IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC01-1397

ROLANDO VILLAZON, as Personal Representative of the Estate of SUSAN COHEN VILLAZON, deceased, :

Petitioner, :

vs. :

PRUDENTIAL HEALTH CARE PLAN, INC., :

Respondent. :

ON PETITION FOR REVIEW OF A DECISION
FROM THE THIRD DISTRICT COURT OF APPEAL

MAIN BRIEF OF PETITIONER

James C. Blecke
Counsel for Villazon
Deutsch & Blumberg, P.A.
New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

TABLE OF CONTENTS

INTRODUCTION 1

SUMMARY STATEMENT OF THE CASE AND FACTS 1

HMO'S, HEALTH INSURANCE AND PREFERRED PROVIDERS 2

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 7

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. THE PROVISION OF COMPREHENSIVE HEALTH CARE IS A NON-DELEGABLE DUTY MAKING PRUCARE LIABLE FOR THE NEGLIGENCE OF THE PRUCARE PHYSICIANS 11

II. STATE LAW CLAIMS AGAINST HMO'S ALLEGING VICARIOUS LIABILITY FOR PHYSICIAN MALPRACTICE ARE NOT PREEMPTED BY ERISA 18

III. AGENCY IS A QUESTION OF FACT PRECLUDING SUMMARY JUDGMENT 23

CONCLUSION 27

CERTIFICATE OF SERVICE 28

CERTIFICATE OF COMPLIANCE 28

TABLE OF AUTHORITIES

Cases

Atchley v. First Union Bank of Florida,
576 So.2d 340 (Fla. 5th DCA 1991) 10, 15

CISU of Florida, Inc. v. Porter,
457 So.2d 1118 (Fla. 1st DCA 1984) 10, 14

City of Coral Gables v. Prats,
502 So.2d 969 (Fla. 3d DCA), rev. den.,
511 So.2d 297 (Fla. 1987) 10, 17

Dukes v. U.S. Healthcare, Inc.,
57 F.3d 350 (3d Cir. 1995) 11, 20, 22

Gordon v. Sanders,
692 So.2d 939 (Fla. 3d DCA 1997) 10, 16

Hinterlong v. Baldwin,
720 N.E.2d 315 (Ill. App. 1999) 11, 20

Hull v. Fallon,
188 F.3d 939 (8th Cir. 1999) 22

In re Estate of Frappier,
678 So.2d 884 (Fla. 4th DCA 1996) 11, 18

In re: U.S. Healthcare, Inc.,
193 F.3d 151 (3d Cir. 1999) 11, 20, 22

Irving v. Doctors Hospital of Lake Worth, Inc.,
415 So.2d 55 (Fla. 4th DCA), rev. den.,
422 So.2d 842 (Fla. 1982) 10, 12, 14, 20, 22

Jaar v. University of Miami,
474 So.2d 239 (Fla. 3d DCA 1985), rev. den.,
484 So.2d 10 (Fla. 1986) 10, 17, 25

Jass v. Prudential Health Care Plan, Inc.,
88 F.3d 1482 (7th Cir. 1996) 22

Lazorko v. Pennsylvania Hospital,
237 F.2d 242 (3d Cir. 2000) 12, 22

Metrolimo, Inc. v. Lamm,
666 So.2d 552 (Fla. 3d DCA 1995) 10, 16

Mills v. Krauss,
114 So.2d 817 (Fla. 2d DCA 1959), cert. den.,
119 So.2d 293 (Fla.1960) 10, 13

Orlando Executive Park, Inc. v. Robbins,
433 So.2d. 491 (Fla. 1983) 25

Orlando Regional Medical Center, Inc. v. Chmielewski,
573 So.2d 876 (Fla. 5th DCA 1990), rev, den.,
583 So.2d 1034, 1036 (Fla. 1991) 25

Pacificare of Oklahoma, Inc. v. Burrage,
59 F.3d 151 (10th Cir. 1995) 11, 20, 22

Pappas v. Asbel,
768 A.2d 1089 (Pa. 2001) 11, 20

Paterno v. Albuerne,
855 F.Supp. 1263 (S.D. Fla. 1994) 11, 20

Pegram v. Herdrich,
530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) 20

Pryzbowski v. U.S. Healthcare, Inc.,
245 F.3d 266 (3d Cir. 2001) 20, 22

Rice v. Pachal,
65 F.3d 637 (7th Cir. 1995) 11, 20, 22

Stoll v. Noel,
694 So.2d 701 (Fla. 1997) 11, 20, 22

U.S. Security Services Corporation v. Ramada Inn, Inc.,
665 So.2d 268 (Fla. 3d DCA 1995), rev. den.,
675 So.2d 121 (Fla. 1996) 10, 16

