IN THE SUPREME COURT OF FLORIDA

ORIGINAL

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CASE NO. SC01-2444
Lower Tribunal No. 1D00-2974

CASE NO. SC02-198
Lower Tribunal No. 2D00-4027

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

DINO KAKLAMANOS, ET AL.,

Respondent.

VERON CARAVAKIS,

Petitioner,

vs.

ALLSTATE INDEMNITY COMPANY, ETC.,

Respondent.

REPLY BRIEF OF PLAINTIFF/PETITIONER, VERON CARAVAKIS

On Discretionary Review from a Decision
of the District Court of Appeal
Second District of Florida

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ARGUMENT I

THE FLORIDA PIP STATUTE AND THE FLORIDA CONSTITUTION ARE THE "CLEARLY ESTABLISHED PRINCIPLES OF LAW" THAT THE CIRCUIT COURT "DEPARTED FROM THE ESSENTIAL REQUIREMENTS" CAUSING A "MISCARRIAGE OF JUSTICE."

A. The Ivey Opinion and the Standard for Certiorari Review

It is apparent that the only issue the parties agree on is that Ivey v. Allstate Insurance Company, 774 So.2d 679 (Fla. 2000) sets forth the standard for certiorari review. This Court has held that **"only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice"** should the district court exercise its certiorari discretion to overturn a circuit court acting in its appellate capacity. Ivey, 774 So.2d at 682; Haines City Community Development v. Heggs, 658 So.2d 523, 528 (Fla. 1995).

B. "Clearly Established Principles of Law" exist in Florida Statutes and the Florida Constitution

Allstate argues that there is "no controlling precedent" that existed regarding the "standing" issue. Therefore, the circuit court could not have violated a "clearly established principle of law," could not have "departed from the essential requirements of law," and could not have caused a "miscarriage of justice."

Allstate cites the Ivey opinion for the proposition that there must be a "controlling precedent" in the form of "case law."

Allstate attempts to convince this Court that "controlling precedent" is synonymous with "case law" and that "case law" is synonymous with a "clearly established principle of law." However, Allstate fails to cite to this Court one case to support its contention that "controlling precedent" equates to "case law" and that "case law" equates to a "clearly established principle of law." Allstate fails to cite to this Court one case to support its restricted and limited definition of what may constitute a "clearly established principle of law."

In the instant case, Caravakis submits that a "clearly established principle of law" may just as easily be a clear and unambiguous section of a longstanding Florida Statute, in this case Florida's PIP law. In addition, a "clearly established principle of law" may just as easily be applicable sections of Florida's Constitution, in this case Article I, Sections 21 and 22 guaranteeing access to courts to every person for redress of any injury and the right to trial by jury.

Arguably, Florida's longstanding PIP law, codified at §627.736, Florida Statutes and the sections of Florida's Constitution pertaining to access to courts and the right of trial by jury are **more "clearly established principles of law"** than Florida's appellate case law construing them. If "controlling precedent" can constitute a "clearly established principle of law," **certainly**, a longstanding Florida statute and sections of Florida's

Constitution can also constitute "clearly established principles of law."

In the instant case, therefore, the "clearly established principle of law" is a statute, Florida's PIP statute, codified at §627.736, Florida Statutes. The "clearly established principle of law" is §627.736(4)(b), pertaining to when PIP benefits are due and owing. This section is "crystal clear." It clearly states that "personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same." Fla. Stat. §627.736(4)(b).

Once Allstate unilaterally deemed only a portion of the submitted bills to be reasonable and medically necessary, and unilaterally decided to pay only a portion of them, then under §627.736(4)(b), Florida Statutes and Article I, Sections 21 and 22 of the Florida Constitution, "clearly established principles of law," Caravakis had the "standing" to file suit and **to claim** that the entire bill (which he owes his doctor) is reasonable, medically necessary, and causally related to the motor vehicle accident. These are the "clearly established principles of law" that were not applied and resulted in a "departure of the essential requirements of law," causing a "miscarriage of justice" to Caravakis.

C. The Rodriguez Opinion and Allstate's Right to "Contest" the Bills

Allstate cites this Court's recent opinion in United Auto

Insurance Company v. Rodriguez, 808 So.2d 82 (Fla. 2001) for the proposition that it has the right to "contest" the reasonableness and medical necessity of the bills. Rodriguez, 808 So.2d at 87.

This is true! Caravakis wholeheartedly agrees that under Rodriguez, Allstate has the right to "contest" the reasonableness and medical necessity of the bills! However, the right to "contest" does not mean Allstate "automatically wins." It is true that Allstate has the "right" to unilaterally decide to pay what it deems to be reasonable and medically necessary and, further, Allstate has the "right" to "contest" any bills it unilaterally deems not to be reasonable or medically necessary.

