ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,515

FARREN IVEY,

Petitioner,

-vs.-

ALLSTATE INSURANCE CO.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

ROY D. WASSON
Suite 450 Gables One Tower
1320 South Dixie Highway
Miami, FL 33146
(305) 666-5053

ROSS B. GAMPEL
Klemick & Gampel, P.A.
1953 SW 27th Avenue
Miami, FL 33145
(305) 856-4577

Attorneys for Petitioner

TABLE OF CONTENTS

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

TABLE OF AUTHORITIES

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

STATEMENT OF THE CASE AND OF THE FACTS

This is a proceeding for discretionary review of a decision from the Third District Court of Appeal in a PIP case. The Third District, in an opinion filed on February 10, 1999, quashed an appellate decision by a three-judge panel of the Miami-Dade County Circuit Court. A1, 728 So. 2d 282 (Fla. 3d DCA 1999). The Circuit Court Appellate Division had reversed a judgment by the County Court determining that the Defendant/Respondent, Allstate Insurance Co., was not liable for Plaintiff/Petitioner's attorney's fees under §§627.428 and 627.736, Fla. Stat.

The Third District's opinion contains the following recitation of the facts of the case:

> Farren Ivey ("Ivey") was struck by a vehicle insured by Allstate Insurance Company ("Allstate"). Ivey sought treatment from her doctor, which treatment included physical therapy consisting of unattended electrical stimulation therapy. Ms. Ivey's treatment extended from December 16, 1994 to January 10, 1995. By that time, the overall cost for services totaled $710.00.
>
> Ms. Ivey filed a PIP claim with Allstate and the required Health Insurance Claim Form for payment of the claim. Allstate then made payment to the doctor in the amount of $461.60 together with an explanation of benefits form explaining how Allstate arrived at the total.
>
> Thereafter, Ms. Ivey filed suit against Allstate for medical expenses and routine personal injury damages. Allstate, under the belief that Ms. Ivey's claim had been paid with the exception of the reduction, answered Ms. Ivey's Complaint. During the doctor's deposition, Allstate learned that the bill included two treatments, and not one as reflected on the face of the bill. Upon review of his bill, the doctor recognized that the bill did not itemize the charges and conceded that the billing on the Health Insurance Claim Form was incorrect. Within 30 days of the deposition, Allstate paid the doctor the additional monies owed him. Ms. Ivey continued this action against Allstate under the theory that Allstate's

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

failure to pay the original bill in full constituted a wrongful withholding of benefits requiring her to seek the services of an attorney.

A non-jury trial was held on the issue of whether Ms. Ivey was entitled to attorney's fees under section 627.428, Florida Statutes. The county court judge made the following findings of fact: Allstate paid the "reasonable rate" for one unit of billing; *the bill was ambiguous as to whether it reflected one or two units of treatment*; the doctor did not question the reduced payment; the doctor admitted the bill was unclear and that Allstate's belief was reasonable; Allstate did not learn of this until the doctor's deposition; the balance of the bill was paid within 30 days of Allstate's notice of the error. The court found that Allstate and its claims adjuster had a right to rely on the Health Insurance Claim Form without having to look beyond it unless given notice of an error, and accordingly, denied Ms. Ivey's entitlement to fees and cost. On appeal, the Appellate Division of the Circuit Court reversed.

A1.

The Third District granted certiorari and quashed the circuit court's appellate decision, finding "that the Appellate Division... departed from the essential elements of law." A1. In a footnote to that sentence, the Third District quoted *Fortune Ins. Co. v. Everglades Diagnostics, Inc.*, 721 So. 2d 384 (Fla. 4th DCA 1998): "Given the pervasiveness of automobiles and PIP coverage in the state, *we deem an erroneous interpretation of this law to be important enough for certiorari.*" A2(emphasis added).

The Third District distinguished cases which found for insureds against PIP carriers where untimely payments of policy proceeds had occurred and held: "Because Allstate did not pay the entire claim due to an error in the doctor's bill, its failure to pay said claim does not rise to that level of `wrongful' which would entitle Ms. Ivey to an award of attorney's fees." A2.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

Petitioner's motions for rehearing, rehearing *en banc*, and certification were denied.

SUMMARY OF THE ARGUMENT

This Court should grant discretionary review, because the Third District's decision expressly and directly conflicts with decisions of this Court and of other districts in three important areas. First, the decision conflicts with decisions from this and other courts concerning the effect of an insurer's voluntary payment of a claim following the commencement of litigation. Second, the decision conflicts with other districts' decisions which hold that a PIP insurer has the burden of determining the compensability of a claim within thirty days, even though the claimant's physician may not readily provide all necessary information to clearly establish the compensability within that time. Third, the decision recognizes a different standard of review for *certiorari* in PIP cases, expressly and directly conflicting with decisions from this Court and other districts on the applicable standard of review.