Webb v. Priest,
413 So.2d 43 (Fla. 3d DCA 1982) 12

Weinstock v. Groth,
629 So.2d 835 (Fla. 1993) 4

<u>Statutes, Rules and Regulations</u>

Chapter 766, Medical Malpractice, Florida Statutes (2000) 4, 12

Florida Administrative Code, 4-191.024(4),(12),(21) 12

Florida Administrative Code, 4-191.069 13

Section 624.02, Florida Statutes (2000) 2

Section 624.603, Florida Statutes (2000) 2

Section 627.601, et seq., Florida Statutes (2000) 2

Section 627.6471, Florida Statutes (2000) 3

Section 627.6472, Florida Statutes (2000) 3

Section 627.6473, Florida Statutes (2000) 3

Section 641.17, et seq., Florida Statutes (2000) 13

Section 641.19(12), Florida Statutes (2000) 4, 12

Section 641.19(13), Florida Statutes (2000) 4, 12

Section 641.30(2), Florida Statutes (2000) 3

Section 766.102(1), Florida Statutes (2000) 4, 12

Section 768.50(2)(b), Florida Statutes (1985) 4, 12

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC01-1397

ROLANDO VILLAZON, as Personal Representative of the Estate of SUSAN COHEN VILLAZON, deceased,

Petitioner,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Respondent.

INTRODUCTION

This main brief is filed on behalf of the plaintiff appellant, Rolando Villazon, as Personal Representative of the Estate of Susan Cohen Villazon, deceased ("Villazon"). The defendant appellee is Prudential Health Care Plan, Inc. ("PruCare"), Susan Villazon's Health Maintenance Organization.

SUMMARY STATEMENT OF THE CASE AND FACTS

Villazon brought this medical malpractice wrongful death action against PruCare and other health care providers. PruCare is an HMO and as such is a health care provider required to provide comprehensive health care. The sole claim against

PruCare was one of vicarious liability for the negligence of the various PruCare physicians, including PruCare's "Primary Care Physician" Dr. Sarnow. On motion for summary judgment, the trial court determined as a matter of law that the claims of vicarious liability were preempted by ERISA and the District Court affirmed. The District Court also held that there is no support for the proposition that PruCare had a non-delegable statutory and contractual duty to provide comprehensive health care.

HMO'S, HEALTH INSURANCE AND PREFERRED PROVIDERS

The hearing on the motion for summary judgment suggested trial court confusion over the difference between the responsibility of an HMO and a health insurance company. Comments about preferred provider health insurance were made at oral argument in the District Court. Although health insurance per se was not mentioned in the decisions below, clarification and distinction seem prudent.

"Insurance is a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies." Section 624.02, Florida Statutes (2000). Health insurance is insurance against the expense of bodily injury and sickness. Section 624.603, Florida Statutes (2000). Health insurance policies are governed by Section 627.601, et seq., Florida Statutes (2000). In sum and substance, health insurance companies pay health

insurance claims. Health insurance companies do not provide health care and are not health care providers.

Health insurance companies are authorized to establish relationships with "preferred providers," health care providers who agree to an alternative or reduced rate of payment. Section 627.6471, Florida Statutes (2000). Policy holders benefit from reduced deductibles or copayments when they select "preferred" providers over other providers of health care. Health insurers may also condition payment of benefits on the insured's exclusive use of preferred providers. Section 627.6472, Florida Statutes (2000). Hybrid policies are allowed. Section 627.6473, Florida Statutes (2000):

> An insurer may issue a policy that provides coverage for certain benefits through a preferred provider network and other benefits through an exclusive provider network. With regard to the coverage provided through a preferred provider network, the requirements of s. 627.6471 apply, and with regard to the coverage provided through an exclusive provider network, the requirements of s. 627.6472 apply.

Health Maintenance Organizations are *not* health insurers. HMO's are health care providers, and are governed by Chapter 641, not Chapters 624 - 627, Florida Statutes (2000). "Except as provided in this part, the Florida Insurance Code

does not apply to health maintenance organizations certified under this part . . . ." Section 641.30(2), Florida Statutes (2000).

HMO's are "health care providers" under Chapter 766, Medical Malpractice. Section 766.102(1), Florida Statutes (2000) (adopting by reference Section 768.50(2)(b), repealed). See, Weinstock v. Groth, 629 So.2d 835, 836-7 (Fla. 1993). By statutory definition, a Health Maintenance Organization, "Provides emergency care, inpatient hospital services, physician care . . . diagnostic treatment, and preventive health care services." Section 641.19(13), Florida Statutes (2000). A "Health Maintenance Contract" is a contract between an HMO and its subscribers "to provide comprehensive health care." Section 641.19(12), Florida Statutes (2000).

