3]

[3] *Sans Souci v. Div. of Fla. Land Sales & Condos*, 448 So. 2d 116 (Fla. 1st DCA 1984); *Dependable Ins. Co. v. Landers*, 421 So. 2d 175 (Fla. 5th DCA 1982); *De La Rosa v. Tropical Sandwiches, Inc.,* 298 So. 2d 471 (Fla. 3d DCA 1974);.

What that means in the context of this case is that Shaw, as the assignee of the right of the insured to payment under the insurance contract had, no duty to perform any covenant under the insurance contract because he never agreed to do so. An obligor cannot unilaterally attach conditions to the obligee's right of assignment and cannot bind the assignee to any performance under the contract unless the assignee has agreed.

The assignments in this case are straightforward transfers of the right to receive payment:

> I hereby authorize and direct you, my insurance company and/or my attorney, to pay directly to DAVID G. SHAW, DC PA d/b/a CENTRAL FLORIDA CHIROPRACTIC CENTER ("Assignee"), *such sums as may be due and owing Assignee* for the services rendered to me, both by reason of accident or illness, and by reason of any other bills that are due Assignee, and to withhold such sums from any disability benefits, medical payment benefits, No-Fault benefits, or any other insurance benefits obligated to reimburse me or from any settlement, judgment or verdict on my behalf as may be necessary to adequately protect said Assignee. In the event that I do not have insurance coverage, I understand that I remain personally responsible for payment of services rendered. I hereby further give an irrevocable lien to said assignee against any and all insurance benefits named herein and any and all proceeds of any settlement, judgment or verdict which may be paid to me as a result of the injuries or illness for which I have been treated by the Assignee. This is to act as an assignment of my rights and benefits to the extent of the Assignee's services provided.

(Emphasis added.) There is simply no good faith argument to be made that Shaw undertook any duty of performance under the State Farm policy. In exchange for services provided, Shaw took the right to be paid "such sums as may be due and owing" under its client's insurance policy for the services Shaw rendered. The majority seems to be suggesting that because an assignee "steps into the shoes of the assignor

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and takes the assignment subject to all defenses of the obligor" that the assignee assumes the obligations of the assignor, but that simply misapplies the rule. The rule means that the right of the assignee under the contract is no better than its assignor's rights. If the assignor is entitled to be paid, the assignee is entitled to be paid, but if the assignor is not entitled to be paid because of some failure of performance on the part of the assignor, then the assignee is not entitled to be paid either. "Standing in the shoes" means being subject to the same defenses, not assuming the same duties. By accepting an assignment of a right to be paid, the assignee does not obligate himself to perform any covenant under the contract. The assignee is a stranger to the underlying contract and will not be bound to *any* duty under the contract unless he agrees to assume it.

The ability to assign contractual rights is an important commercial mechanism to facilitate transactions and to secure the payment of obligations, but this device would be completely thwarted if the obligor could impose conditions on the exercise of rights acquired through assignment. There is a reason why there is a vast body of case law on whether a particular right is or is not assignable but no law on assignments that are purportedly conditioned on performance of some contractual duty by the assignee.

Here the insured has agreed that whatever monies he is entitled to receive on account of the care he has been given, is payable to Shaw. If no monies are due and owing because of the failure of the insured to perform some covenant under the policy, including the examination under oath, then Shaw has no claim against State Farm, precisely because it is subject to State Farm's defenses against the insured. But State Farm may not include in the insurance contract any requirement of performance on the

part of the assignee that conditions the right to payment. To the extent State Farm's policy may have such a provision, it is simply unenforceable. It does not matter whether it is the requirement to submit to examination under oath, to pay a fee, to accept a discount or anything else. The assignee did not undertake any duty of performance, and State Farm cannot unilaterally impose an obligation on the assignee by putting it in the policy. Unless the assignee agrees to assume a duty under the contract, he simply does not have the duty. Contrary to the majority's reading of *Marlin*, this is exactly the holding of that case. The *Marlin* court quickly dispatched State Farm's argument that the assignment of payment by the insured to the healthcare provider transferred not only her right to payment, but her duty to submit to an examination under oath: "The obligation to attend an EUO does not shift to the provider merely because the insured assigned her benefits." 897 So. 2d at 470.

