ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,515
Third DCA Case No.: 98-2575

Florida Bar No.: 184170

FARREN IVEY,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION
ALLSTATE INSURANCE COMPANY

(With Appendix)

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TABLE OF CITATIONS

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POINTS ON APPEAL

I. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH THE THIRD DISTRICT'S DECISION IN THIS CASE REGARDING A VOLUNTARY CLAIM PAYMENT AFTER A SUIT IS FILED.

II. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH THE THIRD DISTRICT'S DECISION AND OTHER DISTRICTS REGARDING THE ALLOCATION OF THE BURDEN OF DETERMINING NON-COMPENSABILITY UPON PIP INSURERS.

III. THERE IS NO CONFLICT ON THE STANDARD OF REVIEW IN CERTIORARI CASES, THEREFORE THIS COURT SHOULD NOT GRANT JURISDICTION.

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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STATEMENT OF THE FACTS AND CASE

This is the Plaintiff's fourth attempt to have the trial judge's Order overturned in a routine PIP case. Her argument has been repeatedly rejected and she has given this Court no legal basis nor any public policy reason to invoke this Court's jurisdiction and the Petition must be dismissed. The Third District's Decision summarized this case as follows:

> 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.[1]
>
> 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 failure to

[1]Allstate determined that $36.00, not $55.00 as the doctor charged, was a reasonable fee per unit of treatment.

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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 costs. On appeal, the Appellate Division of the Circuit Court reversed.

Because we find that the Appellate Division of the Circuit Court departed from the essential elements of law, we grant the Petition for Writ of Certiorari.[2] The circuit court relied on *Fortune Ins. Co. v. Pacheco,* 695 So.2d 394 (Fla. 3d DCA 1997) and *Martinez v. Fortune Ins. Co.,* 684 So.2d 201 (Fla. 4th DCA 1996) as a basis for reversal. However, both of those cases are distinguishable from the instant case. In those cases, the carrier failed to recognize and verify the claims within the 30 days, to wit, the carrier simply held the payment of claims until they received "proof" of the loss. In the case at hand, however, Allstate recognized and paid the "reasonable" cost of the services described in the bill.

Section 627.736(4)(b), Florida Statutes, requires that benefits due from an insurer be

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[2]"Given the pervasiveness of automobiles and PIP coverage in this state, we deem an erroneous interpretation of this law to be important enough for certiorari." *See Fortune Ins. Co. v. Everglades Diagnostics, Inc.,* 721 So.2d 384 (Fla. 4th DCA 1998).

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> payable within 30 days after the insurer is furnished written notice of the fact of the covered loss and the amount of the claim. Section 627.736(5) requires that a physician, hospital or clinic charge "only a reasonable amount for the products, services, and accommodations rendered" to individual covered by PIP insurance.
>
> Allstate properly paid the "reasonable" cost of one unit of treatment as provided by Ms. Ivey's doctor. Allstate made payment on Ms. Ivey's claim based on what a "reasonable" charge would be per unit of treatment. Ms. Ivey's doctor admitted that the bill, on its face, seemed to be for only one unit of treatment. Additionally, Allstate paid the balance of the bill within 30 days of learning that the total amount of the bill included two units of treatment. 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. Fla. Stat. ss 627.736(8), 627.428; *see also Obando v. Fortune Ins. Co.*, 563 So.2d 116 (Fla. 3d DCA 1990). Accordingly, we reverse.
>
> The Petition for Certiorari is granted, the decision of the Appellate Division of the Circuit Court is quashed, and the case is remanded to the Circuit Court for Dade County, Appellate Division with directions to enter an opinion affirming the County Court judgment.
>
> Allstate Ins. Co. v. Ivey, Fla. L. Weekly D390 (Fla. 3d DCA, February 10, 1999).

The Plaintiff then filed this Petition for Discretionary Jurisdiction, which must be denied.

SUMMARY OF ARGUMENT

There is no express conflict, as the Plaintiff admits and no direct conflict, as needed to establish discretionary

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jurisdiction. The Third District Court of Appeal's decision is accord with all Florida law on point, there is no jurisdiction to review it and the Petition must be denied.

ARGUMENT

I. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH THE THIRD DISTRICT'S DECISION IN THIS CASE REGARDING A VOLUNTARY CLAIM PAYMENT AFTER A SUIT IS FILED.

There is no conflict jurisdiction. The Petitioner is merely seeking a second appeal on the merits, which this Honorable Court has repeatedly said it will not do. The substance of Ivey's Petition is that she is unhappy with the Third District Court of Appeal's decision and wants to reargue her case for the fifth time. Point I, II and III of Ivey's petition are the verbatim argument she made below, which were rejected. Ivey simply rearranged her arguments in the various proceedings below.

