IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-296
Florida Bar No. 184170

MAURICE DERIUS,

Petitioner,

vs.

ALLSTATE INDEMNITY COMPANY,

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS
ALLSTATE INDEMNITY COMPANY

(With Appendix)

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CERTIFICATION OF TYPE

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

STATEMENT OF THE FACTS AND CASE

Petitioner Maurice Derius ("Derius") suffered injury in an auto accident. His doctors submitted bills for his medical treatment to Allstate Indemnity Company ("Allstate") for payment of personal injury protection ("PIP") benefits under Derius' Allstate auto policy. Allstate paid a reduced amount for some of those bills on grounds of reasonableness, necessity and relatedness.

Derius brought suit contending that Allstate improperly reduced the amount paid under his PIP coverage. In discovery, Allstate obtained the testimony from the three doctors whose bills Derius claimed had been unlawfully reduced. Doctors Rosati, Scott and Vinsant each admitted that he had written off the unpaid amounts, that his records reflected a zero balance owing to him from Derius, and that he had not and would not seek to recover any additional amounts from Derius beyond the payments which Allstate had already made. Allstate sought summary judgment because it was undisputed that Derius had suffered no damages. The trial court granted summary judgment for Allstate with regard to Dr. Rosati because he had written off the unpaid amount of his bills (R 254-256, 824).

Allstate moved for summary judgment with regard to Dr. Scott, on the basis that he had written off the unpaid amount of his bills, and Derius moved for summary judgment with regard to Dr. Vinsant,[1]

[1] Derius argued that because this third doctor (Dr. Vinsant) had testified that he would be happy to get a check for the amount he had written off ($60), even though he did not expect it, a controversy was present and Derius had a cause of action. The trial court apparently agreed with this argument even though Derius had not paid that additional $60 and Dr. Vinsant did not seek payment of that amount from Derius (R 1093; 1096-1098).

contending he was entitled to judgment as a matter of law because Allstate had no medical report which said that the bill was unreasonable, had not paid the bill within 30 days, and had not obtained a report based on an independent medical examination of Derius within 30 days of receiving the bill (R 221-227; 290-303; 909-918).

In opposition to Derius' motion as to Dr. Vinsant, Allstate produced the undisputed report it had obtained from Dr. Zeide indicating that this charge was not reasonable. That report was attached to the Affidavit of Joseph G. Murasko and submitted with Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the $75.00 Portion of Dr. Vinsant's Bill (R 1067-1085).[2] The Dr. Zeide report was not, however, obtained within 30 days of receipt of the bill in question. Id. At the argument of this motion, Derius argued that because Allstate had not obtained that report within the 30 day period, it could not refuse payment on reasonableness grounds, and Allstate argued that no report was required by the statute (R 1275-1286).

Although Allstate was entitled to summary judgment as to Dr. Scott for the same reason as Dr. Rosati (R 826-830), it appears that no order was entered as to Dr. Scott. Instead, as the transcript of the summary judgment hearing on Dr. Vinsant's bill reflects, the trial court was prepared to rule in favor of Derius, with regard to Dr. Vinsant, based upon the 30 day rule for obtaining a report as

[2] A true and correct copy of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the $75.00 Portion of Dr. Vinsant's Bill is being filed contemporaneously with this Brief as Respondent's Appendix "A."

stated in United Auto. Ins. Co. v. Viles, 726 So. 2d 320 (Fla. 3d DCA 1999). Counsel for Allstate agreed that such an order would apply to Dr. Scott's case as well, since a report had not been obtained within 30 days there either and requested that the trial court certify the question. Thus, the trial court entered summary judgment against Allstate on October 12, 1999, holding that because Allstate had not obtained a physician's report within 30 days, it could not reduce the amount of payment of PIP benefits of any of plaintiff's medical bills on grounds of reasonableness (R 1276-1292).

The trial court certified the following question of great public importance to the Fourth District Court of Appeal:

> Must an insurance company, who seeks to reduce bills for medical treatment, pursuant to Section 627.736(1)(a), first obtain a report from a physician licensed under the same chapter as the treating physician stating that the bills for treatment are not reasonable, pursuant to Section 627.736(7)(a)?

Allstate Indemnity Company v. Derius, 773 So. 2d 1190 (Fla. 4th DCA 2000). The Fourth District answered that question in the negative, holding that § 627.736(7)(a), Fla. Stat. does not "require [] a written report as a condition prerequisite to reducing payment of a bill for treatment on the grounds of reasonableness, necessity or relationship," 773 So. 2d 1191. This discretionary review follows.

