STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0119

Isles Wellness, Inc., n/k/a Minneapolis Wellness, Inc., et al.,
Respondents,

vs.

Progressive Insurance Co., a Delaware corporation doing
business in the State of Minnesota, et al.,
Appellants.

Filed September 15, 2009
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-03-005396

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellants challenge the district court's grant of partial summary judgment in favor of respondents. Because we conclude that the district court only has subject-matter

jurisdiction over legal issues and improperly exercised jurisdiction over the individual no-fault medical-expense claims, we reverse in part and remand. But because we conclude that appellants waived their objections to the existence of respondents' claimed assignments, and the assignments are valid, we affirm in part.

FACTS

Respondents Minneapolis Wellness, Inc., f/k/a Isles Wellness, Inc.; A Licensed Physical Therapy, Inc., f/k/a MN Licensed Physical Therapists, Inc.; and Twin Cities Licensed Massage Therapy, Inc., f/k/a Licensed Massage Therapists, Inc. ("the clinics") provided treatment to patients (the insureds) who had automobile insurance coverage with appellants Progressive Insurance Company and Allstate Indemnity Company ("the insurers"). In early 2003, the clinics sued the insurers on behalf of the insureds in five lawsuits, each alleging breach of contract and violation of the Minnesota Fair Claims Practices Act, Minn. Stat. § 72A.201, subd. 4(11) (2002).[1]

In December 2003, the parties executed a stipulation seeking to consolidate the five cases. The district court did not address the stipulation; instead, it granted the insurers' motions for summary judgment on the grounds that the clinics had violated Minnesota's corporate practice of medicine doctrine (CPMD). The CPMD was the focus of the parties' first appeal. Ultimately, the supreme court held that the prohibition against the corporate practice of medicine does not apply to massage therapy or physical therapy, but does apply to chiropractic care. *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703

[1] The dispute involves 49 insureds who received chiropractic care, massage therapy, and physical therapy from the clinics.

N.W.2d 513, 524 (Minn. 2005) (*Isles Wellness I*). The supreme court remanded the matter to this court to determine "whether the insurers are required to pay outstanding amounts billed for services provided by the clinics." *Id.* On review of this court's remand decision, the supreme court held that the CPMD violation does not automatically void the underlying contracts between the insureds and the clinics. The supreme court remanded the case to the district court to resolve the remaining issues. *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 95 (Minn. 2006) (*Isles Wellness II*).

On remand, the parties filed cross-motions for summary judgment. The district court granted the clinics' motion on the ground that there were no facts demonstrating a knowing and intentional CPMD violation so as to void the contracts. The district court rejected the insurers' argument that the underlying no-fault claims were subject to mandatory arbitration and concluded that the care provided by the clinics to the insureds was reasonable and necessary. The district court denied the clinics' motion for summary judgment regarding other damages caused by the insurers. And the district court granted the insurers' motion to dismiss the claims under the Minnesota Fair Claims Practices Act on the basis that the Act does not provide for a private cause of action. But the district court denied the insurers' motion for dismissal based on the lack of subject-matter jurisdiction and standing. This appeal, limited to jurisdictional issues, follows.

D E C I S I O N

On appeal from summary judgment, this court views the evidence in the light most favorable to the party against whom summary judgment was granted and reviews de novo whether there are any genuine issues of material fact and whether the district court erred

in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002).

I. The district court properly decided the legal issues concerning the clinics' entitlement to assert the insureds' claims, but the underlying no-fault claims must be decided in arbitration.

The insurers argue that the district court erred by exercising jurisdiction over the factual disputes, which belong in arbitration. No-fault arbitrators decide questions of fact, "leaving the interpretation of the law to the courts." *Weaver v. State Farm Ins. Cos.*, 609 N.W.2d 878, 882 (Minn. 2000). The existence of subject-matter jurisdiction is a legal question, which we review de novo. *Olson v. Am. Family Mut. Ins. Co.*, 636 N.W.2d 598, 601 (Minn. App. 2001).

