IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Defendant/Petitioner,

vs. CASE NO. SC01-2444

DINO KAKLAMANOS and
KEELY KAKLAMANOS,

Plaintiffs/Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
DCA Case No.: 1D00-2974

REPLY BRIEF OF DEFENDANT/PETITIONER ALLSTATE INSURANCE COMPANY

CHARLES F. BEALL, JR.
Florida Bar Number 66494
MOORE, HILL & WESTMORELAND, P.A.
220 West Garden Street - Suite 900

Post Office Box 13290
Pensacola, FL 32591-3290
Telephone: (850) 434-3541

PETER J. VALETA
Florida Bar Number 327557
ROSS & HARDIES
150 North Michigan Avenue
Chicago, IL 60601
Telephone: (312) 558-1000
ATTORNEYS FOR
DEFENDANT/PETITIONER

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ARGUMENT

I. THE DISTRICT COURT IMPROPERLY GRANTED THE WRIT BECAUSE THERE WAS NO PRECEDENT ON POINT

The limited scope of certiorari review presents the Kaklamanoses with an insurmountable problem. They acknowledge that a writ of certiorari may be granted only when the circuit court appellate decision violates "a clearly established principle of law." (*Respondent's Brief at 9.)* See Combs v. State, 436 So.2d 93, 95-96 (Fla. 1983). They further acknowledge that the circuit court here was not bound by any controlling decisions holding that insureds may sue an insurance company when they have sustained no damages. (*Respondent's Brief at 11-13.)*

Recognizing this problem, they argue — as does their amicus, the Academy of Florida Trial Lawyers ("AFTL") — that the circuit court decision violated "the well established principle of law that an action arises against an insurer thirty days after being properly present[ed with] a medical bill that it has refused to pay." (*Respondent's Brief at 13; AFTL Brief at 4-5.)* They are incorrect.

First, the Kaklamanoses misunderstand the central issue presented by the petition. The issue was not, as the Kaklamanoses contend, whether an insurer must pay a PIP claim within 30 days after it is submitted or risk being sued. Rather, the issue was whether insureds may sue an insurer when the insureds have suffered and

can suffer no damages, because they have not paid the disputed medical bill and have never been threatened with collection activity. As the Second District Court of Appeal correctly observed in Caravakis v. Allstate Indemnity Company, 806 So.2d 548 (Fla. 2d DCA 2001), neither this Court nor any district courts of appeal had addressed that issue when the district court granted the writ.

Second, the Kaklamanoses base their argument on the assumption that the circuit court failed to consider the 30-day rule when reaching its decision. This assumption is unwarranted. As Allstate observed in its initial brief, the circuit court affirmed the summary judgment without opinion. Though the Kaklamanoses argue that a handful of courts have granted writs from circuit court decisions issued without opinion, that begs, rather than answers, the question. If it is not clear what issues the circuit court reached, how can the district court determine the circuit court applied the incorrect law?

In a nutshell, the Kaklamanoses' primary argument is that the circuit court refused to extend the 30-day rule to cover the factual situation presented here. Even if the circuit court erred in this regard — which it did not, as Allstate demonstrates below — this is not a proper basis for granting a writ of certiorari. District courts are not authorized to grant writs of certiorari simply because the circuit court misapplied the law or refused to extend the existing law to a new set of facts. See Stilson v. Allstate Ins. Co., 692 So.2d 979, 982 (Fla. 2d DCA 1997). Because no controlling

cases existed, the district court should not have granted the writ.

Apparently sensing the problems they face meeting the test, the Kaklamanoses suggest binding precedent is not required for a writ, citing Jones v. State, 459 So.2d 1068, 1081 (Fla. 2d DCA 1984). There, though the issue was one of first impression in Florida, the district court granted a writ of certiorari because the circuit court had not applied the appropriate "framework of constitutional principles" to a police roadblock issue. Id. at 1081.

Jones, however, is inapplicable. First, as the court in Jones noted, the constitutional issues involved there were of such importance that applying them incorrectly necessarily resulted in a miscarriage of justice. Id. Second, and more important, Jones was decided by the Second District Court of Appeal — the same court that later decided both Stilson and Caravakis. The latter cases stand for the proposition — brushed aside in Jones — that controlling adverse precedent is a prerequisite to granting writs, and both show that Jones is limited to the constitutional context. Indeed, Jones has not been cited for its certiorari analysis in the 18 years since it was issued.

This Court has never before approved the use of certiorari jurisdiction to create precedent where it did not previously exist. See Ivey v. Allstate, 774 So.2d 679, 683 (Fla. 2000) (citing Stilson, 692 So.2d at 983). It should not do so now.

