

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

**VINCENT PREZIOSI, D.C., a/a/o
DENNIS ANDERSON,**

Appellant,

CASE NO.: 2006-CA-000277-O
WRIT NO.: 06-03.

v.

**PROGRESSIVE EXPRESS
INSURANCE COMPANY,**

Appellee.

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

Mark A. Cornelius, Esquire,
for Appellant.

Douglas H. Stein, Esquire
for Appellee.

Before G. ADAMS, STRICKLAND and DAWSON, JJ.

PER CURIAM.

**ORDER AFFIRMING FINAL JUDGMENT AND DENYING APPELLANT'S
MOTION FOR COUNSEL FEES**

I. INTRODUCTION

This is a PIP case.¹ The plaintiff below, Vincent Preziosi, (Preziosi or “appellant), a

¹ PIP is an acronym for “personal injury protection. With limited exception, “each motor

chiropractor, filed two actions for payment of PIP benefits. These cases were consolidated and the County Court granted summary judgment to the defendant below, Progressive Express Insurance Company (Progressive or “appellee) as to all claims. The trial court also assessed counsel fees against Preziosi who now appeals the fee award. This Court has jurisdiction over this appeal pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

I. FACTS

Dennis Anderson (Anderson) sustained injuries in an automobile accident. He received treatment at C.V. Chiropractic (C.V.) and at Preziosi West/East Chiropractic Clinic, P.A. (West/East)² C.V. is a registered fictitious name owned by Preziosi. West/East was at all times relevant “a registered corporation” of which Preziosi was the sole owner. (Order Granting defendant’s Mot. Entitlement 10; R. 448.) On May 2, 2002, Anderson executed an assignment of “all rights, title and interest in any PIP benefits to Vincent Preziosi, D.C / C.V. Chiropractic. (Attach. to Compl. in SC-02-10440-O.)

On September 18, 2002, Preziosi filed suit (the C.V. suit), in his own name, as assignee of Anderson, claiming that Progressive had not paid \$576.82 in PIP benefits in connection with

vehicle owner or registrant required to be licensed in Florida is required to carry a minimum amount of personal injury protection, or PIP insurance, for the benefit of the owner and other designees. *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005). This coverage includes benefits for accident-related medical expenses, disability (lost wages) and death. § 627.736(1)(a),(b),(c), Fla. Stat. (2005).

² The West/East Clinic is referred to simply as the West Clinic on the insurance carrier’s Explanations of Benefits (EOBs).

services rendered to Anderson at C.V.³ The Assignment was attached to the complaint.

On September 21, 2002, Preziosi filed another suit ("the West/East suit), again in his own name and as assignee of Anderson, seeking to recover PIP benefits from Progressive for services performed at West/East.⁴ The same Assignment was appended to the complaint in the West/East suit.

On January 7, 2004, Progressive served upon appellant's counsel, via regular mail, a motion for attorney's fees pursuant to section 57.105, Florida Statutes. This motion related to the C.V. case.

On January 12, 2004, Progressive mailed a similar fee motion, in connection with the West/East matter, to appellant's attorney.

On February 2, 2004 and February 5, 2004, Progressive filed the counsel fee motions it had previously served upon Preziosi's counsel.

The two cases were consolidated and Progressive moved for summary judgment as to both claims. After hearing oral argument, the trial court granted this motion for summary judgment. The court's decision on the summary judgment motion does not appear to have been memorialized in a written order at or near the time of its decision.

The court below heard oral argument on Progressive's fee motions on August 12, 2005. It directed counsel to provide supplemental submissions specifically indicating the PIP bills in issue and which facility (C.V. or West/East) submitted them to Progressive. On October 28, 2005, the trial court judge again heard oral argument and granted Progressive's motion for

³ The C.V. suit was Case Number SC-02-10440-O.

⁴ The West/East suit was case Number SC-02-10953-O

counsel fees. He reserved ruling as to whether fees should be assessed against appellant's law firm, as well as against the appellant.

In an Order Granting Defendant's Motion for Entitlement, the court below held that Preziosi and the firm representing him were each one-half liable for Progressive's fees. This order also set forth the trial court's reasons for earlier granting summary judgment in favor of Progressive.

The County Court explained that it had granted Progressive's summary judgment motion because "the assignment to Vincent Preziosi in his individual capacity did not give his corporation, Preziosi West/East Chiropractic Clinic, P.A., standing. . . . Since the Plaintiff did not have an assignment of benefits [for West/East Chiropractic Clinic, P.A.], [he] was not a real party in interest and therefore lacked standing to recover for the bills submitted by Preziosi West/East Orlando Chiropractic Clinic, P.A. (Order Granting Def. Mot. for Entitlement 16.) With respect to the C.V. suit, the trial court judge explained that Progressive had been granted summary judgment because the undisputed evidence indicated that all of C.V.'s bills had been paid in full.