The Third D.C.A.'s decision conflicts with decisions from this Court and other courts involving the effect of an insurer's voluntary payment of a claim after suit is filed. This Court and other districts have held that such a payment constitutes the equivalent of a confession of judgment, entitling the insured to recover her attorney's fees. The Third D.C.A.'s decision recognizes that payment was voluntarily made after suit was filed, but quashes the decision awarding fees.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

The decision expressly and directly conflicts with decisions from other districts which place the burden of determining PIP compensability upon insurers. Where an insurer fails to make full payment of a claim within thirty days, even where the claimant's physician fails to provide essential information, the insurer is liable for fees under decisions from other districts. The present case expressly and directly conflicts with such cases.

The decision expressly and directly conflicts with decisions from this Court and other courts on the standard of review in *certiorari* proceedings arising out of appellate decisions from circuit courts. The Third District effectively adopts a simple error test, as opposed to the recognized test which requires a failure to afford procedural due process or failure to apply the correct body of law. Such a new standard of review would effectively allow litigants two appeals, rather than one, in express and direct conflict with this Court's pronouncements that parties are entitled to but a single appeal in Florida.

ARGUMENT

I.

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE THIRD DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER DISTRICTS WHICH HOLD THAT THE VOLUNTARY PAYMENT OF A CLAIM AFTER SUIT IS FILED IS THE FUNCTIONAL EQUIVALENT OF A CONFESSION OF JUDGMENT

This Court should accept jurisdiction, because the Third District's opinion expressly and directly conflicts with decisions from this Court and from other districts which establish that an

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

insurer's voluntary payment of a claim after suit is filed is the functional equivalent of a confession of judgment or a verdict in favor of the insured, entitling the insured to an award of her attorney's fees. In *Wollard v. Lloyds and Companies of Lloyds*, 439 So. 2d 217, 218 (Fla. 1983), this Court held that an insured is entitled to recover attorney's fees from its insurance company when a claim is paid after a lawsuit has been filed, because such payment "is the functional equivalent of a confession of judgment or a verdict in favor of the insured."

Other districts have followed *Wollard* and held that voluntary payments like the one which Allstate made in this case amount to an effective confession of judgment, entitling the insured to an award of fees, and preventing further inquiry into the merits of the insured's claim. In *United Auto. Ins. Co. v. Zulma,* 661 So. 2d 947 (Fla. 4th DCA 1995), a PIP case, the Fourth District held:

> Zulma prevailed in her lawsuit when a settlement was reached between her and United Automobile. "When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or verdict in favor of the insured."

Id. at 948 (*quoting Wollard,* 439 So. 2d at 218). *Accord, e.g., Brown v. Vermont Mut. Ins. Co.*, 614 So. 2d 574 (Fla. 1st DCA 1993).

Although Petitioner in her Motion for Certification filed below expressed fear that, absent certification, this Court might not accept jurisdiction because the conflict on this point was not "express," Petitioner submits that conflict is sufficiently express to support this Court's jurisdiction. The Third District states in

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

its opinion that "[w]ithin 30 days of the deposition [of Plaintiff's physician], Allstate paid the doctor the additional monies owed him. Ms. Ivey continued this action against Allstate under the theory that Allstate's failure to pay the original bill in full constituted a wrongful holding of benefits requiring her to seek the services of an attorney." A2. Therefore, it is obvious that Allstate voluntarily paid Plaintiff's claim after the lawsuit was filed and without any sort of settlement agreement which would preclude Ms. Ivey from recovering her attorney's fees. The conflict is express and direct, and this Court should accept jurisdiction.

II.

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER DISTRICTS ALLOCATING THE BURDEN OF DETERMINING NON-COMPENSABILITY UPON PIP INSURERS

The Third District's opinion directly and expressly conflicts with the decisions of other districts concerning which party in a PIP case has the burden of establishing the compensability of PIP claims, where the information furnished by a health care provider is not adequate to make that determination. Other districts have clearly held that the burden is not on the insured or her physician to establish that the claim is payable by the insurance company; the burden is upon the insurer.

The First District has held "[T]he statutory language is clear and unambiguous, the insurance company has thirty days in which to verify the claim after receipt of an application for benefits....

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

The burden is clearly upon the insurer to authenticate the claim within the statutory time." *Dunmore v. Interstate Fire Ins. Co.*, 301 So. 2d 502, 502 (Fla. 1st DCA 1974).