The Minnesota No-Fault Automobile Insurance Act mandates the submission to binding arbitration of all cases where the claim "is in an amount of $10,000 or less." Minn. Stat. § 65B.525, subd. 1 (2008). "The statute thereby deprives district courts of subject matter jurisdiction over a certain type of dispute—claims for comprehensive benefits of $10,000 or less." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 800 (Minn. 2004). And the right to demand arbitration under the no-fault act may not be waived. *Id.*

Here, it is undisputed that each of the individual no-fault claims the clinics assert totals less than $10,000. But the clinics argue that arbitration is not mandated based on waiver, the statute of limitations, judicial estoppel, and the absence of any factual dispute. These arguments are unavailing.

A. Waiver

"Waiver is the voluntary and intentional relinquishment of a known right," and to establish waiver there must be evidence that the possessor of the right knew of the right and intended to waive it. *Ill. Farmers*, 683 N.W.2d at 798. As stated above, arbitration of no-fault claims in the amount of $10,000 or less is not a right that can be waived. *Id.* at 800. And even if it could be waived, the factual basis the clinics rely on does not support a finding of waiver. The 2003 stipulation between the parties makes no mention of arbitration; it only proposed consolidation of the five cases. The district court did not approve the stipulation at that time and, in fact, the court did not order consolidation until after the supreme court issued its decision in *Isles Wellness II*. On this record, we conclude that the insurers could not and did not waive mandatory arbitration of the underlying no-fault claims.

B. Statute of limitations

The clinics argue that because more than six years have passed since the insureds' no-fault claims arose, the limitations period has run and they will not be able to arbitrate the claims. *See Entzion v. Ill. Farmers Ins. Co.*, 675 N.W.2d 925, 929 (Minn. App. 2004) (six-year statute of limitations applies to no-fault claims). We disagree. Here, the initial claims were timely made. And the limitations period applies to commencement of the action, not to the date the claims are referred to arbitration. Because the clinics timely asserted the claims, arbitration under the no-fault act remains available.

C. Judicial estoppel

The clinics urge us to recognize and apply the doctrine of judicial estoppel, arguing that the insurers have assumed inconsistent positions regarding whether this case should be resolved in the courts or in arbitration. But as the clinics acknowledge, judicial estoppel has not been adopted in Minnesota. *See Ill. Farmers*, 683 N.W.2d at 800–01. And it is not the role of this court to extend the existing law. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

Moreover, this case does not present appropriate circumstances to apply judicial estoppel. Contrary to the clinics' assertions, the insurers have not been inconsistent with respect to how the underlying no-fault claims must be determined. They have appropriately sought to resolve legal issues in the courts before obtaining a determination of the fact issues in arbitration. *See Johnson v. Am. Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988) (holding that "in the area of automobile reparation, arbitrators are limited to deciding issues of fact, leaving the interpretation of the law to the courts"). Judicial estoppel does not preclude resolution of the underlying no-fault claims in arbitration.

D. Absence of factual dispute

Finally, the clinics argue that there would be nothing for the arbitrators to decide, because all fact issues have already been resolved. Specifically, the clinics assert that the district court has fully determined the primary fact issues—whether the care provided to the insureds was necessary and the associated costs were reasonable. But because the

district court lacks jurisdiction to resolve these issues, the clinics' argument fails. *See Ill. Farmers*, 683 N.W.2d at 800.

Because arbitration of the underlying no-fault claims is mandatory, the district court erred in deciding the merits of these claims. We therefore reverse and remand to the district court for an order directing the parties to arbitrate the underlying no-fault claims in accordance with the Minnesota No-Fault Arbitration Rules.

II. The clinics have standing to pursue the insureds' no-fault medical-expense claims in arbitration.

Framing the issue as one of standing, the insurers argue that the clinics cannot assert the insureds' claims based on the terms of the insurance contracts and the no-fault rules. We address each argument in turn.

A. The insurance contracts

The insurers argue that the clinics lack standing because they are not parties to the insurance contracts, are not third-party beneficiaries, and cannot stand in the shoes of the insureds because the policies prohibit assignments.