Ivey's argument that the Third District's decision is in conflict with this Court's decision in Wollard v. Lloyd's and Companies of Lloyd's, 439 So. 2d 217 (Fla. 1983) is wrong. This Court held in Wollard, that where Lloyd's denied coverage, forcing the insured to retain an attorney and file suit and then on the eve of trial agreed to settle the claim, that this constituted a confession of judgment; which was equivalent to the judgment required under the insurance policy, as a condition precedent, to the award of attorney's fees. Wollard, 218. In addition, this Court was concerned that an insurer could avoid liability for statutory attorney's fees by the simple devise of paying the proceeds at some point after suit was filed, but

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before judgment was entered. To avoid this inequitable result, this Court held that when the insurance company agreed to settle the disputed case, which in effect was a determination that it was no longer defending its position which led to the pending lawsuit, this was a functional equivalent of a confession of judgment, or a verdict in favor of the insured, entitling the insured to attorney's fees under § 627.428 Wollard, 218.

Wollard is factually distinguishable from this case and therefore, no direct and express conflict exists. In this case:

> Allstate properly paid the "reasonable" cost of one unit of treatment as provided by Ms. Ivey's doctor. Allstate made payment on Ms. Ivey's claim based on what a "reasonable" charge would be per unit of treatment. Ms. Ivey's doctor admitted that the bill, on its face, seemed to be for only one unit of treatment. Additionally, Allstate paid the balance of the bill within 30 days of learning that the total amount of the bill included two units of treatment.
>
> Ivey, D390.

The Third District's decision in this case does not conflict with Wollard in any respect, because Allstate never refused a claim, nor did it settle a claim after first denying payment. Initially Allstate paid what the Third District affirmed was a "reasonable" charge for the doctor's services. However, once the doctor's error was revealed to Allstate, Allstate paid the additional amount of the bill within 30 days. There is absolutely no conflict between Wollard and Ivey; therefore there is no express and direct conflict and this Court has no jurisdiction.

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Ivey also cites as conflict, United Automobile Insurance Company v. Zulma, 661 So. 2d 947 (Fla. 4th DCA 1995). However, Zulma is also factually off-point and not relevant to this case. In Zulma, the issue dealt with IME's; when they were set; and whether or not the plaintiff even knew of the IME, since she could not speak, read or write English. Zulma, 948. When the insurance company found out, during the course of litigation, that the reason that Zulma had missed the scheduled IME, was based on her inability to communicate in English, and she mistakenly went to her own doctor, believing that is what the insurance company was asking her to do, the insurance company then abandoned its defense of failure to comply with the condition precedent, which was the basis of its denial of benefits in the case. Zulma, 948.

This case is not the situation where the insurer could have reasonably paid the claim for benefits, without causing the insured to hire a lawyer and file suit; because the claim for the doctor's bill was not made until after the litigation was filed and, therefore, there was no confession of judgment in the present case. Unlike Zulma, Allstate, in this case, never denied payment for bills and when Allstate was notified of the billing error, Allstate immediately paid the remaining portion of the bill. Allstate could not have denied payment for bills of medical treatments it never knew were rendered. There can be no direct or express conflict between the Third District's decision in this case and this Court's holding in Wollard, or the Fourth District's holding in Zulma and therefore, this Court had no

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jurisdiction and no legal reason to review the Decision below.

II. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH THE THIRD DISTRICT'S DECISION AND OTHER DISTRICTS REGARDING THE ALLOCATION OF THE BURDEN OF DETERMINING NON-COMPENSABILITY UPON PIP INSURERS.

Ivey previously argued that under Dunmore v. Interstate Fire Insurance Company, 301 So. 2d 502 (Fla. 1st DCA 1974); and Martinez v. Fortune Insurance Company, 684 So. 2d 201 (Fla. 4th DCA 1996), failure to make timely payment of a claim within 30 days, entitles the claimant to attorney's fees.

The Third District's decision is not in conflict with the above mentioned cases; which were distinguished in the Third District's Opinion; which is why this argument was rejected three times below:

> The circuit court relied on Fortune Ins. Co. v. Pacheco, 695 So.2d 394 (Fla. 3d DCA 1997) and Martinez v. Fortune Ins. Co., 684 So.2d 201 (Fla. 4th DCA 1996) as a basis for reversal. However, both of those cases are distinguishable from the instant case. In those cases, the carrier failed to recognize and verify the claims within the 30 days, to wit, the carrier simply held the payment of claims until they received "proof" of the loss. In the case at hand, however, Allstate recognized and paid the "reasonable" costs of the services described in the bill.
>
> Ivey, D390.