However, what Allstate fails to recognize is that it is a "contest." The **noun** "contest" is defined in the American Heritage Dictionary of the English Language, New College Edition, as "1. A struggle for superiority or victory between rivals. 2. Any competition; especially, one in which entrants perform separately and are rated by judges." The **verb** "contest" is defined as "1. To compete or strive for. 2. To attempt to disprove or invalidate; to dispute; to challenge." American Heritage Dictionary of the English Language, New College Edition (1981).

Certainly, Caravakis agrees that the Rodriguez opinion entitles Allstate to "contest" any bills that it feels are not reasonable or not medically necessary. However, it is a "contest." It is not an "automatic win" for Allstate. Allstate has the right

to pay what it unilaterally deems to be reasonable and medically necessary. However, under Florida's PIP statute and Florida's Constitution providing for access to courts and trial by jury, the insured, Caravakis, has the right to have the "contest" decided by the "trier of fact" in a court of law, in this case, the jury, not a county judge or a circuit court judge.

The right of the PIP insured to have a jury trial to determine the reasonableness and medical necessity of the medical bills properly submitted and properly received, but "contested" by the insurer is the "clearly established principle of law" that the trial court and, thereafter, the circuit court in its appellate capacity, failed to apply. Instead, both the trial court and the circuit court in its appellate capacity "departed from the essential requirements of law" and "caused a miscarriage of justice" when they both held as a matter of law that Allstate "automatically wins" the "contest" pertaining to the reasonableness and medical necessity of the medical bills without the "contest" being decided by the trier of fact as in all PIP cases where the insured is the party plaintiff.

D. The 30 Day Time Period Codified in §627.736(4)(b)

Allstate attempts to convince this Court that Caravakis is presenting a "30 day theory." In response, first of all, it is not a "theory" and secondly, it is not Caravakis' "idea." The Florida Legislature **in its wisdom**, when it passed Florida's No-Fault law,

codified the 30 day period in §627.736(4)(b), Florida Statutes. Florida case law has always upheld Florida's PIP law 30 day time period holding that nothing tolls this time limitation and that the burden is clearly upon the insurer to authenticate the claim within the statutory time period. Dunmore, 301 So.2d 502 (Fla. 1st DCA, 1974); Kaklamanos v. Allstate Insurance Company, 796 So.2d 555, 558 (Fla. 1st DCA 2001).

In its answer brief, Allstate attempts to distinguish Dunmore v. Interstate Fire Insurance Company, 301 So.2d 502 (Fla. 1st DCA 1974) from the instant case.

What Allstate fails to realize is that it is undisputed that on at least one occasion, Allstate paid **nothing for a bill that was submitted for medical services rendered.** In other words, as in Dunmore, Allstate decided that one bill was entirely unreasonable and entirely not medically necessary. Therefore, with respect to at least one medical bill, the facts of the Dunmore opinion are the same as the instant case. Therefore, Allstate's attempt to distinguish Dunmore is without merit.

ARGUMENT II

ON THE MERITS OF THE CIRCUIT COURT DECISION, THE CIRCUIT COURT ERRED WHEN IT HELD THAT CARAVAKIS "SUFFERED NO DAMAGES."

In response to Allstate's contention that the circuit court correctly applied the law and correctly interpreted the amendatory

endorsement of Allstate's insurance policy and correctly concluded that Caravakis "suffered no damages," Caravakis continues to rely on the validity of Kaklamanos v. Allstate Insurance Company, 796 So.2d 555 (Fla. 1st DCA 2001).

In addition, it is noteworthy that on June 6, 2002, Caravakis filed his Notice of Filing Supplemental Authority, citing Burgess v. Allstate Indemnity Company, 27 FLW D814 (2nd DCA 4/10/02), as supplemental authority "on the merits" of this case.

In Allstate's Answer Brief, Allstate argues that the Kaklamanos opinion is wrong. Allstate, further, cites multiple circuit court appellate opinions from Pinellas County and Hillsborough County for the proposition that "the overwhelming" number of cases directly on point show that the circuit court ruled properly.

However, Allstate in its Answer Brief never once mentions Burgess v. Allstate Indemnity Company, 27 FLW D 814 (Fla. 2nd DCA 4/10/02), which is a Second District Court of Appeal opinion that squarely decides "the merits" of the case identically to the First District's opinion in Kaklamanos. The Second District in Burgess expressly agreed with the First District's holding "on the merits." The Second District reviewed the identical legal issue de novo and adopted the Kaklamanos reasoning.