II. THE CIRCUIT COURT CORRECTLY AFFIRMED THE JUDGMENT THAT THE KAKLAMANOSES

LACKED STANDING TO SUE ALLSTATE

Both the Kaklamanoses and the AFTL pepper their briefs with diatribes against what they perceive to be shortcomings in the insurance industry's method of reviewing medical bills for the required reasonableness and necessity. They also posit a parade of horribles as to what might happen if the Court finds standing does not exist in these circumstances. The problem is that the former arguments are irrelevant rhetoric, and the latter are total fabrication without record support.

The simple and narrow question here is whether, when it is undisputed that the insured's medical provider has engaged in absolutely no collection activity as to the disputed bill, and nothing suggests that any collection activity will ever occur, the insured has standing to sue the insurer over the issue of the reasonableness or necessity of the disputed portion of the bill. The answer to that question is definitely no, since, under those circumstances, the insured has not been injured in any way.

A. Under Florida Law, Parties Must Show Actual Or Tangibly Threatened Injury To Have Standing, And The Kaklamanoses Have Not Met This Requirement

The Kaklamanoses and the AFTL suggest the Kaklamanoses' "interest" in this case gives them standing. *(AFTL Brief at 10; Respondent's Brief at 17.)* Yet, as a matter of law, to have "sufficient interest" in the controversy, a party "must have an *injury in fact* which relief is likely to address." Pandya v. Israel, 761 So.2d 454, 456 (Fla. 4th DCA 2000) (emphasis added). See also Peregood v. Cosmides, 663 So.2d 665, 668 (Fla. 5th DCA 1995), rev. denied, 673 So.2d 29 (Fla. 1996) (injury "must be distinct and palpable," not "abstract, conjectural or hypothetical").

None of the cases the Kaklamanoses or the AFTL cite holds otherwise. Unlike the Kaklamanoses, the plaintiffs in those cases all could demonstrate some actual or tangibly threatened injury.[1] Here, by contrast, the Kaklamanoses and the AFTL merely speculate about intangible damages, including the "harmful consequences" to some hypothetical insured's credit history, the "detriment to the insured's financial reputation of having a credit driven lawsuit filed against him," "the harassment and embarrassment . . . from the constant barrage of letters and phone calls seeking payment of bills," and "the myriad of other detrimental consequences which will befall the insured." *(Respondent's Brief at 18, AFTL Brief at 12-13.)*

Initially, such intangible "detrimental consequences" may not be recovered in a breach of contract suit. See Hobbley v. Sears, Roebuck & Co., 450 So.2d 332, 333 (Fla. 1st DCA 1984). Accordingly, they would not constitute sufficient injury to confer standing. Moreover, it is undisputed that *none* of these hypothetical "detrimental consequences" has happened to the Kaklamanoses.

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[1] See, e.g., Kumar Corp. v. Nopa Lines, Ltd., 462 So.2d 1178 (Fla. 3d DCA 1985) (plaintiff suffered actual injury from stolen goods); Gieger v. Sun First Nat'l Bank of Orlando, 427 So.2d 815 (Fla. 5th DCA 1983) (finding standing for injury which would clearly occur once garnishment payments were diverted to pay off plaintiff's debt to bank under pledge agreement); Khazaal v. Browning, 707 So.2d 399 (Fla. 5th DCA 1998) (grantor of security interest had standing to appeal default judgment of foreclosure which had been entered against him, and which grantor involuntarily paid); Jamlynn Investments Corp. v. San Marco Residences of Marco Condominium Ass'n, 544 So.2d 1080 (Fla. 2d DCA 1989) (commercial lessee had standing to enjoin condominium association's efforts to limit parking, which would cause lessee irreparable harm from lost customers and income); Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994) (plaintiffs had standing to challenge law imposing impact fee on cars purchased or titled outside state because they were forced either to pay an allegedly illegal tax or risk being penalized by the State).

The AFTL asks "what physician in his or her right mind would treat an insured victim with Allstate PIP coverage knowing that filing a lawsuit is a virtually mandatory condition precedent to getting paid," and sarcastically surmises that Allstate has "[n]o problem knowingly casting its insureds as defendants in lawsuits," or having "a final judgment forever blacken an insured's credit history...even if the judgment is paid." *(AFTL Brief at 13.)* Again, this speculation only highlights the Kaklamanoses' lack of standing. It is undisputed that the Kaklamanoses *did* receive medical treatment; their medical provider has *not* sued them or even threatened collection activity; and there is *no* judgment against them, much less a "blackened credit history."

