IN THE SUPREME COURT OF FLORIDA
IN AND FOR THE STATE OF FLORIDA

MAURICE DERIUS,

Appellee/Petitioner,

v.

ALLSTATE INDEMNITY COMPANY,

Appellant/Respondent.

SC Case No.: SC01-296
4th DCA Case No.: 4D99-3842

PETITIONER'S SECOND AMENDED BRIEF ON JURISDICTION

Respectfully Submitted,

_____
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CASES CITED

STATUTES CITED

I. STATEMENT OF THE CASE & FACTS

This is an action involving a suit by an insured to enforce full payment of PIP benefits by his No-Fault insurance carrier, Allstate Indemnity Company. The focus of the dispute before this Honorable Court is whether an insurance carrier is required to obtain a written report from a physician as a condition precedent to paying only part of, or denying payment of, a bill submitted for payment under a PIP insurance policy. In the case at bar, the trial court held that an insurer was so obligated and that its failure to have obtained a timely report was sufficient reason to enter a final summary judgment against an insurance carrier. The trial court then certified the following question to the Fourth District Court of Appeal:

> "Must and 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 licensing chapter as the treating physician stating that the bills for treatment are not reasonable, pursuant to Section 627.736(7)(a), Florida Statutes?"

The Fourth District Court of Appeal, relying on its previous precedent answered the question at issue in the negative. Subsequently, a Motion for Re-Hearing was filed seeking reconsideration in light of this Honorable Court's opinion in Ivey v. Allstate 25 Fla. L. Weekly S1103 (Fla. Dec. 7, 2000,

which appears to favorably cite Perez v. State Farm Fire & Casualty Company, 746 So. 2d 1123 (Fla. 3d DCA 1999), which directly supports the trial court's ruling and is in clear and direct conflict with the case at bar. This Motion for Re-Hearing was denied and this petition was filed seeking this Honorable Court's assistance in resolving a very important issue to the consumers and insured's of Florida.

II. SUMMARY OF THE ARGUMENT

The case at bar is one of a series of cases in conflict between the District Courts of Appeal seeking to resolve the issue of whether a PIP insurance carrier is obligated to obtain a written report of a physician in order to challenge the reasonableness, necessity or relationship of the medical care provided to a covered accident. The second issue, associated with the first and also part of the ongoing struggle within the appellate courts, is whether an insurance carrier can fail to obtain this report with the thirty day review period and then at a later time obtain such a report to defend its inappropriate payment or lack of payment. It is the contention of the Petitioner that there is clear conflict between the District Courts of Appeal on this issue, with the Third District and the Fifth District agreeing with the Petitioner's argument that an insurer must have a written report of a physician, within the thirty day review period of Florida Statute 627.736, essentially as a condition precedent to justifying any reduction or non-payment of the submitted medical charges. The Fourth District has held that such a report is not required and recognizes the conflict with the Third District over this issue, which emanates from Perez v. State Farm Fire & Casualty Company, 746 So. 2d 1123 (Fla. 3d DCA 1999), which is currently before this

honorable court. The Second District Court of Appeal recently withdrew is opinion on this issue for procedural reasons while indicating its now indirect alignment with the Fourth District on this issue.

Given the import of the Perez, issue, and the procedural circumstances in this case, the Petitioner requests that this Honorable Court accept review of this matter in order to ensure uniformity of this Court's decision in Perez, and also to ensure, that should this Court affirm the Perez, case, that the litigants in this matter not be unjustly and adversely impacted by the exhaustion of appellate remedies on this important issue.

III. ARGUMENT

A. THE OPINION IN THE CASE AT BAR IS IN DIRECT CONFLICT WITH THE PEREZ, CASE, CURRENTLY BEFORE THIS HONORABLE COURT

In the case at bar, The Fourth District Court of Appeal, rendered a ruling that is in direct conflict with Perez v. State Farm Fire & Casualty Company, 746 So. 2d 1123 (Fla. DCA 1999) which is currently on review before this Honorable Court. In the case at bar, the Fourth District Court of Appeal adopts the construction of 627.736(7) set forth in AIU Insurance Company v. Daidone, 760 So. 2d 1110 (Fla. 4th DCA 2000) in which the Fourth District Court of Appeal expressly noted conflict with Perez v. State Farm Fire & Casualty Company, 746 So. 2d 1123 (Fla. 3d DCA 1999). Daidone, was recently followed by the Second District Court of Appeal in Progressive Specialty Insurance Company v. Biomechanical Trauma Association, Inc., 25 Fla. L. Weekly D2675 (Fla. 2d DCA 200), which has now been withdrawn for procedural reasons. More recently, the Fifth District has weighed in on the issue in Palmer v. Fortune Insurance Company, 2001 WL 50899 (Fla. 5th DCA 2001) on the side of the Perez/Viles argument. As this Honorable Court did in Ivey, the Fifth District focused upon the long line of precedent emanating from Dunmore v. Interstate Fire Insurance Company, 301 So. 2d 502 (Fla. 1st DCA 1974) in concluding that the legislative intent behind the No-

Fault Act would be thwarted if Section 627.736(7) was read in such a way as to negate that requirement.

As this Court is fully aware, Perez, essentially re-affirmed and extended the concepts of United Automobile Insurance Company v. Viles, 726 So. 2d 320 (Fla. 3d DCA 1998). In both Viles, and Perez, the court ruled that Florida Statute 627.736(7) required that a written report from a physician was required to support and insurance carrier's refusal to make full payment of medical charges submitted under a PIP policy.

IV. CONCLUSION

Given this Honorable Court's ruling in Ivey, and the pendency of an opinion in Perez, ample reasons exist for this Honorable Court to accept jurisdiction over this matter given the direct and overt split of authority in the District Courts of Appeal below. Equally important is that this matter was originally certified as a question of great public importance and the clear split of authority on such a pervasive matter is evidence of the need for this Honorable Court to accept jurisdiction and resolve the issues at bar. Additionally, should this Court approve the Perez case, this will essentially leave the Petitioner in the position of having been denied the application of the Perez argument after having prevailed on the Perez/Viles issues at trial, yet be denied a remedy due to the exhaustion of appellate review. With the foregoing stated, the Petitioner respectfully prays that this Honorable Court intervene in this matter, accept jurisdiction and allow the parties to brief this Court on the merits of their respective arguments.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to James P. Cooksey, Esquire, 2601 Broadway, Suite 3, Riviera Beach, Florida 33404, Gary Dickstein, Esquire, and Robert R. Reynolds, IV, 515 North Flagler Drive, Suite 700, West Palm Beach, Florida 33401-4324, Tracy R. Gunn, Esquire, 501 East Kennedy Boulevard, Suite 1700, Tampa, Florida 33602, Richard A. Sherman, Esquire, 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33316, this _____ day of July, 2001.

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V. CERTIFICATE OF COMPLIANCE

Certification of Font Size and Type is 12pt and type is Courier under Wordperfect 9.0/2000.

Respectfully Submitted,

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Mark Tischhauser, Esquire
Co-Counsel for Petitioner

APPENDIX TO EXHIBITS