Finding a complete absence of a justiciable issue both of law and fact the lower court granted Progressive's motion for counsel fees pursuant to section 57.105 and assessed fees against both Preziosi and his attorneys in equal measure. (*Id.* at 22.)⁵

The court below entered a final judgment in favor of Progressive in the amount of \$24,000 representing its costs and counsel fees.

⁵ The parties stipulated that \$24,000 is a reasonable fee for costs and fees for defense counsel's services in this case.

Preziosi appeals.

III. PARTIES' ARGUMENTS

Preziosi contends that Progressive's fee application should have been denied because it did not comply with the "safe harbor" provision of section 57.105(4). (Appellant Br. 10.)

Appellant next argues that its counsel made a legitimate, good faith argument that there was an equitable assignment from Anderson to the West/East Clinic. (*Id* at 12.) Further, Preziosi asserts that he "should be considered indistinguishable from" the West/East Clinic. (*Id.*) Finally, appellant contends that he had "legitimate arguments that Progressive waived the defenses raised . . . and was equitably estopped from raising those defenses. (*Id.* at 22.)

In response, Progressive argues that none of appellant's arguments was raised below. As for the merits of those arguments, Progressive argues that it fully complied with the safe harbor provisions of section 57.105. (Appellee Br. 16.) Further, the carrier asserts that the alter ego legal fiction is not to be used by shareholders for the purpose of seeking affirmative relief. (Appellee Br. 11.) The undisputed facts, according to Progressive, indicate that C.V., the insured's assignee, had been paid and that the only arguably unpaid bills were those of West/East which was neither a party to this suit nor did it have an assignment. The appellee also responds to Preziosi by arguing that there was no equitable assignment and even if Preziosi, the individual plaintiff (and only plaintiff) in this consolidated case, was an equitable assignee, this still would not confer standing upon him, individually, to collect monies allegedly not paid to the West/East corporate entity which submitted them. Finally, Progressive urges that appellant's waiver argument lacks merit both factually and legally.

IV. APPLICABLE STANDARD

Both Progressive and Preziosi assert that the adverse party did not raise an issue or issues in the lower court. While these arguments do not, strictly speaking, involve a standard of review, they do raise the threshold issue of whether this Court should even consider several points of alleged error.

As a general rule, reviewing courts will not consider claims of error which are raised for the first time on appeal because it is the function of the appellate court to review errors allegedly committed by the trial court, not to entertain for the first time on appeal issues which the complaining party could have and should have, but did not, present to the trial court.

Herskovitz v. Hershkovich, 910 So. 2d 366, 367 (Fla. 5th DCA 2005).

An appellate court reviews an award of counsel fees pursuant to section 57.105, Florida Statutes, utilizing an abuse of discretion standard. *Scott v. Busch*, 907 So. 2d 662, 664 (Fla. 5th DCA 2005)

V. DISCUSSION

A. Failure To Raise Arguments Below

The Court can readily dispose of several issues. Progressive asserted in its brief that Preziosi did not raise the following issues in the lower court which he now raises in this appeal: 1) that appellee failed to comply with the safe harbor provisions of section 57.105; 2) that West/East was the beneficiary of an equitable assignment of Anderson's PIP benefits; 3) that West/East is an alter ego of Preziosi; and 4) that Progressive waived or was equitably estopped from asserting that Preziosi lacked standing.

"For an issue to be preserved for appeal, ... it must be presented to the lower court and the

specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved. *Anderson v. Wagner*, 955 So. 2d 586, 590 (Fla. 5th DCA 2006) (citing *Archer v. State*, 613 So. 2d 446, 448 (Fla.1993)).

In his reply brief, Preziosi addresses only the claim that he failed to raise the alter ego theory at the trial level. He does not dispute his failure to raise below the other arguments as asserted by Progressive. Therefore, the Court need not concern itself with Preziosi's arguments concerning waiver, equitable estoppel, equitable assignment or an alleged failure by Progressive to comply with the procedural requirements of section 57.105.

B. Preziosi's Alter Ego Theory

There is another argument advanced by Preziosi which Progressive contends was not raised below. In the case of this one argument, however, Preziosi claims that the argument was raised, argued and passed upon by the court below. While appellant admits that the word alter-ego was never uttered during oral argument below, he notes that he was the sole owner, officer and director of West/East. With respect to the legal effect of the corporate form, Preziosi did not advance the "specific legal argument that he now raises. *See Anderson v. Wagner*, 955 So. 2d at 590. Thus, we would be justified in refusing to consider the alter ego issue now.

While not mentioned by Preziosi in any filings below, the issue of whether Preziosi could assert a claim on behalf of West/East on account of his being that entity's sole owner was raised and addressed at oral argument. Even if this is deemed sufficient to have raised the "alter ego argument, Preziosi still does not prevail on the merits.