Indeed, it is interesting that the amicus is a group of plaintiffs' lawyers — not the providers themselves, who should, if the AFTL's rhetoric is correct, be up in arms over the insurance industry's method of reviewing bills. Of course, the AFTL has cited no statistics, because none exist, to back up its unfounded claims that providers will avoid treating patients, or will sue them repeatedly, if standing is not found here. Indeed, as noted below, many Florida courts have, for years, found no standing in these circumstances, yet there has certainly been no spate of provider treatment refusals or lawsuits against insureds.

As discussed in Allstate's initial brief, the overwhelming number of cases across the country, including most Florida circuit and county court cases, have held that insureds lack standing to sue insurers in these circumstances. *(Allstate's Brief at 17-*

23.) A plain reading of these cases shows that the Kaklamanoses' rambling attempts to distinguish them are unavailing.

[2]

Indeed, later in their brief, the Kaklamanoses *admit* that if a medical provider accepts an insurer's payment decision (as in Ny v. Metro. Property & Casualty Ins. Co., 1998 WL 603138, (Mass. App. Ct. Sept. 2, 1998)), the provider "will not likely pursue the insured for any unpaid amount," and "[t]here is little danger of judgments against the insured for unpaid bills in that situation." *(Respondent's Brief at 31.)* Yet, that is obviously what has occurred here, because it is undisputed that the Kaklamanoses' medical provider has never indicated disagreement with Allstate's payment decision. So, even the Kaklamanoses recognize that there is no actual or threatened injury under the facts of this case.

Allowing insureds to sue when they are in no danger of injury turns the concept of standing on its head. The only possible injury in these circumstances is to insurers, who are forced to retain counsel to

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[2] The Kaklamanoses cite four cases in which courts have reached the opposite conclusion: Burgess v. Allstate Indem. Co., 27 Fla. L. Weekly D814 (Fla. 2d DCA, April 10, 2002), Jones v. Allstate Ins. Co., 7 Fla. L. Weekly Supp. 541 (Fla. Escambia Cty. Ct. March 26, 2000); Andrews v. Allstate Ins. Co., 7 Fla. L. Weekly Supp. 613 (1st Cir. June 21, 2000); Decker v. Allstate Prop. Cas. Ins. Co., 7 Fla. L. Weekly Supp. 145 (17th Cir. Oct. 22, 1999). Each of these cases used rationale similar to the First District's in this case, so they are flawed for the same reasons. The same is true of Puritt v. Allstate Ins. Co., 284 Ill. App. 3d 442, 672 N.E. 2d 353 (1st Dist. 1996), app. denied, 171 Ill. 2d 585, 677 N.E. 2d 971 (1997), cited by the AFTL. In any event, as the AFTL admits, Puritt is distinguishable because the insured actually paid out-of-pocket for the disputed medical bills, thus arguably suffering an actual monetary injury. Moreover, by citing Puritt, the AFTL has conceded that out-of-state cases are relevant to this analysis, and, of course, cases in other jurisdictions have overwhelmingly rejected standing in these circumstances -- 5 jurisdictions (Texas, Massachusetts, Michigan, Missouri and Maryland) to 1 (Illinois).

respond to such frivolous lawsuits. And the only possible benefit is to the plaintiffs' lawyers, who stand to use PIP coverage attorneys' fees as a "personal slush fund." See Florida Grand Jury "Report on Insurance Fraud Related to Personal Injury Protection" at 2, 15.

B. Whether Allstate's Policy Indemnifies Against Loss Or Liability Is Irrelevant To The Analysis

The Kaklamanoses and the AFTL devote much of their briefs to the argument that Allstate's policy insures against liability, as opposed to loss, so that a cause of action arose once liability was incurred. Yet, the indemnification-against-liability argument is completely irrelevant for purposes of the standing analysis, because the Kaklamanoses still must suffer damages to have standing.

Even if an expense or a debt is incurred, or liability for payment attaches, these events alone do not create actual injury, and they certainly have not done so here. Again, the Kaklamanoses have paid nothing at all for their "debt," and their medical providers have never even disagreed with Allstate's payment decision, let alone engaged in collection activity.

Notably the standing analysis in this case does not hinge on Allstate's defense and indemnification provision, which is another focus of the Kaklamanoses' and the AFTL's briefs. Since there has been no real or threatened collection activity, there has been no injury regardless of the existence of that provision. What the defense and indemnification provision does do, however, is negate the AFTL's and the Kaklamanoses' speculative arguments about possible future collection activity. Even

if that were to happen (which the Kaklamanoses themselves admit is unlikely), the provision would fully protect the Kaklamanoses. Allstate's defense and indemnification promise would obviously include explaining to the medical provider and any credit agency that the bill is disputed, and similar steps to protect the insured's credit history. So, the AFTL's and the Kaklamanoses' "credit history" parade-of-horribles is not only purely speculative, it does not even present a threatened injury.