Since that decision, this Court issued its opinion in United Auto. Ins. Co. v. Rodriguez, State Farm Fire and Cas. Co. v. Perez, Nos. SC00-1112, 2001 WL 1380001, 26 Fla. L. Weekly S747 (Fla. Nov. 8, 2001)("United Auto v. Rodriguez") holding: (1) where an insurer fails to pay a PIP claim within 30 days of receiving a medical bill, the insurer is not barred from contesting the validity of that claim

at a later date; and (2) that the "reasonable proof" under § 627.736(4), which would allow an insurer to avoid overdue interest when it did not pay a PIP claim within 30 days of receipt is not limited to the "report" required under § 627.736(7)(a).

SUMMARY OF ARGUMENT

This Court's decision in United Auto v. Rodriguez confirms the correctness of the statutory interpretation by the Fourth District in this case. Faced with United Auto v. Rodriguez, Petitioner has now presented this Court with a new argument which differs greatly from his argument made in support of the certified question to the Fourth District. Conceding that United Auto v. Rodriguez makes it clear that an insurer need not obtain a report within 30 days of receiving a medical bill for PIP payment, he asserts for the first time in this case that the PIP statute requires that an insurer obtain a medical report to justify its reduction of or refusal to pay a bill on grounds of reasonableness prior to a judicial decision on an insured's claim for such unpaid benefits. This argument should not be considered because it was not made below. Moreover, even if it is considered, Derius' argument is inconsistent with United Auto v. Rodriguez. The decision of the Fourth District should be affirmed and this appeal dismissed because there is no report requirement whatsoever under the PIP statute as a prerequisite to the reduction of a medical bill on grounds of reasonableness. Furthermore, even if there were a report requirement as Derius now contends, the record is clear and undisputed that, on August 3, 1998, more than one year prior to the court's summary judgment ruling on October 12, 1999,

Allstate had obtained a report. In all events, Derius had no cause of action because he suffered no damages.

ARGUMENT

I. THE SUPREME COURT SHOULD DISMISS THE DISCRETIONARY REVIEW BECAUSE PETITIONER SEEKS TO ASSERT NEW ARGUMENTS NOT RAISED BELOW.

As stated above, this appeal arises from Derius' motion for summary judgment with regard to Dr. Vinsant's bill reductions, in which he contended that he was entitled to judgment as a matter of law because Allstate had not obtained a medical report which said that the bill was unreasonable within 30 days of receiving it, and therefore could not contest the reasonableness of the bill. Only after this Court decided United Auto v. Rodriguez, rejecting the argument presented by Derius below, did he present his new argument to this Court. Derius now asserts, for the first time, that Allstate was required to obtain a medical report prior to a dispositive hearing on the issue of reasonableness.

New arguments cannot be raised for the first time on appeal in Florida. Betts v. Samardak, 609 So. 2d 700, 701 (Fla. 4th DCA 1992). This is true at both the District Court of Appeals and Supreme Court level. See, Mariani v. Schleman, 94 So. 2d 829, 831 (Fla. 1957)(On appeal, Supreme Court will confine itself to a review of those questions only which arose before the trial court, and matters not presented to the trial court by the pleadings and evidence will not be considered.); Atwood v. Hendrix, 439 So. 2d 973 (Fla. 1st DCA 1983)(Issues not presented to trial court will not be considered for the first time on appeal). Derius' entire brief is devoted to his new argument that § 627.736(4) requires that unless an insurer

obtains a report prior to a dispositive judicial hearing, the insurer cannot defend its decision to challenge the reasonableness of a medical bill. Accordingly, this appeal should be dismissed.

II. AS CLEARLY ANNOUNCED IN UNITED AUTO V. RODRIGUEZ, SECTION 627.736 DOES NOT REQUIRE A MEDICAL REPORT TO SUPPORT AN INSURER'S REDUCTION OR REFUSAL TO PAY MEDICAL BILLS ON GROUNDS OF REASONABLENESS, RELATEDNESS OR NECESSITY.

