IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE CO.
ALLSTATE INDEMNITY CO.,

Petitioners/Cross-Respondents,

vs. **Case No. SC05-435 (Consolidated)**
Case No. SC05-545 (Consolidated)

HOLY CROSS HOSPITAL, INC.,
et al.,

Respondent/Cross-Petitioner.
_________________________________/

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

CROSS-REPLY BRIEF ON THE MERITS OF RESPONDENT/CROSS-PETITIONER, HOLY CROSS HOSPITAL, INC.

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Dated: June 28, 2006

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ARGUMENT

AN INSURER IS REQUIRED TO COMPLY WITH THE PROVISIONS OF §627.736(10), FLORIDA STATUTES, IN ORDER TO TAKE PREFERRED PROVIDER REDUCTIONS IN THE PAYMENT OF PIP BENEFITS FOR MEDICAL SERVICES RENDERED TO ITS INSUREDS.

Remarkably, Allstate takes the position that we have neither answered Allstate's arguments, nor responded to them, and that we have, in some fashion, confessed that the plain text of the PIP statute authorizes Allstate's conduct. Allstate further alleges that our Brief "never grapples" with the decision of the Second District in Nationwide Mutual Ins. Co. v. Jewell, 862 So.2d 79 (Fla. 2nd DCA 2003), which the Fourth District adopted as its own in this case. Finally, Allstate continues to maintain that HCH has no standing to bring suit against Allstate.

The fact that Allstate is confounded by our arguments is not surprising. Our arguments are, after all, based on long-standing principles of statutory construction applied in a traditional, straight-forward fashion to statutory language that is neither ambiguous nor uncertain. We do not believe that our argument needs clarification, but to the extent it needs to be put in more simple terms for Allstate, we will do so here.

As we pointed out in our Answer/Cross Initial Brief, along with the Complaints in this case, Allstate was served with a variety of Requests for

Admissions. Two of those Requests for Admissions are pertinent here. First, Allstate was asked to admit:

> There is no first party contract between the Plaintiff and Defendant which was/were in effect when the insured sustained the injuries in a motor vehicle accident which is the subject of this cause and upon which the Defendant relied to support the reduction of bills submitted by Plaintiff for the care and treatment of the insured. (R.V. I, 15; R.V. III, 276).

Allstate was also asked to admit:

> The Defendant did not have a written contract between itself and the Plaintiff relating to the reduction of medical bills submitted by the Plaintiff for the medical care and treatment of the personal injuries the patient received as a result of the motor vehicle accident which is the subject of this cause. (R.V. I, 17; R.V. III, 278)

Allstate admitted both Requests (R.V. I, 37-38; R.V. III, 298-299). At the hearing on the Motions for Summary Judgment, Allstate conceded that it failed to comply with the other requirements of §627.736(10), Florida Statutes (R.V. V, 644). With those essential facts, we can examine the statute and apply it to this case.

Section 627.736(10), Florida Statutes, provides:

> An insurer may negotiate and enter into contracts with licensed health care providers for the benefits described in this section, referred to in this section as "preferred providers," which shall include health care providers licensed under Chapters 458, 459, 460, 461, and 463. The insurer may provide an option to an insured to use a preferred provider at the time of the purchase of the policy for personal injury protection benefits, if the requirements of this subsection are met. If the insured

> elects to use a provider who is not a preferred provider, whether the insured purchases a preferred provider policy or a non-preferred provider policy, the medical benefits provided by the insurer shall be as required by this section. If the insured elects to use a provider who is a preferred provider, the insurer may pay medical benefits in excess of the benefits required by this section and may waive or lower the amount of any deductible that applies to such medical benefits. If the insurer offers a preferred provider policy to a policy-holder or applicant, it must also offer a non-preferred provider policy. The insurer shall provide each policy-holder with a current roster of preferred provider policies in the county in which the insured resides at the time of purchase of such policy, and shall make such list available for public inspection during regular business hours at the principal place of the insurer within this State.