On the issue of the indemnity clause, the Second District reasoned:

> As the First District noted, **the indemnity clause on which Allstate relied did not purport to restrict the insured's right to sue** ... Yet, in all these cases, Allstate has claimed that the insureds lack standing to sue based on that provision. In essence, Allstate argues here that Burgess has not suffered any damages from its failure to fully pay the medical bills. We disagree. An insured "may be damaged by an insurance company's failure to pay a claim even if the insured has not already paid or been sued by the medical provider." (citation omitted).

Burgess v. Allstate Indemnity Company, 27 FLW D 814 (Fla. 2nd DCA 4/10/02) (emphasis added).

Therefore, all of the circuit court cases cited by Allstate from Pinellas County and Hillsborough County are all overruled by Burgess v. Allstate Indemnity Company, 27 FLW D814 (Fla. 2nd DCA 4/10/02).

Contrary to Allstate's assertion pertaining to the prevailing view "on the merits" of this case, the prevailing view in Florida is that:

> An insured's right of action against his PIP and medical payments insurer arises thirty days after written notice to the insurer that reasonable and necessary medical treatment covered by the insurance has resulted in a debt.

Burgess v. Allstate, 27 FLW D814 (Fla. 2nd DCA 4/10/02); Kaklamanos v. Allstate Insurance Company, 796 So.2d 555 (Fla. 1st DCA 2001); See §627.736(4)(b), Florida Statutes (1997).

As far as other states are concerned, Allstate cites cases from Texas, Michigan, Massachusetts, Missouri, and Maryland in

support of its position that a PIP claimant cannot file suit under these factual circumstances. Upon examination, none of these cases support Allstate's position.

The two Texas cases cited by Allstate in its answer brief are Gloria v. Allstate County Mutual Insurance Company, No. SA-99-CA-676-PM (W.D.Tex. September 29, 2000) and Noah v. Government Employees Insurance Company, No. SA-00-CA-018 (W.D.Tex. April 9, 2001). Neither case supports Allstate's position in the instant circumstances. Further, Gloria dealt significantly with RICO and Sherman antitrust claims, inapplicable to the issues in the instant case.

In Gloria, there was no affirmative evidence of continued outstanding liability on the part of the plaintiff for unpaid medical bills, whereas, in the instant case, there is clear evidence of outstanding liability of Mr. Caravakis.

The Michigan cases cited by Allstate are McGill v. State Farm Mutual Automobile Insurance Company, 207 Mich. App. 402, 526 N.W.2d 12 (1994) and LaMothe v. Auto Club Insurance Association, 214 Mich. App. 577, 543 N.W.2d 42 (1955). In McGill, the PIP insurer made only partial payment of the PIP claimant's medical bills, denied payment of the balance on the grounds that the bills were excessive, and the claimant brought suit against the insurer for the balance of the PIP benefits allegedly due. The Michigan Court of Appeals held that the trial court had properly denied relief

because of the insurer's agreement to indemnify the claimant, and, more importantly, because of a directive from the Michigan Commissioner of Insurance that required that the insurer:

> provide insureds and claimants with *complete protection from economic loss* for benefits provided under personal protection insurance. Auto insurers *must act at all times to* assure *that the insured or claimant is* not exposed to harassment, dunning, disparagement of credit, *or lawsuit* as a result of a dispute between the healthcare provider and the insurer.

McGill at 14 (emphasis added).

Based on this broad and unequivocal directive of the Commissioner of Insurance, the Court of Appeals in McGill concluded that: "[P]laintiffs are protected, by both the defendant's promise and the directive of the Commissioner of Insurance, from incurring damages as a result of defendant's payment of less than the full amount billed by plaintiff's healthcare providers." Id. at 14.

The Florida District Court of Appeal in Kaklamanos v. Allstate Insurance Company, 796 So.2d 555 (Fla. 1st DCA 2001) specifically distinguished the decision in McGill from the facts presented in Kaklamanos (which are identical to the facts presented in Caravakis) precisely because, in McGill, "[T]he insurance commissioner directed no-fault insurers to provide claimants with 'complete protection from economic loss' including any exposure to 'harassment, dunning, disparagement of credit, or lawsuit as a result of a dispute between healthcare providers and the insurer'". Kaklamanos at 559-560, footnote 6. Absent such

governmental protection, the court in Kaklamanos noted that "[T]he insured may be damaged by an insurance company's failure to pay a claim even if the insured has not already paid or been sued by the medical provider." Id. at 560-561.

Inasmuch as the Michigan authorities cited by Allstate rely on the broad-based governmental protection afforded Michigan claimants by the Michigan Commissioner of Insurance, and inasmuch as no such comparable governmental protection exists in Florida, neither of the Michigan cases cited by Allstate are applicable to the facts in the instant case.