STATEMENT OF THE CASE

This wrongful death action was brought against PruCare, three PruCare physicians (Drs. Sarnow, Sellek, and Satz), and two dentists who failed to timely diagnose and treat Susan Villazon's tongue cancer, which ultimately spread and led to her death, leaving her husband and three sons as survivors (R. 1-29). Dr. Sarnow was the PruCare Primary Care Physician who failed to diagnose the tongue cancer, failed to properly refer Susan Villazon to an appropriate specialist, failed to follow up on

specialist referral, failed to obtain appropriate diagnostic tests, and overall failed to monitor Susan Villazon's health care.

Dr. Sellek was an employee of Dr. Sarnow's P.A., who was also involved in Susan Villazon's care on behalf of PruCare. Dr. Satz was a PruCare physician who saw Susan Villazon, suspected cancer, recommended a biopsy, but did not perform or order a biopsy. Dr. Satz never communicated his suspicion or recommendation to Susan Villazon, her primary care physician Dr. Sarnow, or to PruCare. Nor did Dr. Satz follow up to learn of the outcome of any biopsy or otherwise ensure that a biopsy was even done.[1]

Count VI contains the only claim against PruCare. The relevant allegations are:

> 94. The Defendant, PRUDENTIAL HEALTH CARE PLAN, INC. is a health maintenance organization doing business in Dade County, Florida as defined by and governed by Section 641.17 et seq., Florida Statutes;

---

[1]During the course of the litigation confidential settlements were reached with Dr. Satz, Dr. Sellek, and the dentists. The settlement with these other defendants was irrelevant to the issues raised in the motion and cross-motion for summary judgment. After entry of judgment for PruCare, Dr. Sarnow timely accepted a Rule 1.442 proposal for settlement, leaving PruCare as the lone defendant. The issue on remand will be limited to PruCare's responsibility for the negligence of Dr. Sarnow, the Prudential Primary Care Physician.

Chapter 4-31, Florida Administrative Code; 42 U.S.C. Section 300(e); and 42 C.F.R. Part 417.

95. SUSAN COHEN VILLAZON was a PRUDENTIAL HEALTH CARE PLAN, INC. subscriber under a health maintenance contract by which PRUDENTIAL HEALTH CARE PLAN, INC. agreed to provide SUSAN COHEN VILLAZON with comprehensive health care services.

96. By statute, rule, and contract, the Defendant, PRUDENTIAL HEALTH CARE PLAN, INC. had the non-delegable duty to provide SUSAN COHEN VILLAZON with quality health care including without limitation, in-patient and out-patient hospital services, and medical, surgical, diagnostic, x-ray, laboratory, nursing, physical therapy, and pharmaceutical services.

97. The Defendant, PRUDENTIAL HEALTH CARE PLAN, INC. contracted with Melvyn Sarnow, D.O., Basilio Garcia-Sellek, D.O. and Harvey S. Satz, D.M.D., to provide SUSAN COHEN VILLAZON with health care services, and PRUDENTIAL HEALTH CARE PLAN, INC. is responsible for any and all negligence, Melvyn Sarnow, D.O., Basilio Garcia-Sellek, D.O. and Harvey S. Satz, D.M.D. in the rendering of failure to render health care to SUSAN COHEN VILLAZON, as more specifically set forth herein.

98. The Defendant, PRUDENTIAL HEALTH CARE PLAN, INC. as set forth herein breached its duty to provide quality health care to SUSAN COHEN VILLAZON, resulting in her death.

99. As a result of the acts and conduct of the Defendant, PRUDENTIAL HEALTH CARE PLAN, INC., by and through its agents, apparent agents, employees, SUSAN

> COHEN VILLAZON sustained injury and ultimately died on February 9, 1997.

PruCare moved for summary judgment alleging ERISA preemption and the absence of vicarious liability for Drs. Sarnow, Sellek, and Satz as "independent contractors." (R. 50-55). Villazon filed a cross-motion for summary judgment on PruCare's liability for its physicians as a matter of law (R. 56-60, 207-212). The trial court entered summary judgment for PruCare (R. 702) and the Third District affirmed.

STATEMENT OF THE FACTS

As spelled out in PruCare's Primary Care Physician Capitation Agreement with Dr. Sarnow, the:

> "Prudential Health Care System" (PHCS) means the health care delivery system resulting from a formal arrangement among The Prudential, Physicians and Health Care Providers, including those under contract to The Prudential as Participating Physicians or Participating Health Care Providers and those who are not participating.

PruCare is a provider of comprehensive health care and its health care delivery system includes both participating and non-participating health care providers. PruCare contracts to provide primary health care through "Primary Care Physicians." Prudential Primary Care Physicians are physicians who contract with Prudential to

provide health care in accordance with "the rules established by Medical Director and The Prudential for the utilization of health care services." Prudential Primary Care Physicians must "adhere, at minimum, to the standards set forth in The Manual, developed for such purpose."