Martinez, supra, relied on Dunmore; which held that an insurer has 30 days to verify the claim after receipt of an application for benefits. Dunmore, 502. In Dunmore, the insurer did not pay the benefits within the 30 day statutory limit and the plaintiff filed suit. Dunmore, 505. A default judgment was entered but

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then later set aside. Dunmore, 502. The insurer did not contest the entitlement to payment of benefits, but merely disputed the allowance of attorney's fees. Again, this is the same case and same argument Ivey unsuccessfully argued below. There is no conflict between Dunmore and this case, because as held by the Third District, Allstate did not refuse to pay, deny payment or dispute payment; and more importantly, payment was repeatedly held to have been timely made within 30 days. Furthermore, the Third District held that there was no reason for Allstate to think that the bill had not been fully paid. There is no express and direct conflict because Allstate never refused to pay the claim, as was the case in Dunmore, and Martinez, therefore, the First and Fourth Districts' holdings in those cases are completely consistent with the Third District's holding and there just is no conflict.

III. THERE IS NO CONFLICT ON THE STANDARD OF REVIEW IN CERTIORARI CASES, THEREFORE THIS COURT SHOULD NOT GRANT JURISDICTION.

Ivey again claims that the Third District did not follow the Fortune Insurance Company v. Everglades Diagnostics, Inc., 721 So. 2d 384 (Fla. 4th DCA 1998) standard, that the intermediate appellate court deviated from the essential requirements of law, because of its erroneous interpretation of the PIP law, which was important enough to invoke certiorari review. Ivey is simply mixing and matching statements from different appellate court cases in order to try to create some kind of conflict. However, the very case that Ivey relies on from this Court, Haines City

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Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995), clearly explains that certiorari review applies to decisions where the procedure used by the lower courts is essentially irregular and not according to the essential requirements of law. Haines, 526.

In this case, the Third District followed Haines, finding that "the Appellate Division of the Circuit Court departed from the essential elements of law" granted certiorari relief:

> "[G]iven the pervasiveness of automobiles and PIP coverage in this state, we deem an erroneous interpretation of this law to be important enough for certiorari." See Fortune Ins. Co. v. Everglades Diagnostics, Inc., 721 So.2d 384 (Fla. 4th DCA 1998).
>
> Ivey, D390.

The Third District expressly used the same standard set forth in Fortune and this is not an extension of the District Court of Appeal's certiorari review; therefore, no conflict exists. The very basis for certiorari review in this case is that the Circuit Court panel failed to apply the correct law and created new law; thus, deviated form the essential requirements of law as prescribed by this Court in Haines, which was sufficient to invoke the Third District's certiorari jurisdiction.

The exact test set out by this Honorable Court in Haines, was followed by the Third District, in that inquiry on certiorari review is limited to whether the circuit court afforded procedural due process "and whether the circuit court applied the correct law." Haines, 530. This Court further stated that these are merely expressions of ways in which the circuit court

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decision may have departed from the essential requirements of law and this standard contains a degree of flexibility and discretion. Haines, 530-531.

There is no conflict between this case and the First District's holding in Nationwide Mutual Fire Insurance Company v. Hatch, 717 So. 2d 71 (Fla. 1st DCA 1998). Again, Ivey's argument is off-point and totally wrong. In Nationwide, the First District denied certiorari because the issue concerned a factual basis and not the application of incorrect law:

> The county court found, as a matter of fact, that petitioner waived its right to compel arbitration by engaging in discovery. *See, e.g., Coral 97 Associates, Ltd. v. Chino Electric, Inc.*, 501 So.2d 69 (Fla. 3d DCA 1987). On appeal to the circuit court, petitioner failed to challenge the adequacy of the factual basis for the county court's finding of waiver. We cannot say that the circuit court, acting in its review capacity, failed to afford petitioner procedural due process or failed to apply the correct law.
>
> Nationwide, 71.

In summary, the Decision in the present case is in accord will all case law on point and there is no express and direct conflict. The Petitioner is simply seeking a second appeal on the merits, using the same arguments repeatedly rejected below. This Court has no jurisdiction to review Ivey and the Petition must be denied.

CONCLUSION

There is no express and direct conflict; the Decision is in accord with all Florida case law; and, this Honorable Court has no jurisdiction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of June, 1999 to:

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