IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-296

Florida Bar No. 184170

ALLSTATE INDEMNITY COMPANY,

Petitioner,

vs.

MAURICE DERIUS.

Respondent.

FILED
THOMAS D. HALL
APR 18 2001
CLERK, SUPREME COURT
BY

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

BRIEF OF RESPONDENT ON JURISDICTION
ALLSTATE INDEMNITY COMPANY

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POINT ON APPEAL

THERE IS NO DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION IN DERIUS AND THE DECISIONS IN IVEY AND PALMER; ANY CONFLICT BETWEEN DERIUS AND PEREZ IS NOT AT ISSUE AS THE PLAINTIFF LACKED STANDING TO BRING THIS LAWSUIT AND THE PETITION MUST BE DISMISSED.

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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.

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STATEMENT OF THE FACTS AND CASE

This Court does not need to exercise its jurisdiction to review the Derius decision because this Court can resolve any conflict in the Perez v. State Farm Fire and Casualty Company, 746 So. 2d 1123 (Fla. 3d DCA 1999), review granted, United Automobile Insurance Company v. Rodriquez, 767 So. 2d 464 (Fla. 2000) which is already pending before this Honorable Court. Allstate Indemnity Company v. Derius, 773 So. 2d 1190 (Fla. 4th DCA 2000) Therefore, the Petition for Jurisdiction should be denied. The underlying facts are:

> On August 10, 1994, Maurice Derius sustained injuries as a result of an automobile accident. Derius received treatment for injuries sustained during the accident and had a policy with Allstate providing for personal injury protection (PIP) and medical expense coverage. Allstate reduced the amount of some of the doctor bills submitted by Derius, prompting Derius to sue Allstate and alleged that on the basis that the PIP statute required a report from a physician before no-fault benefits could be denied, withheld, or reduced.
>
> The trial court granted Derius summary judgment against Allstate because Allstate did not have a report to contest the reduction of one doctor's bill. Thus, the issue on appeal is whether a PIP insurer must first obtain a report from a like-licensed physician in order to contest the reasonableness of a treating physician's bill.
>
> Derius, 1191.

The Circuit Court's certified question was answered in the negative. Derius, 1191.

The Fourth District used the AIU Insurance Company v. Daidone, 760 So. 2d 1110 (Fla. 4th DCA 2000) decision as a basis for finding that a medical report is not a prerequisite to

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reducing a PIP payment. Derius, 1191. The Court noted that in Daidone, it expressly disagreed with the Third District's decision in Perez, which appears to hold that a medical report is a condition precedent to any action taken on PIP bill to reduce, deny or terminate benefits, which must be done within 30 days of receiving the bill. The Fourth District distinguished United Auto Insurance Company v. Viles, 726 So. 2d 320 (Fla. 3d DCA 1998), as it dealt with a termination of PIP benefits due to fraud. Derius, 1191. The Court interpreted § 627.736(7)(a) and found no report requirements to reduce PIP payment and Mr. Derius seeks review in this Court.

SUMMARY OF ARGUMENT

There is no direct and express conflict between the decision in Derius and this Court's decision in Ivey v. Allstate, 25 Fla. L. Weekly, S1103 (Fla. December 7, 2000), as it is totally off point and factually distinguishable. There is no direct and express conflict between the decision in Derius and the Fifth District's decision in Palmer v. Fortune Insurance Company, 86 Fla. Law Weekly, D278 (Fla. 5th DCA, January 19, 2001); as that case dealt solely with an attempt to toll the 30-day time period in § 627.736(4)(b).

There is certified conflict between Daidone and Perez, but the Court does not have to address it in this case, as any existing conflict can be resolved in the Perez case, which has already been briefed and argued. Due to the absence of any new direct and express conflict, this Court should not exercise its jurisdiction in a second case, with the same issue, and the

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Petition should be dismissed.

ARGUMENT

THERE IS NO DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION IN DERIUS AND THE DECISIONS IN IVEY AND PALMER; ANY CONFLICT BETWEEN DERIUS AND PEREZ, CAN BE FULLY AND ADEQUATELY RESOLVED IN REVIEW OF PEREZ AND THE PETITION SHOULD BE DISMISSED.

A. No Direct and Express Conflict with Ivey and Palmer

Ivey, a case handled by undersigned counsel, is completely off point legally and is factually distinguishable. The issue in Ivey was whether a bill, which had been submitted and reduced, generated a basis for fees and interest, when a second portion of the bill was paid after litigation began. What happened was that a bill was submitted for electrical stimulation treatment and according to the HICF form, the billing was for a single unit of treatment. However, other records of the plaintiff indicated that the plaintiff was being treated in two different areas, and even though the doctor admitted he had billed incorrectly, this was not discovered until after the plaintiff filed suit for nonpayment of the full amount of the PIP bill. As soon as the doctor's deposition was taken during the case and it was discovered that he was actually billing for two units of treatment and not one, the remainder of the bill was completely paid. The Court found this constituted a confession of judgment, which triggered fees and interest in favor of Ivey. Ivey, supra.

