IN THE SUPREME COURT OF FLORIDA

CASE NUMBER _____

ROLANDO VILLAZON, as Personal Representative of the Estate of SU-SAN 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

JURISDICTIONAL BRIEF OF PETITIONER

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INTRODUCTION

This jurisdictional 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.

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. HMO's are "health care

providers" under Chapter 766, Medical Malpractice. Section 766.102(1), Florida Statutes (1997). 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 (1997). A "Health Maintenance Contract" is a contract between an HMO and its subscribers "to provide comprehensive health care." Section 641.19(12), Florida Statutes (1997).

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.

SUMMARY OF ARGUMENT

The Third District holds that claims against an HMO for its vicarious liability for the negligence of its contracting physicians are preempted by ERISA. This is in direct conflict with the Fourth District holding that claims against an HMO for its

vicarious liability for the negligence of its contracting physicians are not preempted by ERISA. In re Estate of Frappier, 678 So.2d 884, 886-7 (Fla. 4th DCA 1996).

The Third District also holds that there is no cause of action for vicarious liability under a theory of non-delegable duty created by statute or contract. This holding conflicts with a long line of cases to the contrary. 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).

JURISDICTIONAL ARGUMENT

I.

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." (slip op. at p. 3). Villazon sued PruCare for its vicarious liability for the negligence of PruCare physicians (slip op. at pp. 2-3). "Because the Employee Retirement Income Security Act of 1974 (ERISA)., 29 U.S.C. § 1144(a), preempts Villazon's claim, we affirm." (Slip op. at pp. 1-2). 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.

II.

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.

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. The Third District's contrary holding is in direct conflict with this longstanding settled case law on nondelegable duty.

CONCLUSION

This Court should accept jurisdiction and on the merits quash the decision of the District Court.

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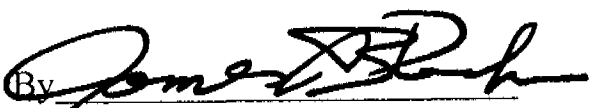
By 
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CERTIFICATE OF SERVICE

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 28th day of June, 2001.

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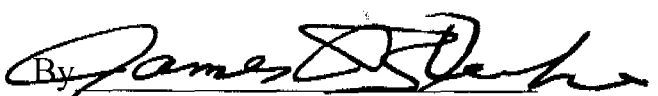
By 
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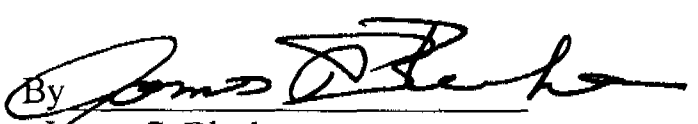
I HEREBY CERTIFY that the foregoing complies with font requirements.

By 
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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2001

ROLANDO VILLAZON, etc.,	**	
Appellant,	**	
vs.	**	CASE NO. 3D00-1509
PRUDENTIAL HEALTH CARE PLAN, INC.,	**	LOWER TRIBUNAL NO. 97-17882
Appellee.	**	
	**	

Opinion filed March 14, 2001.

An Appeal from the Circuit Court for Miami-Dade County, David L. Tobin, Judge.

Deutsch & Blumberg, and James C. Blecke, for appellant.

Steven M. Ziegler, and Diane H. Tutt, for appellee.

Before SCHWARTZ, C.J., and LEVY, and RAMIREZ, JJ.

RAMIREZ, J.

Rolando Villazon, plaintiff below, appeals the entry of an adverse summary judgment in a wrongful death action filed against his deceased wife's health care provider, appellee Prudential Health Care Plan, Inc. Because the Employee Retirement Income

Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), preempts Villazon's claim, we affirm.

Villazon's late wife, Susan Villazon, was a member of Prudential Health through her employer. Prudential Health is a federally qualified and state licensed independent practice associated health maintenance organization (IPA HMO). During treatment for a certain mouth ailment, her condition was misdiagnosed, and the existing cancerous condition went untreated. She eventually died of tongue cancer.

Mr. Villazon brought a wrongful death action against Drs. Melvyn Sarnow, Harvey S. Satz, and Basilio Garcia-Selleck in which he raised negligence claims, as well as against Prudential Health, in which he raised claims of vicarious liability and breach of a non-delegable duty, directly relating to the manner in which Prudential Health had administered the health plan. The actions against Drs. Satz and Garcia-Selleck were settled and the only claims that remain are against Dr. Sarnow and Prudential Health. Dr. Sarnow was the Primary Care Physician, as well the Participating Health Care Provider.

Villazon's theories of liability against Prudential Health are premised on Prudential Health's administration of the health plan through which Prudential Health influenced the manner in which the contracted health care providers rendered care and treatment. In his complaint, Villazon specifically alleged that Prudential

Health breached a non-delegable duty to provide comprehensive health care, and was vicariously liable for the negligence of its contracted health care providers. Villazon argues that Prudential Health care controlled the referral process and required that authorization be obtained prior to the performance of diagnostic and therapeutic procedures. Prudential Health also required that the contracted physicians adhere to rules and seek approval for diagnostic tests. Physicians had to provide and arrange health care services through Prudential Health and refer subscribers to contracted providers. Villazon, however, does not allege that his wife was denied proper medical testing and referrals to specialists.