We first consider an argument the insurers did not present until their reply brief—that there is no evidence that the clinics actually obtained assignments from the insureds. We generally do not consider arguments presented only in a reply brief, *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990), but we choose to do so here. We have previously held that an insurance company may waive its right to object to an assignment by failing to assert a timely objection. *In re Estate of Sangren*, 504 N.W.2d 786, 790 (Minn. App. 1993) (holding insurer that waited four

months waived its right to contest assignment through its "failure to assert an objection at the time of the assignment"), *review denied* (Minn. Oct. 28, 1993). Here, the insurers did not challenge the existence of the assignments until the litigation had been pending for five years, including multiple appellate proceedings. On this record, we conclude that the insurers waived their right to object to the existence of the assignments.

We next address the validity of the assignments. The Progressive Insurance Company policy states: "This policy may not be transferred to another person without **our** written consent." The Allstate Indemnity Company policy states: "This policy can't be transferred to another person without our written consent." Each of the five complaints alleges that the clinics have obtained assignments of the insureds' "rights" to obtain no-fault benefits.

Minnesota law distinguishes between insurance provisions that prohibit the assignment of an insured's "rights and duties" or "interest" in the policy, from those that prohibit assignment of the "policy" itself. Anti-assignment provisions that bar assignment of the policy, such as those in the insurers' policies, do not prohibit the insured from assigning her rights to the proceeds of a claim. *Reitzner v. State Farm Fire & Cas. Co.*, 510 N.W.2d 20, 26 (Minn. App. 1993); *see also Windey v. N. Star Farmers Mut. Ins. Co.*, 231 Minn. 279, 283, 43 N.W.2d 99, 102 (1950) ("Assignment, after loss, of the proceeds of insurance does not constitute an assignment of the policy, but only of a claim or right of action on the policy."); *cf. Star Windshield Repair, Inc. v. W. Nat'l Ins. Co.*, 768 N.W.2d 346, 350 n.6 (Minn. 2009) (observing that majority rule limits the validity of anti-assignment clauses to pre-loss assignments).

Because the insurance contracts here only prohibit assignment of the policies themselves—not the insureds' rights to receive benefits under the policies—the insureds are not prohibited from assigning their rights to obtain no-fault benefits. The assignments the clinics obtained are valid and permit the clinics to pursue the no-fault claims against the insurers.[2]

B. The no-fault rules

The insurers also argue that the no-fault rules do not permit the clinics to pursue claims on behalf of the insureds because the clinics are not "claimants." The rules do not define the term "claimant," so the insurers rely on a policy statement of the Minnesota No-Fault Standing Committee, which states: "For purposes of the administration of the Minnesota No-Fault Arbitration Rules, the word Claimant shall mean an insured under a policy of no-fault automobile insurance. Claims for economic loss benefits can be made only by the insured." The standing committee developed this policy after it heard "a presentation in support of allowing health care providers with assignments to bring no-fault claims on their own behalf."

In construing procedural rules, we first look to the plain language of the rule and its purpose. *Rubey v. Vannett*, 714 N.W.2d 417, 421 (Minn. 2006). We are not bound by the comments of an advisory committee. *Vandenheuvel v. Wagner*, 690 N.W.2d 753, 756 (Minn. 2005).

[2] Because we hold that the clinics obtained valid assignments of the insureds' no-fault claims, we decline to address the insurers' third-party beneficiary argument.

A claimant is generally understood as a person "who asserts a right or demand." *Black's Law Dictionary* 282 (9th ed. 2009); *see also The American Heritage Dictionary of the English Language* 341 (4th ed. 2006) (defining claimant as a "party that makes a claim"). The clinics here assert the insureds' rights to no-fault benefits pursuant to valid assignments. Under the plain language of the rule, a party with an assignment from the insured can be a claimant. And while the standing committee has sought to restrict the scope of the term, it did not expressly prohibit assignments or the maintenance of a claim after an assignment. The standing committee said a claim must be *made* by the insured; here, the insureds initially submitted claims to the insurers but later assigned their rights to the clinics when the insurers failed to pay the bills. Finally, the standing committee did not adopt this policy statement until October 2004, more than a year after this litigation was commenced. It would defeat the purpose of the no-fault rules—which is "to promote the orderly and efficient administration of justice," Minn. R. No-Fault Arb. 1(a)—to now require the insureds and clinics to assign the rights back to the insureds in order to pursue the claims.

We therefore affirm the district court's conclusion that the clinics, acting as assignees, may properly assert the no-fault claims against the insurers.

Affirmed in part, reversed in part, and remanded.