The majority also seems to find it significant that the examination under oath is a condition precedent to the right of payment. I do not quarrel with the notion that submitting to an EUO, if demanded, is a duty of performance that is a condition precedent to recovery under the policy. The issue is *whose* duty. Shaw has agreed to accept from Mr. St. Louis an assignment of "such sums as may be due and owing." Until the sums are "due and owing," Shaw has no right to claim them from State Farm. By the same token, however, once the insured has performed its obligations under the policy, the sums are "due and owing" and there are no more conditions to fulfill -- by anybody. By definition, the conditions to payment have already been met. As the policy expressly recognizes by classifying the duty to submit to an EUO as an "insured's dut[y]," the duty can *only* belong to the insured. The duty was never delegated by the

insured and Shaw never agreed to assume it. State Farm's attempt to impose it on the assignee is a nullity.

Even if it were possible for State Farm to require all providers of healthcare services to their insured to submit to an EUO by including such a requirement in the policy, contrary to State Farm's argument that the policy expressly grants the right to take an EUO, analysis of the exact policy language also requires rejection of their position. When the language of an insurance policy is clear and unambiguous, it must be accorded its natural meaning. *Saha v. Aetna Cas. & Sur. Co.,* 427 So. 2d 316, 317 (Fla. 5th DCA 1983). An insurance policy should receive a reasonable, practical and sensible interpretation, and ambiguities should be resolved against the insurer. *Id.*

The relevant provision of the policy is contained in the section entitled: **REPORTING A CLAIM – INSURED'S DUTIES.** This section was amended by endorsement to provide:

> **4. Other duties under No-Fault, Medical Payment, Uninsured Motor Vehicle and Death Dismemberment and Loss of Sight Coverages**
>
> **. . . .**
>
> **c. Questioning Under oath**
>
> b. No Fault Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage any **person** *or organization* making claim or seeking payment;
>
> must, at our option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as we require. Such **person** *or organization* must answer questions under oath, asked by anyone we name, and sign copies of answers. We may require each **person**

> *or organization* answering questions under oath to answer the questions with only that **person's** *or organization's* legal representative, or representatives and no other **person** present.

(Emphasis supplied with italics).

It is true that the new policy language states that "any person or organization making a claim or seeking payment" must submit to an EUO. Notably, however, the section of the policy at issue is entitled "INSURED'S DUTIES." The assignee healthcare providers are indisputably not "insureds." At oral argument, State Farm's only answer to this fact was to assert that headings are meaningless and should be ignored.[4] This is nonsense; all parts of an insurance policy, including the titles of the various sections of insurance policies, are crucial to their interpretation. *See Brown v. Travelers Ins. Co.,* 649 So. 2d 912, 914-15 (Fla. 4th DCA 1995). The majority cites to two Florida cases for the proposition that a caption in a policy cannot be used to create an ambiguity where the policy language is clear; however, that same rule recognizes that captions can be used to explain ambiguity and to clarify meaning. *Winter Garden Ornamental Nursery, Inc. v. Cappleman*, 201 So. 2d 479, 480 (Fla. 4th DCA 1967).

Here the provision purports to require any "person or organization making claim or seeking payment" to submit to an EUO. Putting aside the question whether the insurer has the power to require EUO's of all assignees of the insured's rights to payment under the policy, the smaller question is whether it has effectively done so. Considering the policy language alone, I say it has not. State Farm claims that its

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[4] *But see Miller Elect. Co. v. Employers' Liability Assur. Corp.,* 171 So. 2d 40 (Fla. 1st DCA 1965).