In United Auto v. Rodriguez, this Court resolved conclusively the question of whether an insurer must first obtain a report from a physician before it denies or reduces payment of a PIP claim on the basis that the treatment was not reasonable, related or necessary. United Auto v. Rodriguez, at *4. The Court stated unequivocally that a "medical report" is **not** necessary when reducing or denying PIP benefits:

> Further, the district court held that in order to escape the thirty-day rule, an insurer must obtain a "medical report" showing that the insurer is not responsible for payment. Amici Allstate Insurance Company and Geico Casualty Company point out that this requirement of a medical report is not mentioned anywhere in section 627.736(4) and they contend it erroneous. Amici are correct. The statute does not mention "medical report" in this regard; the statute simply says that the insurer must pay benefits within thirty days unless the insurer "has reasonable proof to establish that the insurer is not responsible for the payment." The statute does not limit "reasonable proof" to a "medical report." Thus, to the extent that the present district court opinion defines "reasonable proof" to mean only a medical report, the district court has rewritten the statute. This too was error.
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> United Auto v. Rodriguez, at *6.

This Court was asked in United Auto v. Rodriguez to resolve a conflict among the Florida district courts regarding whether or not

an insurer is barred from contesting liability on a PIP claim if payment of the claim is "overdue," as defined in section 627.736(4)(b). Id. at *2. The district courts had, in their decisions, proposed a variety of interpretations of the PIP statute, and the requirements that the statute imposes upon insurers who have "denied" or "reduced" PIP benefits.

Under section 627.736 of the PIP statute, an insurer is required to furnish benefits to its insureds for losses that are sufficiently related, reasonable and necessary. Id. at *2. Specifically, section 627.736(1) provides:

> (1) Required Benefits. - Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to the provisions of subsection (2) and paragraph (4)(d), to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows:
>
> > (a) *Medical Benefits* - Eighty percent of all reasonable expenses for necessary medical, surgical, X-ray, dental and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services....

§ 627.736(1) Fla. Stat. (1997)(emphasis added).

The PIP statute imposes penalties against insurers who allow PIP claims to become overdue. §§ 627.736(4)(c) and (8) Fla. Stat. (1997). Section 627.736 defines overdue payment:

> (b) 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....However, any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer....

§ 627.736 Fla. Stat. (1997)(emphasis added).

The PIP statute also sets forth a procedure by which insurers may withdraw benefits. That section provides:

> An insurer may not withdraw payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the insurer first obtains a report by a physician licensed under the same chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that treatment was not reasonable, related or necessary.

§ 627.736(7)(a) Fla. Stat. (1997)(emphasis added). The conflict among the district courts centered on these provisions. Specifically, the district courts' decisions varied regarding whether the "reasonable proof" standard of § 627.736(4)(b) required the insurer to obtain a medical report, as described in § 627.736(7), and what penalties could be levied upon an insurer who failed to satisfy the "reasonable proof" standard within 30 days of receiving written notice of the claim.[3]

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[3] The Third District in Perez v. State Farm Fire and Cas. Co., 746 So. 2d 1123 (Fla. 3rd DCA 1999) had applied the "report requirement" of § 627.736(7) to the "reasonable proof" standard of § 627.736(4)(b). On that basis, the appellate court held that "[t]he PIP statute *clearly requires* that the insurer must obtain, *within thirty days*, a medical report providing "reasonable proof" that it is not responsible for payment." Id. at 1125. The appellate court thus concluded that the insurer was required to pay the claim plus accrued

However, in AIU Ins. Co. v. Daidone, 760 So. 2d 1110 (Fla. 4th DCA 2000), the Fourth District Court of Appeals anticipated this Court's decision in United Auto v. Rodriguez. Indeed, like this Court, the Daidone court noted that the language of § 627.736(4)(b) does not support the proposition that an insurer is required to obtain a written medical report stating that the patient's treatment was unnecessary or unreasonable before reducing or denying coverage, nor could it think of any "reason why an insurer should have to go to the expense of obtaining a medical report, where it is apparent that the medical bill submitted is for treatment not related to the accident." Id. at 1112.

In United Auto v. Rodriguez, this Court resolved the conflicting holdings and held that an insurer is not barred from contesting a claim simply because it fails to pay a claim within thirty days of receipt of the claim. Rodriguez, 2001 WL 1380001, at *4. The court also held that the "reasonable proof" requirement articulated in § 627.736(4) does not necessitate that the insurer

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interest because the insurer did not obtain a medical report within thirty days of receiving notice of the claim. Id. The Third District reached the same result in United Auto v. Viles, the case relied upon by the trial court here when granting summary judgment in favor of Derius.