Specifically, referrals between and among the Primary Care Physician, Participating Health Care Providers and Participating Physicians are controlled by Prudential's "Medical Director," a physician retained by Prudential "to coordinate and supervise the delivery of health care services for Covered Persons through Participating Physicians and Participating Health Care Providers . . . ." Prudential Primary Care Physicians also agree "to obtain pre-authorization from PHCS Medical Director before performing the diagnostic or therapeutic tests, procedures or treatments specified in the Manual as requiring pre-authorization."

It is the obligation and responsibility of Primary Care Physicians to provide or arrange health care services through Prudential Participating Physicians, and to "obtain approval from Medical Director *prior* to referral of a Covered Person to a Consultant (e.s.)." "Consultants" are physicians who are not under contract with Prudential, but provide services for subscribers upon referral from a Prudential Primary Care Physician.

Prudential Primary Care Physicians must refer subscribers to "Institutes of Quality Health Care," defined as a network of health care providers under contract with Prudential. "Referrals to an Institute of Quality Health Care Provider and/or Physician are subject to consultation with and approval of Medical Director. Primary Care Physician agrees to abide by the decision of Medical Director."

The deposition testimony of the PruCare representative, Dominick Messano (R. 61-206, 494-649), unequivocally establishes PruCare's responsibility for PruCare's physicians:

> If a member is in the HMO, then the member must use a *Prudential physician* who is a member of the HMO. [p.31, e.s.].
>
> Prudential makes the decision as to which providers will be part of our network. [p. 35].
>
> For routine care members are required to select a physician in our network. [p. 35].
>
> The HMO plan was designed *to provide medical care to its members*. [p. 39, e.s.].

SUMMARY OF ARGUMENT

By contract with a client, a general contractor agrees to provide a quality built home. The general contractor's only employee is its construction manager. The

general contractor uses separate and independent sub-contractors to pour the foundation, build the walls, install the plumbing, and raise the roof. If the roof leaks, the general contractor is responsible because the general contractor agreed to provide the client a quality built home. There is no independent sub-contractor defense.

PruCare was to provide Susan Villazon with comprehensive health care and PruCare provided health care through its network of PruCare physicians. Susan Villazon died because PruCare physicians negligently failed to diagnose or treat her cancer. PruCare is responsible for the quality of care provided by the PruCare physicians because PruCare agreed to provide comprehensive health care.

Vicarious liability exists for breach of a non-delegable duty created by statute or contract. Atchley v. First Union Bank of Florida, 576 So.2d 340, 343-4 (Fla. 5th DCA 1991); CISU of Florida, Inc. v. Porter, 457 So.2d 1118, 1119 (Fla. 1st DCA 1984); Irving v. Doctors Hospital of Lake Worth, Inc., 415 So.2d 55, 57 n.2 (Fla. 4th DCA), rev. den., 422 So.2d 842 (Fla. 1982); Mills v. Krauss, 114 So.2d 817, 819 (Fla. 2d DCA 1959), cert. den., 119 So.2d 293 (Fla.1960); Gordon v. Sanders, 692 So.2d 939, 941 (Fla. 3d DCA 1997); Metrolimo, Inc. v. Lamm, 666 So.2d 552, 553 (Fla. 3d DCA 1995); U.S. Security Services Corporation v. Ramada Inn, Inc., 665 So.2d 268, 270-1 (Fla. 3d DCA 1995); City of Coral Gables v. Prats, 502 So.2d 969,

971 (Fla. 3d DCA), rev. den., 511 So.2d 297 (Fla. 1987); Jaar v. University of Miami, 474 So.2d 239, 243-4 (Fla. 3d DCA 1985), rev. den., 484 So.2d 10 (Fla. 1986).

Claims against an HMO for its vicarious liability for the negligence of its contracting physicians are not preempted by ERISA. See, In re Estate of Frappier, 678 So.2d 884, 886-7 (Fla. 4th DCA 1996); Pappas v. Asbel, 768 A.2d 1089 (Pa. 2001); Hinterlong v. Baldwin, 720 N.E.2d 315 (Ill. App. 1999). Cf. Lazorko v. Pennsylvania Hospital, 237 F.2d 242 (3d Cir. 2000); In re: U.S. Healthcare, Inc., 193 F.3d 151 (3d Cir. 1999); Rice v. Pachal, 65 F.3d 637 (7th Cir. 1995); Pacificare of Oklahoma, Inc. v. Burrage, 59 F.3d 151 (10th Cir. 1995); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995); Paterno v. Albuerne, 855 F.Supp. 1263 (S.D. Fla. 1994).

ARGUMENT

I.

THE PROVISION OF COMPREHENSIVE HEALTH CARE IS A NON-DELEGABLE DUTY MAKING PRUCARE LIABLE FOR THE NEGLIGENCE OF THE PRUCARE PHYSICIANS.