The bulk of the Ivey decision is simply a restatement of a

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district court's appellate jurisdiction to review decisions of the circuit court, sitting in its appellate capacity. There is absolutely nothing similar between Ivey and any of the facts or legal issues in Derius.

The section of Ivey which discusses in dicta, the public policy set out in Dunmore v. Interstate Fire Insurance Company, 301 So. 2d 502 (Fla. 1st DCA 1974), is a statement that the insurance company has 30 days to verify a claim, after the receipt of an application for benefits. Ivey, S1104-1105. The entire gist of Ivey was that the documentation submitted with the bills could have verified that two units were being billed not one, within 30 days. Therefore, when Allstate only paid for the one unit, this Court held that Allstate had not properly reviewed the submitted documents, in order to determine the reasonable amount of the bill to pay, within 30 days.

Nowhere in Ivey does it discuss the argument that Mr. Derius made below, that § 627.736(4)(b) must be read in para materia with § 627.736(7)(a), in order to impose the condition precedent, of a medical report within 30 days, prior to any reduction of medical payments.

The only reason that Amador v. United Automobile Insurance Co., 748 So. 2d 307 (Fla. 3d DCA 1999); Perez v. State Farm Fire and Casualty Company, 746 So. 2d 1123 (Fla. 3d DCA 1999); Fortune Insurance Company v. Pacheco, 695 So. 2d 394 (Fla. 3d DCA 1997); Martinez v. Fortune Insurance Company, 684 So. 2d 201 (Fla. 4th DCA 1996); and Crooks v. State Farm Mutual Automobile Insurance Company, 659 So. 2d 1266 (Fla. 3d DCA 1995) are cited in Ivey is

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because they all contain the exact same quote from Dunmore; and this is not a list of cases which hold that some type of report is necessary within 30 days, in order to deny or reduce a PIP payment.

In order to try and create conflict, the Plaintiff argues that the Fifth District has now aligned itself with the Third District in requiring a medical, or peer report, as a condition precedent to the reduction of a PIP bill, citing to Palmer, supra. Once again, the Plaintiff is completely wrong. Palmer is a case where the insurance carrier attempted to toll the 30-day period until it received proof of coverage; the type of actions that occurred in Martinez, Brooks, Dunmore, etc., which is why they are cited in the Palmer case. Palmer, D279. Once again, Palmer had absolutely nothing to do with Derius' claim that § 627.736(7)(a) requires a peer report, prior to the reduction of PIP benefits and that all of this must be done within 30 days, or the insurance carrier loses the right to defend against the bill at trial.

The only reason the Supreme Court's decision in Ivey, was cited in the Palmer case, was to establish that the Fifth District had appellate jurisdiction to review the circuit court's order, entered in its appellate capacity. Palmer, D279.

Again, there is absolutely nothing in Palmer which holds that a medical report is required prior to reducing a PIP bill. More importantly, nothing in Palmer suggests in any way, or indicates, that the Fifth District was reversing, or changing its mind, about its decision in Jones v. State Farm Mut. Auto. Ins.

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Co, 694 So. 2d 165 (Fla. 5th DCA 1997), which was the basis for the courts to hold no medical report is required to reduce or deny PIP benefits.

As correctly pointed out by Allstate previously, the Fifth District is in line with the Fourth District and the Second District, in holding that there is no condition precedent to the reduction or denial of PIP benefits, in the form of a medical report obtained within 30 days prior to a denial or reduction of a bill, just as the Fourth District held in Derius and Daidone. Jones, supra; Daidone, supra.

B. Derius, Daidone, Perez

In Derius, the Fourth District expressly held that it did not interpret § 627.736(7)(a), to require a written report as a condition precedent to reducing payment of a bill for treatment, on the grounds of reasonableness, necessity or relationship. Derius, 1191. The Fourth District distinguished the Third District's Viles decision, where the insurer had withdrawn all payment for treatments as fraudulent and not related to the accident. Viles, supra. The court pointed out in Derius that it was dealing only with the reduction of a physician's bill, and based on the rationale used in Daidone, the court did not find that reduction of a payment for a PIP bill under § 627.736(1)(a), required the type of report mentioned in § 627.736(7)(a). Derius, 1191. The Summary Judgment in favor Derius was reversed, with orders to enter a Partial Summary Judgment on the report requirement in favor of Allstate. Derius, 1191.

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The Fourth District reiterated in Daidone that a plaintiff is only entitled to have payment for PIP bills within 30 days, if those bills are reasonable, necessary and related. Daidone, 1111. Any inaction by the insurance company within those 30 days "does not result in the insurer having to pay a bill which it otherwise would not have to pay." Daidone, 1111. The court found that, not only is there no language in the PIP statutes that supports the Perez 30-day report rule; but under Perez, an insurance company would even have to pay for a bill that was not reasonable, not necessary, or not related to the accident, if it did not first obtain a medical report showing payment was not due. Daidone, 1111-1112. The court again held that it is the duty of the plaintiff to prove that the bill submitted is reasonable, necessary, and related; and when it is not, the bill does not have to be paid. Daidone, 1112.