purpose in adding this language was to create the right to take EUO's from assignee healthcare providers. Interestingly, however, there is no reference in this section of the policy either to assignees or to healthcare providers. If that is what State Farm meant, it easily could have said so. Other parts of the policy deal expressly with assignments,[5] and the policy section dealing with "disputes" specifically addresses assignee healthcare providers of no-fault coverage under the policy. Instead, State Farm chose a different -- and if "assignee" is what they intended -- an oddly oblique term: "person or organization making claim or seeking payment." Does this phrase include assignees? Suppose that, instead of Shaw, Mr. St. Louis had borrowed the money for his chiropractic care from his Aunt Mary and she had taken the same basic assignment of the right to be paid "such sums as may be due and owing" to her nephew under the State Farm policy? In asserting her rights under the assignment to receive the monies due her nephew, would she be a "person making claim or seeking payment" who is obliged to submit to State Farm's various "investigative hurdles"? The answer to at least part of this question is plainly "no." One thing we can tell from the policy is that she could not be a "person making claim," no matter how many claim forms she submits or how forcefully she "claims" the right to be paid. This is because under the very amendatory endorsement at issue in this case, "any person making claim" under the no-fault coverage has to submit to examination by physicians "chosen and paid by [State Farm] . . . . " It would be absurd that the assignees of a right to payment under the policy could be made to submit to physical examinations, but if "person making claim" includes assignees, that would be the clear meaning of this provision. This absurd

[5] *See* Section 9, entitled "Conditions," subparagraph d., of the Amendatory Endorsements.

result is avoided by reference to the title of this section of the policy: "INSURED'S DUTIES." Reading the policy as a whole makes clear that the "person or organization making claim . . ." means the injured insured, not the assignee of the right to payment under the policy. Although there is no parallel provision in the policy that so clearly illustrates the incongruity of State Farm's interpretation for the second part of the phrase: "person or organization making claim or seeking payment," it seems clear from examination of the policy as a whole that the EUO is one of the "insured's duties," not the duty of the assignee or anybody else. The title of this section of the policy -- "Insureds Duties" -- helps resolve any ambiguity, not create one. Assignees of the right to payment have no duties, only rights to payment once the insured has met all conditions precedent. State Farm must pay up if its insured complies with its duties, including the duty to submit to an IME and EUO, if requested.

In *Marlin*, the Third District reviewed a judgment of dismissal based on the lower court's determination that State Farm had the right to require a PIP medical provider to submit to an EUO when that provider had accepted from State Farm's insured an assignment of benefits. The policy in *Marlin* provided that "a person who suffers a bodily injury and makes a claim under the policy shall 'answer questions under oath' . . . ." 897 So. 2d at 469. The trial court determined that State Farm had the right to require the appellant to submit to an EUO after accepting the assignment of the insured's benefits.

The *Marlin* court reversed, holding that when an insured assigns his benefits to a healthcare provider, the obligation to attend an EUO remains with the insured. The obligation to attend an EUO does not shift to the healthcare provider merely because

the insured made an assignment of policy benefits payable to cover the provider's bill. *Id.* The *Marlin* court noted that the Legislature had expressly dealt with the insurer's need for information by requiring healthcare providers who make claims for personal injury benefits, when requested by the insurance company, to provide a written report of the history, condition, treatment, dates and costs of treatment of the injured person and why the items identified by the insured person were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the injury sustained. *Id.*; *see also* § 627.736(6)(b), Fla. Stat. (2001). The court pointed out that the statute also gives the insurer permission to petition the court to engage in discovery.

Prior to *Marlin*, in *Advanced Diagnostics Testing, Inc. v. State Farm Insurance Co.,* 11 Fla. L. Weekly Supp. C964 (Fla. 11th Cir. Ct. Aug. 17, 2004), the circuit court, sitting in its appellate capacity, had similarly determined that medical providers are not required to attend EUO's. The facts in *Advanced Diagnostics* are similar to *Marlin* and this case. One of State Farm's insureds had received medical treatment from the appellant. The insured assigned his benefits to the appellant, a medical provider treating the insured after an automobile accident. The county court dismissed the appellant's claim because the assignee provider would not submit to an EUO.

In its opinion, the circuit court discussed the fact that the insured did not assign his insurance policy to the appellant, only the right to certain proceeds from his insurance policy. *Advanced Diagnostics*, 11 Fla. L. Weekly Supp. at 965. Such an assignment did not transfer the insured's obligation to attend an EUO to the healthcare provider. When an insured assigns PIP benefits to one or more healthcare providers,

the obligation to attend an EUO remains with the insured. The court noted that State Farm would have had a valid defense against the insured if the insured had not attended a requested EUO, but it would not be a defense against the insured that the healthcare provider did not attend an EUO. *Id.* The court pointed out that, under State Farm's policy, a claimant is required under the policy not only to submit to examination under oath, but also to undergo an independent medical examination, and it would be absurd to consider that the provider would have to submit to such examination. *Id.* at 965-66.