PruCare delegated its statutory and contractual responsibilities "to provide medical care to its members" to the "Prudential physicians" who were each

negligent in rendering or in failing to render health care to Susan Villazon. PruCare has vicarious liability for the malpractice committed by Prudential's "Primary Care Physician," other "Participating Physicians," "Participating Health Care Providers," and "Consultants" under its non-delegable duty to provide comprehensive health care, and the agency relationship between PruCare and the several health care providers. See, Orlando Regional Medical Center, Inc. v. Chmielewski, 573 So.2d 876, 879-80 (Fla. 5th DCA 1990), rev, den., 583 So.2d 1034, 1036 (Fla. 1991); Irving v. Doctors Hospital of Lake Worth, Inc., 415 So.2d 55 (Fla. 4th DCA), rev. den., 422 So.2d 842 (Fla. 1982); Webb v. Priest, 413 So.2d 43, 47 (Fla. 3d DCA 1982).

All HMO's are "health care providers" under Chapter 766, Medical Malpractice Section 766.102(1), Florida Statutes (2000) (adopting by reference Section 768.50(2)(b), repealed). By statutory definition, every Health Maintenance Organization, "Provides emergency care, inpatient hospital services, physician care . . . diagnostic treatment, and preventive health care services." Section 641.19(13), Florida Statutes (2000). All Health Maintenance Contracts are contracts "to provide comprehensive health care services in exchange for a prepaid . . . fixed sum." Section 641.19(12), Florida Statutes (2000).

There are three types of HMO's — the Staff Model, the Individual Practice Association Model, and the Combination Model. See, Florida Administrative Code, 4-191.024(4),(12),(21). There is no statutory, regulatory, or judicial exceptions or exclusions for IPA model HMO's, HMO's that contract with individual physicians and delegate provision of comprehensive health care to these physicians. The only distinction found is that an HMO with employed physicians must provide medical malpractice insurance for both itself and its employed physicians. An IPA model HMO must provide a minimum $1,000,000 malpractice insurance for itself, and require in its contracts that its contract physicians also carry malpractice insurance. See, Florida Administrative Code, 4-191.069. If IPA model HMO's were immune from malpractice claims because their doctors are independent contractors, they would have no need for separate regulated minimum malpractice coverage. The regulation reflects recognition of HMO responsibility for malpractice committed by its doctors.

Under Section 641.17, et seq., Florida Statutes (2000), PruCare has a statutory and contractual duty to provide its subscribers with comprehensive health care. Providing comprehensive health care was a non-delegable duty owed by PruCare to Susan Villazon for which PruCare cannot escape liability, regardless of

whether the Prudential Health Care Providers are deemed "agents" or "independent contractors."

Quoting hornbook and turn of the century case law, the Second District in Mills v. Krauss, 114 So.2d 817, 819 (Fla. 2d DCA 1959), cert. den., 119 So.2d 293 (Fla.1960) , sets out the following settled principles:

> '. . . one who, by a specific agreement, undertakes to do some particular thing, or to do it in a certain manner, cannot by employing an independent contractor, avoid responsibility for an injury resulting from the nonperformance of any duty or duties which, under the express terms of the agreement or by implication of law, are assumed by the undertaker.'
>
> * * *
>
> 'The rule is clear beyond argument that one who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance, or a failure to perform, by showing that he has engaged another to perform in his place, and that the fault or failure is that of another or independent contractor.'

In Irving v. Doctors Hospital of Lake Worth, Inc., 415 So.2d 55, 57 n.2 (Fla. 4th DCA), rev. den., 422 So.2d 842 (Fla. 1982), the Fourth District follows Mills v. Krauss, and finds the following jury charge an appropriate statement of non-delegable duty liability for an independent contractor:

> [O]ne who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance, or a failure to perform, by showing that he has engaged another to perform in his place, and that the fault or failure is that of another or independent contractor.

In CISU of Florida, Inc. v. Porter, 457 So.2d 1118, 1119 n.2 (Fla. 1st DCA 1984), the First District follows Mills v. Krauss and Irving v. Doctors Hospital in recognizing that a party cannot insulate itself from liability by hiring an independent contractor to perform its duties, and explains:

> Holding a particular undertaking to be nondelegable means that *responsibility*, i.e., ultimate liability, for the proper performance of that undertaking may not be delegated. The term nondelegable does not preclude delegation of the actual *performance* of the task. 'Nondelegable' applies to the liabilities arising from the delegated duties if breached. [emphasis by the Court].