When an insurance company is sued by a party who has standing, (a provider whose bill was reduced or denied; or an insured who has paid, or owes, a bill that was reduced or denied) the carrier has a right to defend against that claim, even if no report was obtained, whatsoever. Daidone, 1112. Therefore, failing to obtain reasonable proof within 30 days, whether that proof is a medical report or not, does not deprive the insurer of the right to contest the payment and have the jury to decide the matter. Daidone, 1112; Jones, supra. The Fourth District properly distinguished the Third District's decision in Perez, supra, and the First District's decision in Dunmore, supra, because in those cases, there was no dispute that the PIP

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benefits were owed. Daidone, 1112. Again, the court restated its interpretation that the function of § 627.736(4)(b) was simply to define when interest begins to accrue on unpaid PIP benefits. Daidone, 1112. Unless the bill is reasonable and necessary, nothing has to be paid on it within 30 days, as there are no PIP benefits which are due and no benefits can be overdue. Daidone, 1112.

If the insurance company refuses to pay the bill within 30 days and it obtains reasonable proof that this payment was not due, it is allowed to present this proof to the jury; regardless of what this proof consists of, or when it was obtained. Daidone; Jones; supra.

On the other hand, if the insurance carrier does not present reasonable proof to the jury that this bill was not reasonable, necessary, or related, then the penalty is only 10% interest from the time the bill should have been paid. Daidone, 1112. More importantly, the fact that the reasonable proof may not be accepted at trial, does not mean the insurance carrier does not have a right to go trial, to establish that the benefits were not due. "Failing to obtain proof that it is not responsible for payment, however, does not deprive the insurer of its right to contest payment." Daidone, 1113.

Although the Third District's decisions in Perez and Viles appear to discuss a "report" requirement in conjunction with a "reduction" of medical bills, neither in fact demonstrates that there is such a requirement. In Perez, the insurers who had failed to make certain PIP benefit payments conceded that they

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had not obtained "reasonable proof" that they were not responsible to make such payments within 30 days of receipt of the required written notice. The issue before the Perez court was whether such failure to obtain "reasonable proof" within the 30 day period precluded the insurers from presenting a defense to the overdue claims; on the grounds that they were not reasonable, related or necessary, so that payment of the claims and accrued interest was due immediately; or whether the insurers would be required to pay interest and attorney's fees from the 31st day forward if their defense to the overdue claims ultimately failed.

The Perez court ruled that the failure to obtain "reasonable proof" within the 30 day period precluded the insurers from presenting any defense and required them to pay the overdue claims and accrued interest. Perez, 1125-26. However, without support, the Perez court also asserted that the PIP statute requires that an insurer must obtain, within 30 days, a medical report as such "reasonable proof" that it was not responsible for payment, citing its prior holding in Pacheco, supra.

In Pacheco, an insurer sought, pursuant to the terms of its policy, to require that a claimant furnish all medical records before the 30 day period of § 627.736(4)(b) would begin to run. The court in Pacheco held that such a requirement would obliterate the 30 day provision and advised that "once an insurer receives notice of a loss and medical expenses, it must pay within thirty days unless, pursuant to § 627.736(4)(b), it has obtained reasonable proof to believe that it is not responsible for the payment." Pacheco, 395.

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Notably, the Pacheco decision did not discuss how an insurer might establish "reasonable proof," let alone require that it be done solely with the report required by § 627.736(7)(a). Thus, the Perez court's reliance on Pacheco to import the report requirement from § 627.736(7)(a) is misplaced. Moreover, the Perez decision did not discuss whether there were other means of satisfying the "reasonable proof" requirement. However, two weeks later, in Amador v. United Automobile Insurance Co., 748 So. 2d 307 (Fla. 3d DCA 1999), the Third District considered the question of the meaning of the term "reasonable proof" as used in § 627.736(4)(b) with regard to the requirements for submission of a PIP claim. The court "recognize[d] than an insurer may define 'reasonable proof' in its policy...," acknowledging, in essence, that the words "reasonable proof" are not inherently limited to a "report" or any other restricted meaning. Amador, 308.

All of the issues and conflict spawned by Perez, will be resolved in this Court's review of Perez. There is no legal or factual reason to take a second case for review, which addresses the Perez issues and the Petition should be denied.

CONCLUSION

This is no direct and express conflict between Derius and this Court's decision in Ivey, and the Fifth District's decision in Palmer; so the Petition must be denied.

The direct and express conflict existing between the Third District's decision in Perez and the other district courts, will be resolved in this Court's pending review of Perez; and the Derius Petition should be denied.

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CERTIFICATE OF SERVICE

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