It is hornbook law that corporations are legal entities separate and distinct from the persons comprising them. *Am. States. Ins. Co. v. Kelley*, 446 So. 2d 1085, 1086 (Fla 4th DCA

1984). Preziosi points to no authority permitting an individual plaintiff to utilize the alter ego theory to disregard the corporate form of the entity which is proper party plaintiff. Progressive correctly notes that the alter ego doctrine is used by plaintiffs to impose liability upon defendants, not to confer standing upon themselves. Shareholders in a corporation may not pierce their own corporate veil to attain standing to sue as the owner of the corporation's assets. *Chaul v. Abu-Ghazaleh*, 994 So. 2d 465, 467 (Fla. 3d DCA 2008). See also *Resorts Int'l, Inc. v. Charter Air Ctr., Inc.*, 503 So. 2d 1293, 1296 n. 1 (Fla. 3d DCA 1987) (The corporate veil may be used as a defense but may not be removed at will by the stockholders for the purposes of seeking affirmative relief.)

For a shareholder plaintiff to attempt to meet the prerequisites for piercing the corporate veil with respect to his own entity would lead to an absurd result. "In order to establish an alter ego theory or to pierce the corporate veil, there must be a showing of improper conduct or fraud. *Jewelcor Jewelers & Distributors, Inc. v. Southern Ornaments, Inc.*, 499 So. 2d 850, 852 (Fla. 4th DCA 1986). Thus, Preziosi relies upon a theory which requires him to demonstrate "improper conduct by the entity whose corporate form he urges the Court to disregard. Here, that entity is *Preziosi's own* corporation, West/East. Law and logic require that appellant's alter ego argument be rejected on the merits.

Finally, Preziosi contends that he should not have section 57.105 fees assessed against him because "the trial court stated several times at the August 2005 hearing that the assignment of benefits presented justiciable issues upon which Preziosi could have reasonably believed he could prevail. (Appellant's Reply Br. 10.) Thus, appellant contends that based upon the trial court's rulings in August 2005, Preziosi had a reasonable basis in fact and law to believe he

could prevail and sanctions should not lie. (*Id.*) We reject this argument because the court below did not make any rulings at the time of the August 12, 2005, hearing. The court minutes and the transcript of that hearing indicate, to the contrary, that the trial court judge specifically reserved ruling. Whatever his musings from the bench at the hearing, the trial court judge made no rulings in August 2005. After a second hearing, in October 2005, the court below stated that: I think it is clear that at some point in time, Plaintiff certainly became aware that Dr. Preziosi did not have any standing at all. And I've already ruled on that when I entered summary judgment.

(R. 316.) The County Court judge continued:

So, the Defendant is going to be entitled to attorney's fees. The only question I have is whether or not the statute would allow me to assess these attorney's fees against both the law firm and the Defendant. I know I'm going to assess them against the Defendant. I don't know I'm going to assess them against the law firm.

(R. 316.)

In the end, the lower court requested further briefing on the question of the responsibility, if any, of Preziosi's counsel for the fee award and asked counsel for both parties to submit proposed orders. On December 15, 2005, the court below entered an eleven page order finding, in part, that appellant's counsel did not act in good faith in pursuing this case and therefore they would be responsible for one-half of the Progressive's counsel fees. (R. 452-55.)

Therefore, contrary to Preziosi's contention, the trial court never determined that the assignment of benefits presented justiciable issues.

VI. CONCLUSION

All of the arguments raised on appeal, with the possible exception of one, were not raised below and ought not be considered for the first time on appeal. While it may be said that

Preziosi's argument that he is the alter ego of West/East was not *specifically* advanced below, we conclude that, although the term "alter ego was not used, this issue should be addressed as the court below decided it. We reject Preziosi's alter ego argument as lacking any merit.⁶

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

- 1) The trial court's October 13, 2006, Final Judgment granting the motion of defendant, Progressive Express Insurance Company, for counsel fees, be and hereby is **AFFIRMED**; and
- 2) Appellant, Vincent Preziosi, D.C.'s, motion for appellate counsel fees be and hereby is **DENIED**.

_____/S/_____
GAIL A. ADAMS
Circuit Judge

_____/S/_____
STAN STRICKLAND
Circuit Judge

_____/S/_____
DANIEL P. DAWSON
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 or hand delivery to: 1) Douglas H. Stein, Esq., ANANIA, BANDKLAYRE, BLACKWELL, BAUMGARTEN, TORRICELLA & STEIN, 4300 Bank of America Tower, 100 Southeast Second Street, Miami, Florida 33131-2144; 2) Mark A.

⁶ Appellant moves for counsel fees on appeal. Inasmuch as we have affirmed the lower court's judgment, there is no basis for such an award and Preziosi's counsel fee motion is denied.

Cornelius, Esq., BOGIN, MUNNS & MUNNS, 2601 Technology Drive, Orlando, FL

32804 on this 13 day of May, 2009.

/S/
Judicial Assistant