C. The Kaklamanoses Were Not Injured Simply Because The Disputed Bills Were Not Paid Within 30 Days

The Kaklamanoses argue they have standing to sue simply because Allstate did not pay their medical bills in full within 30 days. Like the First District, they (and the AFTL) ignore this Court's recent ruling that insurers have every right to contest medical bills even *after* 30 days. United Auto. Ins. Co. v. Rodriguez, 808 So.2d 82, 87 (Fla. 2001). They also ignore this Court's holding that an insurer's breach of its duty to pay PIP benefits arises, once 30 days have passed, *only if* "no benefits were paid on the claim, *assuming they were properly due.*" State Farm Mut. Auto. Ins. Co. v. Lee, 678 So.2d 818, 821 (Fla. 1996) (emphasis added). See also AIU Ins. Co. v. Daidone, 760 So.2d 1110, 1112 (Fla. 4th DCA 2000).

As the Daidone court explained, in language equally applicable here: "the thirty-day period ... applies only to benefits which are reasonable and necessary as a result

of the accident....If an insured submits a bill for medical treatment which is not related to the accident, there are no 'benefits due.' If benefits are not due, they cannot be 'overdue.'" Daidone, 760 So.2d at 1112 (emphasis in original).

The Kaklamanoses' and the AFTL's 30-day theory is contrary to the above authorities, because it incorrectly presumes that insureds will automatically suffer "injury," and therefore have standing to sue, if their insurers do not pay all their medical bills within 30 days. Their approach would lead to the absurd result of allowing insureds to sue their insurers for unpaid PIP benefits — just because 30 days have passed — even if the benefits are *not* "properly due," and even if their medical providers *accept* the insurer's determination that the medical expenses were unreasonable or unnecessary. The practical impact of litigating such a moot issue would be a waste of the parties' and the court's resources, and a windfall to the undamaged insureds who, if successful, would collect PIP benefits (and attorneys' fees)

[3] for a bill which their medical provider accepts no payment is due.

The Kaklamanoses cite Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974), for the proposition that PIP benefits must be swiftly paid. But Lasky did not hold that *all* medical expenses

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[3] The AFTL chides Allstate and the NAII for "overlooking" that only "meritorious" litigants are rewarded with attorneys' fees under the PIP statute. *(AFTL Brief at 19.)* But, as the Florida Grand Jury "Report on Insurance Fraud Related to Personal Injury Protection" shows, the potential reward of attorneys' fees is clearly an incentive for ill-founded PIP lawsuits.

must be paid within 30 days, and certainly not those the insurer disputes as unreasonable or unnecessary. To the contrary, this Court recognized in Lasky that "strict observance" of the PIP statute's reasonableness/necessity requirement benefits, rather than harms, insureds because it prevents needless depletion of PIP coverage. Id. at 15.

Fortune Ins. Co. v. Pacheco, 695 So.2d 394 (Fla. 3d DCA 1997), cited by the Kaklamanoses, does state that "the legislature provided no exceptions to the thirty-day period." Pacheco, 695 So.2d at 395-96. Like the First District, however, the Kaklamanoses fail to recognize that "exceptions" refers only to exceptions to the "overdue" status of a PIP claim under § 627.736(4). The PIP statute includes *no exceptions* to its requirement that medical expenses be reasonable and necessary, so the passage of 30 days cannot possibly create an obligation to cover unreasonable or unnecessary bills that are not "properly due."

Indeed, in Pacheco, the insurer *agreed* that the PIP benefits were due. Here, of course, Allstate disagrees that it owes the disputed PIP benefits (and the Kaklamanoses' medical provider has not disagreed with Allstate), so these benefits are not "properly due." Under these circumstances, there can be no breach and no injury just because Allstate did not pay a portion of a bill, which it has every right under the applicable statute and case law to contest, within 30 days.

[4]

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[4] As noted in Allstate's initial brief, the courts in Gloria, Noah and Ostrof dismissed lawsuits just like this one based on the insureds' lack of standing, even though the Texas and Maryland PIP statutes have the same 30-day payment requirement as Florida's. The Kaklamanoses argue these cases are distinguishable, because they are either federal cases or class actions. These distinctions are without a difference, however, since the courts' analysis had nothing to do with any special principles of federal or class action law. Rather, those cases were guided by the universal principle that standing requires injury, which simply does not exist in these circumstances.