In Atchley v. First Union Bank of Florida, 576 So.2d 340, 343-4 (Fla. 5th DCA 1991), the bank was selling real estate with the promise, should roof repairs be required, "Seller shall pay . . . for such repairs or replacements by an appropriately licensed person." 576 So.2d at 341 n.1. The Fifth District holds the bank responsible for negligent roof repairs even though the bank was obviously not itself in the roofing business and performance was agreed to be by an independent licensed roofer:

> The general rule that a employer is not liable for the torts of an independent contractor hired by him to do specific work, is subject to many exceptions. One, which applies here, is when the employer specifically undertakes, pursuant to a contract, to do something for another.
>
> This is sometimes called the category of "nondelegable" duties. What is actually meant, however, is that although the duty to perform may be delegated to an independent contractor, the liability for misfeasance cannot be avoided by the person who obligated himself originally to perform the contract.

In Gordon v. Sanders, 692 So.2d 939, 941 (Fla. 3d DCA 1997), the Third District held:

> [O]ne who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance by showing that he hired someone else to perform the task and that other person was the one at fault. [citation omitted]. In other words, where the contracting party makes it her or his duty to perform a task, that party cannot escape liability for the damage caused *to the other contracting party* by the negligence of independent contractors hired to carry out the task. [emphasis by the Court].

In Metrolimo, Inc. v. Lamm, 666 So.2d 552 (Fla. 3d DCA 1995), the defendants had a contract with Dade County to provide transportation services for disabled riders. Lamm was a passenger under the service agreement injured in an automobile accident. The defendants had no employees of their own, and contracted

out the work. The Court held the defendants "could not, by subcontracting, exonerate themselves from liability." 666 So.2d at 553.

In U.S. Security Services Corporation v. Ramada Inn, Inc., 665 So.2d 268, 270-1 (Fla. 3d DCA 1995), quoting earlier Third District precedent the Court held:

> "[T]he law has always permitted a person to hire an employee or an independent contractor to perform a non--delegable duty owed by that person to third parties . . . ; the law only precludes such person from escaping, by that devise, vicarious responsibility for the proper performance of that nondelegable duty." (emphasis by the Court).
>
> * * *
>
> "Holding a particular undertaking to be nondelegable means that responsibility, i.e., ultimate liability, for the proper performance of that undertaking may not be delegated. The term nondelegable does not preclude delegation of the actual performance of the [nondelegable] task. 'Nondelegable' applies to the liabilities arising from the delegated duties if breached."

In City of Coral Gables v. Prats, 502 So.2d 969, 971 (Fla. 3d DCA), rev. den., 511 So.2d 297 (Fla. 1987), the Court held:

> Although it is well-settled that an employer may not be held liable for the negligence of an independent contractor, [citations omitted], the general rule is riddled with numerous exceptions, [citation omitted]. The exception applicable to the case before us occurs when, as here, an employer

> operates under a contract which creates nondelegable duties. [citations omitted].

In Jaar v. University of Miami, 474 So.2d 239, 243-4 (Fla. 3d DCA 1985), rev. den., 484 So.2d 10 (Fla. 1986), a non-delegable duty was found, as a matter of law, in a contract that provided: "[The University] [s]hall, through members of its faculty . . . *provide professional medical care* for all patients of the Trust (e.s.)." 474 So.2d at 242 n.4. The non-delegable duty was owed to patients of the Trust. The Court held:

> An employer may not escape liability by delegating performance of its contractual duties to its employees *or to an independent contractor*. [citations omitted]. The University, having contracted with the Trust to provide medical care to hospital patients, remains liable for negligent acts performed by its employees in executing its contract obligations. [474 So.2d at 243-4, e.s.].

PruCare is a licensed HMO and a licensed health care provider obligated to provide Susan Villazon with comprehensive health care. It is no defense to a claim of liability for the breach of this duty that the negligent performance was by independent contractors.

II.

STATE LAW CLAIMS AGAINST HMO'S ALLEGING VICARIOUS LIABILITY FOR PHYSICIAN MALPRACTICE ARE NOT PREEMPTED BY ERISA.

In re Estate of Frappier, 678 So.2d 884 (Fla. 4th DCA 1996), says:

> Properly phrased, the issue becomes whether Frappier's claims against Health Options as delineated in counts III-VI of the complaint are to *recover* plan benefits due, or to *enforce* rights, or to *clarify* rights to benefits under the terms of the plan, as those concepts are detailed in section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). [678 So.2d at 886, emphasis by the Court].
>
> * * *
>
> Thus where, as here, an ERISA is implicated by a complaint for failing to provide, arrange for, or supervise qualified doctors to provide the actual medical treatment for plan participants, federal preemption is inappropriate. [citations omitted]. Therefore, even if Health Options is an ERISA subject to federal preemption, we must conclude that the trial court erred in dismissing the vicarious liability count of the instant complaint. [678 So.2d at 887].