The *Advanced Diagnostics* court made an additional point, however, that has become the red herring of this appeal. It observed that neither party had brought to the attention of the court the provision of the policy defining a "person" as a "human being." The appellate court cautioned in a footnote that, in light of that definition, State Farm and its attorneys could face sanctions if they continued to make the argument that a corporate healthcare provider is a "person" "making a claim" required to attend an EUO, while its policy explicitly limited the term "person" to human beings. *Id.* at 966 n.3.

By focusing on the part of the *Advanced Diagnostics* decision in which the court chides the parties for failing to point out that the term "person" was limited by policy definition to mean "human being," State Farm has set up a straw man which it proceeds to knock down with its amendatory endorsement. In other words, having (erroneously) defined the reason it is not entitled to an EUO from the medical provider as being the limited definition of "person" in their policy, it purports to solve its problem by adding the word "organization." However, the reason it cannot require an EUO from the medical providers, as *Marlin* and *Advanced Diagnostics* make clear, is that Shaw merely agreed

to accept an assignment of the monies due the insured under the policy; Shaw did not become the "insured" and Shaw did not undertake any duties under the policy.

Appellants also contend that State Farm's position not only disregards the policy reasoning of *Marlin* and *Advanced Diagnostics*, but further attempts to impermissibly alter the PIP statutory scheme, which is comprehensive. Section 627.736(5), Florida Statutes (2007), contemplates that simply by countersigning a bill, the insured can authorize the insurer to pay the provider directly and closely regulates the details of the obligation. Section 627.736(6)(b), Florida Statutes (2007), provides an elaborate mechanism for insurers to obtain information from healthcare providers concerning their treatment and expenses:

> Every physician, hospital, clinic, or other medical institution providing, before or after bodily injury upon which a claim for personal injury protection insurance benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested to do so by the insurer against whom the claim has been made, furnish forthwith a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the terms identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce forthwith, and permit the inspection and copying of, his or her or its records regarding such history, condition, treatment, dates, and costs of treatment; provided that this shall not limit the introduction of evidence at trial.

This statute gives State Farm the ability to seek information related to alleged insurance fraud. Moreover, an insurance company has a statutory right to petition the court to

engage in discovery with those medical providers. Subsection (c) of that same statute states:

> In the event of any dispute regarding an insurer's right to discovery of facts under this section, the insurer may petition a court of competent jurisdiction to enter an order permitting such discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and it shall specify the time, place, manner, conditions, and scope of the discovery. Such court may, in order to protect against annoyance, embarrassment, or oppression, as justice requires, enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

The fact of the existence of these procedures means that the contractual remedy State Farm claims both duplicates and creates a more onerous burden on medical providers. State Farm has the statutory ability to gain information in cases, such as the present one, even to investigate suspected PIP fraud, without relying on the EUO language in the insurance policy. Thus, its public policy argument fails.

State Farm protests that it would never use a contractual power to take EUO's irresponsibly; that even though it claims the contractual right to require multiple EUO's conducted by whomever it chooses, as often as it chooses, it would only use it against suspected bad actors, never legitimate providers. The Legislature has, however, established a scheme that attempts to strike a proper balance, under court supervision, between the insurers' need for information and the burden on providers. State Farm's attempt to claim an unfettered contractual right must fail.

Finally, it is unclear to me on what subject State Farm will be able to inquire in the majority's scheme of things. *Assuming* Shaw's right to payment under the

assignment is the "making of a claim" for purposes of the EUO provision, exactly what will State Farm be entitled to inquire about? Given that Shaw has a right to receive that which is already due and owing to the insured, there should be no occasion for any questions about the treatment. I suppose it could ask about the validity of the assignment . . . ? Given that Shaw has taken an assignment of money already due and payable, inquiry into anything other than the assignment would be an abuse of the procedure. Once the assignment has been verified, the only question State Farm has any business asking of an assignee like Shaw is, "Where do I send the check?"