In contrast, the Fourth District in AIU Ins. Co. v. Daidone, 760 So. 2d 1110 (Fla. 4th DCA 2000) explicitly disagreed with the Third District's decision in Perez. Daidone, 760 So. 2d at 1111. The court in Daidone held that an insurer's failure to obtain proof that it is not responsible for payment "does not deprive the insurer of its right to contest payment." Id. at 1113. In reaching its decision, the court relied on a Fifth District court opinion in Jones v. State Farm Mutual Auto. Ins. Co., 694 So. 2d 165 (Fla. 5th DCA 1997) which made clear that the insurer did not lose its right to contest a PIP claim simply because it had not paid the claim within thirty days of receiving notice of the claim. Id. at 1112.

obtain a medical report that demonstrates that the PIP claim is unreasonable, unrelated or unnecessary. Id.

In his Brief, Derius asserts that the concurring opinion in United Auto v. Rodriguez "astutely recognizes a distinction between eliminating an insurer's ability to defend a claim merely based upon its overdue status, and the circumstance where the insurance carrier fails to produce an appropriate report in order to justify its withdrawing of payment at a dispositive hearing" (Petitioner's Brief, p. 5). This statement is both misleading and incorrect. First, it is misleading in that it suggests that this case involves "withdrawing of payment." Clearly, however, only a reduction of payment is involved here for which no report is required.[4] Second, it is incorrect because no such distinction is made in the concurring opinion.

There is no discussion in United Auto v. Rodriguez of Derius' "dispositive hearing report." Nor is there a single statement from which such a requirement could possibly be inferred. Furthermore, the facts of the Perez v. State Farm case[5] underscore that this Court

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[4] The distinction between a "reduction of payment" and a "withdrawal of treatment" is addressed by this Court in United Auto v. Rodriguez. In particular, the majority's discussion, focused around footnotes 10 and 11, clarifies that a report is not necessary to establish reasonable proof that an insurer is not responsible for payment of benefits under § 627.736(4)(b) for services rendered, but is necessary for the non-consensual withdrawal of PIP benefits for future treatment under § 627.736(7). United Auto, at *4. Further, the concurrence states that "Nothing in the language of section 627.736(4)(b) suggests that the 'reasonable proof' necessary to avoid 'overdue' status is limited to the 'report' necessary to 'withdraw' payment of a treating physician under section 627.736(7)(a)." Id. at *6.

[5] Perez v. State Farm was the companion case to United Auto v. Rodriguez. Unlike United Auto, which secured a medical report more

did not recognize any report requirement whatsoever. In Perez, State Farm never obtained any report. Yet this Court treated the claims against United Auto and State Farm in the same manner, holding that the insurers could challenge reasonableness of medical bills regardless of whether a report was obtained or not. Thus, Derius' argument about eventually obtaining a "dispositive hearing report" has for all intents and purposes already been rejected by this Court.

Finally, Derius' entire hypothetical regarding the correct interplay of §§ 627.736(4) and (7) Fla. Stat. (1997), recounted in pages 5 through 7 of his Brief, is based solely on his baseless and incredible "dispositive hearing report" requirement. In United Auto v. Rodriguez, this Court stated clearly and emphatically that "reasonable proof" for a reduction need not be in the form of a report, regardless of whether such "reasonable proof" was being asserted during the first 30 days after receipt of the bill being reduced, or in conjunction with a dispositive hearing on the merits of the reduction. Accordingly, the distinction Derius attempts to draw between this case and United Auto v. Rodriguez is fundamentally flawed as it draws no support from this Court's opinion.

III. ASSUMING ARGUENDO THAT A REPORT WERE REQUIRED, IT IS UNDISPUTED THAT ALLSTATE OBTAINED A REPORT PRIOR TO THE SUMMARY JUDGMENT HEARING.

There is no dispute that Allstate obtained a report prior to the summary judgment hearing and ruling at issue. The report was

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than 30 days after the bill was submitted, there is no indication that State Farm ever obtained a medical report supporting the reductions at issue there.

presented to the trial court in the attachment to the Affidavit of Joseph G. Murasko as part of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the $75.00 Portion of Dr. Vinsant's Bill and served on Derius on February 3, 1999. As such, even if this Court deemed that a report was necessary in this case, the record clearly shows that Allstate satisfied that requirement more than six months before the summary judgment hearing and more than one year prior to the trial court's ruling on the summary judgment motion.