In this case, Allstate admitted that it had not entered into any contract, direct or otherwise, with HCH, a hospital who qualifies as a licensed health care provider under the first sentence of subsection (10). Allstate also conceded it had not complied with any other aspect of subsection (10). With those concessions, the analysis becomes quite easy. Since Allstate complied with neither aspect of subsection (10), the claims of HCH become nothing more than an ordinary run-of-the-mill claim for PIP benefits. Under subsection (1), Allstate was required to pay 80% of all reasonable and necessary medical benefits. Judgments were entered in an amount representing the difference of what was reasonable and necessary on the one hand and the lesser amount that Allstate had paid on the other hand. Statutory interest was also included in the judgment.

This analysis, the one utilized by the County Court Judge, simply applies the plain meaning of the statute's language. That is precisely the role the courts are to fulfill. See, Knowles v. Beverly Enterprises of Florida, Inc., 898 So.2d 1, 10 (Fla. 2004). It is exactly that rule that the Fifth District relied upon in Nationwide Mutual Fire Ins. Co. v. Central Florida Physiatrists, P.A., 851 So.2d 762 (Fla. 5th DCA 2003), to determine that Nationwide's failure to comply with the requirements of subsection (10), required it to pay the standard PIP benefits pursuant to §627.736(1), Florida Statutes. The Court's analysis is crystal clear and as straight-forward as it can be.

The decision of the Second District in Nationwide Mutual Ins. Co. v. Dennis M. Jewel, D.C., P.A., 862 So.2d 79 (Fla. 2nd DCA 2003), on the other hand presents quite a different scenario. As Allstate has done in this case, Nationwide there admitted that it had no contract with the health care providers and had not complied with any other aspect of §627.736(10), Florida Statutes. In "analyzing" the statute, the Second District observed that subsection (10) does two basic things. First, it authorizes PIP insurers to enter into contractual arrangements with licensed health care providers. Second, it authorizes PIP insurers to issue preferred provider PIP policies subject to certain conditions and requirements. Id. at 84. Where the Second District in Jewell and the Fifth District in C.F.P. differ was their interpretation of the first sentence of the statute. Where the Fifth District in C.F.P.

applied the literal and ordinary meaning to the words "enter into contracts with licensed health care providers," the Second District, while acknowledging the plain meaning rule, found a contract between Nationwide and Dr. Jewell, even though none existed. The Second District reached this conclusion by utilization of the legal fiction that a "reasonable user" of the English language would understand that the statutory authority conferred on insurers to contract with licensed health care providers also granted insurance companies the authority to contract with persons or entities who were not licensed health care providers but, in some fashion, had contracts with those providers. The court's explanation was as follows:

> A "reasonable user" of the English language would understand the authorization to contract in this context is encompassing contractual arrangements in which an insurer contracts to obtain the service of providers through an intermediary PPO network. If the Legislature had expressly prohibited contracts between insurers and PPO providers, it would not be reasonable to understand the prohibition is limited to direct contracts while allowing contracting through an intermediary. Cf., State ex. rel. Powell v. Leon County, 133 Fla. 68, 182 So. 639, 642 (Fla. 1938). "It is fundamental and elementary that the Legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." Similarly, the Legislature's express authorization of contracting should not be read to exclude contracting through an intermediary. The fact that the Legislature has in other context chosen to refer to direct and indirect contracts, see §§627.6471, 440.134(j), Florida Statutes (2000), does not mean that the authorization to contract with providers contained in

> subsection (10) should be given an unreasonably narrow construction.

With all due respect to the Second District, this written explanation rivals some of the prose written by Lewis Carroll in *Alice in Wonderland* and might leave that author with a smile on his face while he chuckled to himself after reading it. In short, the Second District concluded that there was a contract between Nationwide and the health care provider, notwithstanding Nationwide's concession that no such contract ever existed. Remarkably, the Second District reached this conclusion under the auspices of the plain meaning rule.

In our previous brief we identified numerous rules of statutory interpretation which the Second District's decision overlooks and/or misapplied. There is no reason for us to repeat it here. In short, and with the utmost respect for the judges of the Second District and their opinions, the creation of a contract between Nationwide and Dr. Jewell appears not to arise by application of traditional rules of statutory construction but, instead, by judicial fiat. There was a "contract" because the Second District said there was.