D. Allstate's Position Does Not Deny Insureds Access To Court And Furthers The Intent Of The PIP Statute

The Kaklamanoses and the AFTL argue that Allstate's position contravenes the intent of the PIP statute and violates public policy, because it denies insureds access to the courts. Even the First District rejected this "access to courts" argument. The Florida constitutional right of access to courts does not open Florida courts to *all* persons who want to file suit, but only to "every person *for redress of any injury*." Art. I, § 21, Fla. Const. (emphasis added). As demonstrated above, the Kaklamanoses have no injury to redress, hence no standing and no basis for access to the courts.

In fact, the result the Kaklamanoses and the AFTL advocate contravenes the intent of the PIP statute. If insureds are allowed to sue their insurers for unpaid PIP benefits when they are not and never will be responsible for paying them, that will needlessly drain the insured's limited PIP coverage, leaving less PIP benefits for medical bills which *are* properly due. The result is that insureds will be more likely to have to pay out of their own pocket for future medical bills, based on full payment of past bills, including those — like the Kaklamanoses' video fluoroscopy bill-for which their medical providers obviously expect no further payment.

The AFTL argues that, even assuming a medical expense like video fluoroscopy is completely unnecessary, "the right to PIP benefits from the insurer belongs to the

insured," who has the "right to enforce those benefits" by filing suit. *(AFTL Brief at 14-15.)* But this is precisely the type of baseless PIP litigation the Florida Legislature criticized when it revised the PIP statute. See 2001 Fla. Laws ch. 271, 2001 Fla. SB 1092 (the PIP statute's intent of delivering "medically necessary and appropriate medical care quickly *** and *without undue litigation or other associated costs*," has been frustrated by various practices described in the Florida Grand Jury "Report on Insurance Fraud Related to Personal Injury Protection" — including questionable treatment like video fluoroscopy).

The proliferation of unfounded PIP lawsuits against insurers is already a very real and well-documented threat, as shown by the Florida Grand Jury Report on this very issue. This problem will only grow worse if the district court's decision is affirmed, because insureds will be allowed to file PIP suits, with the prospect of substantial attorneys' fees, even when, as here, they have not met the threshold requirement of standing.

CONCLUSION

For all the foregoing reasons, as well as those set forth in its initial brief, Petitioner, Allstate Insurance Company, respectfully requests this Court to quash the First District Court of Appeal's decision and affirm the circuit court's decision upholding summary judgment in Allstate's favor based on the Kaklamanoses' lack of standing.

Dated this 30th day of July, 2002.

Respectfully submitted,

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CHARLES F. BEALL, JR.
Florida Bar Number 66494
MOORE, HILL & WESTMORELAND, P.A.
Post Office Box 13290
Pensacola, FL 32591-3290
Telephone: (850) 434-3541

PETER J. VALETA
Florida Bar Number 327557
ROSS & HARDIES
150 North Michigan Avenue
Chicago, IL 60601
Telephone: (312) 558-1000
Attorneys for Defendant/Petitioner,
Allstate Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished via U.S. Mail this 30th day of July, 2002 to the following:

DAVID LEE SELLERS, ESQUIRE 801 North 12th Avenue Pensacola, FL 32503	**PETER J. VALETA, ESQUIRE** 150 N. Michigan Ave., Ste. 2500 Chicago, IL 60601
DAVID B. SHELTON, ESQUIRE **CANDY L. MESSERSMITH, ESQ.** Rumberger, Kirk & Caldwell P.O. 1873 Orlando, FL 32802-1873	**LEIGH SEGARS, ESQUIRE** P.O. Box 2213 Pensacola, FL 32513
JULIE H. LITTKY-RUBIN, ESQ. Lytal, Reiter, Clark, Fountain & Williams, L.L.P. P.O. Box 4056 West Palm Beach, FL 33402-4056	

_____

CHARLES F. BEALL, JR.
Florida Bar Number 66494
MOORE, HILL & WESTMORELAND, P.A.
220 West Garden Street
9th Floor, SunTrust Tower
Post Office Box 13290
Pensacola, FL 32591-3290
Telephone: (850) 434-3541
Attorneys for Defendant/Petitioner,
Allstate Insurance Company

CERTIFICATE OF COMPLYING WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing "Reply Brief of Defendant/Petitioner Allstate Insurance Company" has been prepared in Times New Roman 14-point font as required by Fla. R. App. P. 9.210(a)(2).

_____

CHARLES F. BEALL, JR.
Florida Bar No. 66494, of
MOORE, HILL & WESTMORELAND, P.A.
9th Floor, Sun Bank Tower
Post Office Box 13290
Pensacola, FL 32591-3290
Telephone: (850) 434-3541