Prudential Health filed a motion for summary judgment asserting that eleven of the claims filed against them were preempted by section 1144(a) of ERISA, as a matter of law, because all of the claims sought to hold Prudential Health liable by challenging the administration of the health plan, and because Villazon could not prevail on any theories of liability as a matter of state law. At the summary judgment hearing, Villazon attacked the administration of the health plan and argued that Prudential Health was liable because they limited subscribers' access to certain physicians, required treatment to be pre-approved by a medical director, and required physicians to comply with directives and guidelines created by Prudential Health.

The trial court entered summary judgment in favor of Prudential Health holding that ERISA governed the claims filed against Prudential Health because the claims related to the manner in which Prudential Health administered its health care plans, and further, that there were no issues of fact as to the theory of vicarious liability or any recognizable cause of action for breach of a non-delegable duty against Prudential Health under state law. We agree.

Under section 1144(a), "the provisions of this subchapter ... shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a). If a claim relates to the manner in which the ERISA plan is administered, ERISA preempts the claim. See Estate of Frappier v. Wishnov, 678 So. 2d 884 (Fla. 4th DCA 1996); see also Jass v. Prudential Healthcare Plan, Inc., 88 F.3d 1482, 1493 (7th Cir. 1996)(holding that vicarious liability claims were preempted by ERISA because any agency relationship was based on the benefit plan and would require an examination of the plan to determine that relationship).

In Estate of Frappier, supra, the plaintiff's estate sued two doctors and a health maintenance organization alleging that the organization had a statutory and common law duty to provide appropriate medical care. The court held that the allegations

related to the administration of the plan and were thus preempted by ERISA. Id. at 887. In Jass, supra, the plaintiff brought a vicarious liability claim against a health maintenance organization based on a doctor's negligent failure to provide treatment. The court held that the alleged negligence claim related to the benefit plan because the failure to provide treatment stemmed from a denial of authorization for the medical procedure. Id. at 1495.

In this case, Villazon's negligence and vicarious liability claims are based upon allegations which require a review of the health plan and its benefits in order to determine the relationship between Prudential Health and Dr. Sarnow. Villazon alleges that Prudential Health had a non-delegable duty that could not be assigned to its medical providers and that Prudential Health limited Susan Villazon's access to health care by requiring referrals to contracted providers. At the summary judgment hearing, Villazon argued that Prudential Health, as part of the management of health care benefits, decides who provides the benefits, when those benefits are provided, where the benefits are provided, and why those benefits need to be provided. Villazon also alleges that Prudential Health controlled the referral process, and required that authorization be obtained prior to the performance of certain tests and procedures. These claims thus directly relate to the health plan as they arise from the denial of medical care and treatment benefits.

Furthermore, to hold that ERISA does not preempt this action would be contrary to Congress' intent when it enacted ERISA. Congress intended to create a single standard in the manner in which health care benefits were to be administered. See Shaw v. Delta Air Lines, 463 U.S. 85, 95 (1983); see also Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990).

Villazon also raised the issue that Prudential Health had a non-delegable duty to render proper medical care to his wife, and that Prudential Health is vicariously liable for the negligence of the physicians involved. The uncontroverted evidence, however, establishes that all medical providers were independent contractors. As an IPA HMO, Prudential Health entered into contracts with physicians who had their own independent practices and who agreed to provide covered services for a contracted rate. Dr. Sarnow was an independent contractor who had his own private practice and agreed to render services to Prudential Health subscribers pursuant to a Primary Care Physician Agreement. Dr. Sarnow continued his independent practice after he entered into this agreement. Susan Villazon had selected Dr. Sarnow as her treating physician before she became a member of Prudential Health.

Villazon argues that Prudential Health assumed a non-delegable duty to render medical care to his wife in a non-negligent manner when she purchased health care coverage from Prudential Health. However, Villazon does not cite any support for this proposition.

In fact, Prudential Health never contracted with Villazon's wife to render any medical services, and only contracted to provide such care through the use of its primary care physicians and participating health care providers.

Additionally, "[t]he existence of a clear and unambiguous contract is the best evidence of the intent of the parties, and its meaning and legal effect are questions of law for determination by the court." Jaar v. University of Miami, 474 So. 2d 239, 242 (Fla. 3d DCA 1985). Here, all the contractual provisions clearly designated the physicians as independent contractors. There is no evidence on this record that Prudential Health exercised any control over the medical judgments and decisions made in the care and treatment of patients, including Villazon's wife.

For these reasons, therefore, the trial court did not err in entering summary final judgment in Prudential Health's favor.

Affirmed.