Villazon did not sue PruCare to *recover* plan benefits due, or to *enforce* rights, or to *clarify* rights to benefits under the terms of the plan. Villazon "does not allege that his wife was denied proper medical testing and referrals to specialists." (DCA op. at p. 3). Villazon sued PruCare for its vicarious liability for the negligence

of PruCare physicians (DCA op. at pp. 2-3). The Third District's conclusion that Villazon's vicarious liability claims are preempted by ERISA directly conflicts with the Fourth District's decision and analysis in Frappier.

It is now settled law that state law claims against an HMO for vicarious liability for the medical negligence of its physicians are not preempted by ERISA. See, Pappas v. Asbel, 768 A.2d 1089 (Pa. 2001); Hinterlong v. Baldwin, 720 N.E.2d 315 (Ill. App. 1999); In re: U.S. Healthcare, Inc., 193 F.3d 151 (3d Cir. 1999); Rice v. Pachal, 65 F.3d 637 (7th Cir. 1995); Pacificare of Oklahoma, Inc. v. Burrage, 59 F.3d 151 (10th Cir. 1995); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995); Paterno v. Albuerne, 855 F.Supp. 1263 (S.D. Fla. 1994).

All doubt about Villazon's entitlement to bring this malpractice action against PruCare for negligent treatment was eliminated by the United States Supreme Court in Pegram v. Herdrich, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) (decisions by HMO physicians are not fiduciary decisions under ERISA). The United States Supreme Court's analysis of a plan's "eligibility decisions" as compared with "treatment decisions" is equally applicable to ERISA preemption analysis. See, Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 273 (3d Cir. 2001).

Pryzbowski also dispels any distinction between complete preemption and express preemption analysis, an argument advanced by PruCare below. "There is no reason why the distinction between quality of care issues and benefits administration issues made in those cases, which arose in the context of complete preemption under §502(a), would not be equally applicable to express preemption under § 514(a)." 245 F.3d at 279.

As health care providers, health maintenance organizations provide and coordinate health care for its members. One of the inherent problems with HMO services is the lack of continuity of care between and among the various HMO physicians. Here, a consulting physician recommended a biopsy, but did not order it himself, seek PruCare authorization for a biopsy, or otherwise communicate his recommendation to the primary care physician or to PruCare for follow-up. The primary care physician did not follow the referral to the consulting physician. But while this sort of mis-communication is systemic in HMO healthcare, it is purely a quality of care problem. In this case it had nothing to do with the approval or refusal of health care plan benefits.

PruCare has a medical director that pre-approves and coordinates members' health care, including the health care provided Susan Villazon. But apart

from negligent treatment by PruCare physicians, PruCare did not delay or deny Susan Villazon any benefits due under her ERISA health care plan. Villazon did not allege and does not claim any negligence by PruCare's medical director. This case is a pure treatment case. Eligibility for benefits is not an issue here.

This case must be distinguished from the reported decisions where the claim is based upon the malfeasance of a medical director or administrator. In deciding whether such claims are preempted, the courts have conducted a quality of care versus quantity of care analysis. If the claim is for negligent treatment, there is no ERISA preemption. See, In re: U.S. Healthcare, Inc., 193 F.3d 151 (3d Cir. 1999); Rice v. Pachal, 65 F.3d 637 (7th Cir. 1995); Pacificare of Oklahoma, Inc. v. Burrage, 59 F.3d 151 (10th Cir. 1995); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995).

If the claim is for delay or denial of benefits, ERISA preemption may be implicated. See and compare, Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 273 (3d Cir. 2001) (delayed approval of necessary surgery was within the realm of administration of benefits); Lazorko v. Pennsylvania Hospital, 237 F.2d 242 (3d Cir. 2000) (denial of request for hospitalization occurred in the course of a treatment decision, not in the administration of the plan); Hull v. Fallon, 188 F.3d 939 (8th Cir.

1999) (claim of negligence by plan administrator in denial of recommended medical test preempted); Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) (claim arising out of utilization review decision preempted).

Here, the District Court's citation to Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996), is where the Court went astray, after recognizing at page three of its opinion that Villazon "does not allege that his wife was denied proper medical testing and referrals to specialists." This is not a claim for denial of ERISA benefits, it is a claim of vicarious liability for negligent physicians. This is not a plan administration case subject to ERISA preemption.

III.

AGENCY IS A QUESTION OF FACT PRECLUDING SUMMARY JUDGMENT.

Although it is not an issue upon which this Court granted review, this Court now has jurisdiction over the entire case and may need to consider this issue in order to do complete justice. There is a factual issue whether PruCare physicians are actual or ostensible agents of PruCare inappropriate for summary disposition.