Similarly, the Fourth District has held that this burden upon an insurance company exists, even where the claimant's treating physician fails to cooperate and provide requested information. In *Martinez v. Fortune Ins. Co.*, 684 So. 2d 201 (Fla. 4th DCA 1996), the claimant made a PIP claim, and the insurance company sent a disability evaluation request to the claimant's physician. "The doctor did not respond." *Id.* at 202. Notwithstanding this lack of cooperation from the claimant's physician, the failure to timely make full payment of the claim within thirty days entitled the claimant to his attorney's fees in *Martinez*.

In the present case "[t]he bill was ambiguous as to whether it reflected one or two units of treatment [per visit]." A1. Although the doctor did not refuse to respond to a request for information, as did the doctor in *Martinez*, *supra*, the principle involved is the same: where an insurance company cannot clearly tell what amounts are compensable, the insurer has the burden to determine compensability, and the failure of the claimant's physician to provide necessary information is not grounds for withholding full payment and avoiding liability for attorney's fees. The present case expressly and directly conflicts with decisions from other districts on this important point, and this Court should accept this case for review.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

III.

THIS COURT SHOULD GRANT REVIEW BECAUSE OF CONFLICT ON THE IMPORTANT ISSUE OF THE STANDARD OF REVIEW IN *CERTIORARI* CASES

This Court should accept review of this case to resolve an express and direct conflict with cases from this Court and other districts concerning the appropriate standard of review in *certiorari* proceedings. The standard of review employed below effectively permits two appeals, recognizing simple error as the test for reviewability of appellate decisions from circuit courts by the district courts of appeal.

Although stating that the circuit court's decision "departed from the `essential elements of law,' the Third District went on in a footnote to explain that it would apply such a test based upon a finding of simple error in a PIP case. The court quoted from *Fortune Ins. Co. v. Everglades Diagnostics, Inc.*, 721 So. 2d 384 (Fla. 4th DCA 1998). That court had expressed a simple error test for *certiorari* review in PIP cases: "Given the pervasiveness of automobiles and PIP coverage in the state, *we deem an erroneous interpretation of this law to be important enough for certiorari.*" A2 @ n.2 (emphasis added). Such a definition of the standard for *certiorari* is directly at odds with the standards for *certiorari* from this Court and other districts.

Other districts held that an erroneous interpretation of law is insufficient to grant *certiorari* review. For example, in *Nationwide Mut. Ins. Co. V. Hatch*, 717 So. 2d 71 (Fla. 1st DCA

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

1998), the district court denied *certiorari*, noting that it could not "say that the circuit court, acting in its review capacity, failed to afford petitioner procedural due process or failed to apply the correct law." That standard of review is well-established and widely recognized. *See e.g. City of Deerfield Beach v. Vaillant*, 399 So. 2d 1045 (Fla. 4th DCA 1981).

The Third District's acceptance of "an erroneous interpretation of law" as the standard for *certiorari* review would effectively grant two appeals in cases involving *certiorari* proceedings from appellate decisions of the circuit courts. That expressly and directly conflicts with this Court's standard for *certiorari* review. *See Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995). This Court should accept jurisdiction to address the important question whether a different standard of review should be applied in *certiorari* cases involving PIP coverage. Otherwise, litigants risk inconsistent results in similar cases, depending upon the district in which their cases are filed.

CONCLUSION

WHEREFORE, The Third D.C.A.'s decision expressly and directly conflicts with decisions of this Court and other districts. The statutory scheme by which tort recovery was traded for PIP protection did so upon the promise of prompt payment. Because the effect of the Third DCA's opinion is to delay payment of PIP benefits by allowing insurers to avoid their duty to verify claims,

ROY D. WASSON, ATTORNEY AT LAW
SUITE 450 GABLES ONE TOWER, 1320 SOUTH DIXIE HIGHWAY, MIAMI, FLORIDA 33146 • TELEPHONE (305) 666-5053

This Court should exercise its power to address these important issues.

Respectfully submitted,

ROY D. WASSON
Attorney for Petitioner
Florida Bar No. 332070
Suite 450, Gables One Tower
1320 South Dixie Highway
Miami, Florida 33146
(305) 666-5053

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by United States mail,upon Ross B. Gampel, Klemick & Gampel, P.A., 1953 S.W. 27th Avenue, Miami, FL 33145; Frank S. Goldstein, Green, Murphy, Wilke & Murphy, P.A., Suite 200, 633 South Andrews Avenue, Ft. Lauderdale, Florida 33301 and Richard A. Sherman, Richard A. Sherman, P.A., 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33316, on this, the 10th day of May, 1999.

ROY D. WASSON