The Massachusetts case cited by Allstate in support of its arguments is the decision by the Massachusetts Appellate Court in Ny v. Metropolitan Property and Casualty Insurance Company, 1998 Mass, App.Ct.Div. 179, 1998 WL 603138 (1998). The decision in Ny is in stark contrast to the facts of the instant case because in that case, the PIP insurer obtained releases from the PIP insured's medical providers, under which the medical providers agreed to accept, as full payment for the medical services provided, the PIP payment received from the insurer. This completely eliminated any possibility that the medical provider would pursue the PIP claimant/insured for the balance owing on the medical bills previously sent to the claimant/insured.

In the instant case, of course, Allstate has obtained no such release, and can give no assurance whatsoever that the medical

provider will not seek to hold Mr. Caravakis liable for the balance owing on the medical bills sent to Mr. Caravakis.

The Missouri case cited by Allsate in its brief is the decision of Kinnard v. Allstate Insurance Company, No. 992-00812 (Missouri Circuit Court, November 15, 1999), an unreported trial court decision. In that case, the claims of one plaintiff, Bush, were dismissed for failure to state a claim, not for lack of standing. The court simply determined that the allegation that Allstate had failed to pay the PIP claimant in full, and that Bush had thereby been damaged in the amount of $13, failed to "... show how that sum relates in any way to Allstate's alleged actions." (Kinnard v. Allstate Insurance Company, Missouri Circuit Court at p. 6). By contrast, in the instant case, the plaintiff, Mr. Caravakis, has set forth in detail in his complaint, supported by numerous exhibits, the amount of the bills submitted by his medical providers, the amount paid by Allstate, the amount denied by Allstate and the amount outstanding and unpaid.

The only remaining out-of-state authority cited by Allstate in support of its position is Ostrof v. State Farm Mutual Automobile Insurance Company, 200 F.R.D. 521 (D. Md. 2001). That decision has no application whatsoever to the instant case, as it involved solely a denial of a motion for class certification, and did not dispose of the individual claims of the individual plaintiffs who sought to represent the class.

Maryland law regarding PIP benefits is more accurately represented by the decision of the Maryland Court of Special Appeals in Huntt v. State Farm Mutual Automobile Insurance Company, 72 Md. App. 189, 527 A.2d 1333 (1987), wherein the Appellate Court recognized that under Maryland's statutory scheme regulating PIP benefits, an insurer was only required to pay reasonable medical expenses and was afforded the opportunity to challenge a medical provider's charges by requesting that the insured submit to a physical examination. However, that decision in no way suggests that the PIP insured must wait to be sued by his medical provider or pay his medical bill out of his own pocket as a prerequisite to having the issue determined by a court of appropriate jurisdiction.

Additionally, Allstate failed to address the fact that Illinois, Allstate's "home state," has squarely rejected Allstate's "standing" arguments when this was attempted by Allstate in the case of Puritt v. Allstate Insurance Company, 672 N.E.2d 353 (1st Dist. 1996), cert. denied, 677 N.E.2d 971 (Ill. 1997). In Puritt, the Appellate Court of Illinois squarely rejected Allstate's contention that a PIP claimant/insured must either pay his medical bills out of his own pocket or wait to be sued by his healthcare provider in order to have standing to bring suit against his insurer for wrongful denial of payment of the medical bills. This case dealt with remarkably similar issues to the instant case before this court.

CONCLUSION

For the foregoing reasons, Petitioner, Caravakis, respectfully requests this Court grant certiorari jurisdiction and quash the Circuit Court's Opinion and remand to the County Court for trial by jury on whether the medical bills at issue are reasonable, medically necessary, and causally related to the motor vehicle collision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by regular U.S. Mail to ANTHONY J. PARRINO, ESQ., Reynolds & Stowell, P.A., 8700-4th Street North, St. Petersburg, FL 33702 (counsel for Respondent, ALLSTATE INDEMNITY COMPANY); PETER J. VALETA, ESQ., Ross & Hardies, 150 N. Michigan Avenue, Chicago, IL 60601 (additional counsel for Respondent, ALLSTATE INDEMNITY COMPANY); and, DAVID B. SHELTON, ESQ. and CANDY L. MESSERSMITH, Rumberger, Kirk & Caldwell, Post Office Box 1873, Orlando, FL 32802-1873 (counsel for Amicus, National Association of Independent Insurers), this 11th day of July, 2002.

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I HEREBY CERTIFY that the type style and font in the foregoing brief complies with and satisfies the requirements of Rule 9.100 and Rule 9.210, Florida Rules of Appellate Procedure. Executed this 11th day of July, 2002.

By: _____
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