While it is true that physicians generally exercise independent medical judgment in the treatment of their patients, this professional independence does not preclude a finding of agency. See, Stoll v. Noel, 694 So.2d 701, 703 (Fla. 1997):

> The Restatement (Second) of Agency § 14N (1957) explains that the roles of agent and independent contractor are not mutually exclusive:
>
> > One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor.
> >
> > Comment: [M]ost of the persons known as agents, that is, brokers, factors, attorneys, collection agencies, and selling agencies are independent contractors ... since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services. However, they fall within the category of agents.
>
> Whether CMS physician consultants are agents of the state turns on the degree of control retained or exercised by CMS. . . . CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS Manual and CMS Consultant's Guide which contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel.

> The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.

In Stoll v. Noel, this Court held that the independent contractor physicians were nonetheless agents of the State with sovereign immunity, and reinstated a summary judgment on their behalf. CMS control over CMS physicians is strikingly similar to Prudential Health Care Plan's control over its physicians. Here, the independence of the Prudential Health Care Plan physicians in the exercise of their medical judgment does not preclude a finding of agency and vicarious liability. Here, the extent of control creates, at a minimum, a question of fact. See, Theodore ex rel. Theodore v. Graham, 733 So.2d 538 (Fla. 4th DCA), rev. denied, 737 So.2d 551 (Fla. 1999) (control over physician was fact question precluding summary judgment).

It is generally recognized that agency status is a question of fact, except in the most obvious case. Cf. Jaar v. University of Miami, 474 So.2d 239, 243-4 (Fla. 3d DCA 1985), rev. den., 484 So.2d 10 (Fla. 1986) (agency established as a matter of law, where University contracted to provide medical services); Orlando Executive

Park, Inc. v. Robbins, 433 So.2d. 491 (Fla. 1983) ("The existence of an agency relationship is ordinarily a question to be determined by a jury in accordance with the evidence adduced at trial").

Here, the facts overwhelmingly preponderate in favor of agency, whether deemed actual or ostensible. Actual agency exists when the principal acknowledges the agent, the agent accepts the undertaking, and the principal retains some measure of control over the actions of the agent. Ostensible agency exists when the principal holds out the agent as his own, with anticipated reasonable reliance.

Dominick Messano, the Prudential Health Care Plan representative, testified, "The [Prudential] HMO plan was designed *to provide medical care to its members* (e.s.)" The PruCare Primary Care Physician Capitation Agreement between PruCare and Dr. Sarnow says:

> "Prudential Health Care System" (PHCS) means the health care delivery system resulting from a formal arrangement among The Prudential, Physicians and Health Care Providers, including those under contract to The Prudential as Participating Physicians or Participating Health Care Providers and those who are not participating.

Susan Villazon was a subscriber to the Prudential Health Care Plan, a Health Maintenance Organization. PruCare provided Susan Villazon comprehensive

health care services through the Prudential Health Care System. Dr. Sarnow treated Susan Villazon as a Prudential Primary Care Physician in the Prudential Health Care System.

As a Prudential Primary Care Physician, Dr. Sarnow provided health care services to Susan Villazon in accordance with "the rules established by [Prudential's] Medical Director and The Prudential for the utilization of health care services." Dr. Sarnow was required to "adhere, at minimum, to the standards set forth in The [PruCare] Manual, developed for such purpose."

Dr. Sarnow was obligated and agreed "to obtain pre-authorization from PHCS Medical Director before performing the diagnostic or therapeutic tests, procedures or treatments specified in the Manual as requiring pre-authorization," whenever providing health care to Prudential subscribers, such as Susan Villazon. As a Prudential Primary Care Physician, Dr. Sarnow had to provide or arrange health care services through Prudential Participating Physicians, and had to "obtain approval from [Prudential's] Medical Director prior to referral of a Covered Person to a Consultant."

By contract, PruCare and its Medical Director had final authority and control over all care and treatment provided to PruCare subscribers by Prudential Primary Care Physicians, Participating Physicians, Participating Health Care Providers,

and Consultants. PruCare could disapprove or disallow any proposed or recommended course of treatment for medical or budgetary reasons.

PruCare is liable for the malpractice of its Health Care Providers under its statutory and contractual non-delegable duty to provide comprehensive health care. If a finding of agency is required, then PruCare's liability for its actual or ostensible physician agents remains an issue of fact precluding summary judgment.

CONCLUSION

This Court should quash the decision of the District Court and reinstate Villazon's claim against PruCare.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon the Law Offices of Steven M. Ziegler, P.A., Presidential Circle, 4000 Hollywood Boulevard, Suite 375 South, Hollywood, Florida 33021; and Diane H. Tutt, P.A., 8211 West Broward Boulevard, Suite 420, Plantation, Florida 33324, this 18th day of December, 2001.

James C. Blecke
Counsel for Villazon
Deutsch & Blumberg, P.A.

New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

By__________________________
James C. Blecke
Fla. Bar No. 136047

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with font requirements.

By__________________________
James C. Blecke
Fla. Bar No. 136047