IV. IN ALL EVENTS, IT IS UNDISPUTED THAT DERIUS SUFFERED NO DAMAGES AND THEREFORE HAD NO CAUSE OF ACTION.

Derius brought suit contending that Allstate improperly reduced the amount paid under his PIP coverage. In discovery, Allstate obtained the testimony from Derius' doctors whose bills were reduced, admitting that each of them had written off the unpaid amounts, that their records reflected a zero balance owing to them from Derius, and that each had not and would not seek to recover any additional amounts from Derius beyond the payments which Allstate had already made. Allstate sought summary judgment because it was undisputed that Derius had suffered no damages. The trial court granted summary judgment for Allstate with regard to claims arising from Dr. Rosati's bills and, since he stood in the exact same factual position, would likely have entered the same result with regard to the bills of Dr. Scott. Derius argued, however, that because Dr. Vinsant had testified that he would be happy to get a check for the amount he had written off ($60), even though he did not expect it, a

controversy was present and Derius had a cause of action. The trial court apparently agreed with this argument even though Derius had not paid that additional $60 and Dr. Vinsant did not seek payment of that amount from Derius.

Derius has not alleged that he received a bill for any charges from any of his three doctors. Nor has he alleged that he has paid his medical care providers any amount beyond the appropriate 20% of the agreed-upon reasonable rates at which Allstate paid the providers. Even assuming, therefore, that Allstate's actions in paying medical benefits at a "reasonable" rate which is less than that which providers otherwise would charge, somehow could breach an obligation under the Florida automobile insurance policy or otherwise violate Section 627.736, Derius has not alleged he suffered any damages.

Having failed to establish he has been damaged, Derius has failed to plead a cause of action for which relief can be granted and his cause of action must be dismissed on that basis. See, e.g., Livingston v. State Farm Mut. Auto. Ins. Co., 25 Fla. L. Weekly D533, 2000 WL 234691 (Fla. 2nd DCA, March 3, 2000)(an insured who had not made additional payments to a medical care provider could not establish damages and thus could not maintain a viable cause of action for breach of the insurer's PIP coverage obligations); Garcia v. State Farm Mut. Auto. Ins. Co., 2000 WL 1205624, 25 Fla. L. Weekly D2050 (Fla. 5th DCA, August 25, 2000).

In Garcia, the insured sought to recover PIP benefits from State Farm resulting from an automobile accident. Garcia had executed an assignment in favor of her medical service provider,

although it was unclear whether the assignment was qualified or unqualified. The Court nevertheless concluded Garcia could not maintain a claim against State Farm under either interpretation if she had not been damaged. Garcia, 2000 WL 1205624 at *2, 25 Fla. L. Weekly D2051. The Court specifically stated that because she had not yet suffered any damage, even "if Garcia made a qualified assignment, thereby retaining some financial exposure for her medical bills, Garcia's suit would be premature at this point and should be dismissed." Id.. See also, Oglesby v. State Farm Mut. Auto. Ins. Co., 781 So. 2d 469 (Fla. 5th DCA 2001)(insured's assignment of PIP benefits to a medical provider deprived the insured of standing to sue the insurer, even though the insured remained liable for bills not paid by the insurer because the insured had not suffered damage).

Furthermore, because Derius has not alleged, and cannot allege, that he has suffered any actual damage, his cause of action fails for lack of standing. See, e.g., McGill v. State Farm Mut. Auto. Ins. Co., 207 Mich. App. 402, 526 N.W.2d 12 (1994)(insureds lacked standing to bring action where there was no evidence that they suffered any actual injury based on insurer's alleged failure to pay full benefits); Lamothe v. Auto. Club Ins. Assoc., 214 Mich.App. 577, 543 N.W.2d 42, 43 (1995) (same principle). Accordingly, Derius' action should be dismissed.

CONCLUSION

This case is controlled by the Supreme Court's decision in United Auto v. Rodriguez, which holds that the carrier does not need to have a report in order to reduce a bill from a medical provider. Derius' attempt to assert a new argument on this appeal should be

rejected.

Further, Allstate did obtain a medical report of Dr. Zeide, and therefore the Plaintiff's position on this appeal is without merit.

Further, there was no damage to the Plaintiff, since the doctors had written the bills off and further, the Plaintiff had executed an assignment of benefits. Accordingly, the decision of the Fourth District Court of Appeal must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of January, 2002 to:

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/cac-mn

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

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