In the present case, the Fourth District adopted, as its own, the "analysis" of the Second District in Jewell. Even if the Fourth District correctly adopted the interpretation of the statute articulated in Jewell, the decision, nevertheless, needs to be quashed because the decision overlooks the actual facts in this case. As we stated at the beginning of this brief, Allstate admitted that it had no written contract

between itself and the Plaintiff relating to the reduction of medical bills submitted by HCH for the medical care and treatment of the personal injuries the patient received as a result of a motor vehicle accident which was the subject of this cause. Even if the Second District's interpretation of the first sentence of the statute is accurate, that is, the contract with the PPO network is a contract with a health care provider for purposes of the statute, then using that same interpretation of "contract", Allstate has admitted that no such contract existed. In short, both Allstate companies have admitted that they did not have a direct contract with HCH, nor did they have one through an intermediary. In the absence of such a contract, there simply can be no reduction of medical benefits paid to HCH.

Allstate also continues to make the worn-out argument that HCH had no standing to bring these actions. The argument is precisely the same argument Allstate made in Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885 (Fla. 2003). It is precisely the same argument that this Court rejected in Kaklamanos. That is, Allstate continues to argue that the insured cannot be damaged by its failure to pay PIP benefits to health care providers. In Kaklamanos, this Court extensively analyzed this very same argument and rejected it, finding that damages extend well beyond mere economic damages and that failure to pay the bills damages the doctor-patient relationship. This Court in Kaklamanos also explained that it had not adopted the restricted federal notion of standing and the Florida circuit courts

are tribunals of plenary jurisdiction which have authority over any matter not expressly denied to them by the Constitution or applicable statutes. Allstate's continued insistence to make this argument, notwithstanding the fact that it was rejected by this Court in Kaklamanos, well exceeds the concept of stubbornness and is more closely akin to frivolity. Allstate's argument in this regard must be flatly rejected.

Finally, we must yet again address the notion advanced by Allstate that this scheme actually benefits its policyholders. First, there is not one shred of evidence in this record to support that conclusion. Second, policyholders' relationships with health care providers are damaged as recognized in Kaklamanos. Third, by utilizing an "800" phone number instead of a roster to refer patients to health care providers, Allstate is denying its insureds the ability to obtain critical information so as to make an informed choice for their treatment decisions. For all the patient knows, Allstate could be referring them to a member of its roster of "vendor" doctors or, worse yet, its IME physicians. Benefits will not be broadened but could be exterminated from the outset. Likewise, there is the ever-looming fact that health care providers could balance bill the policyholders for the difference in what was paid and the outstanding amount. Finally, the health care providers could simply require the policyholder to pay up front and make the insured submit the bill to Allstate. Presumably, Allstate would take the position with the insured it

has taken with HCH here. The insured could then take great solace in knowing he or she was getting "greater benefits" only at the cost of higher out-of-pocket expenses.

CONCLUSION

As demonstrated in our briefs, application of the plain meaning rule of statutory construction should lead this Court to the same conclusion reached by the Fifth District in Central Florida Physiatrists. That is, when an insurance company, like Allstate, fails to comply with the statutory requirements of §627.736(10), Florida Statutes, the PIP claim will be treated like any other ordinary PIP claim in Florida. The insurer may not reduce the payments below the statutory requirements of §627.736(1) and (4), Florida Statutes.

However, even if this Court were to conclude that the Jewell Court's analysis was correct, the Fourth District's decision in the present case must still be quashed because Allstate conceded it did not have a contract with the health care provider, through an intermediary, or otherwise. Therefore, §627.736(10), Florida Statutes, has no application whatsoever in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. mail to **Richard C. Godfrey, Esq.**, Richard C. Godfrey, P.C., and **Andrew A. Kassof, Esq.**, Kirkland & Ellis LLP, 200 E. Randolph Drive, Chicago, IL 60601, and **Jack R. Reiter, Esq.**, Adorno & Yoss LLP, 2525 Ponce de Leon Blvd., #400, Miami, FL 33134, and **Laura Watson, Esq.**, 220 N.E. 51st Street, Ft. Lauderdale, FL 33334, on March 1, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Cross-Reply Brief on the Merits of Respondent, Holy Cross Hospital, Inc., (Matthew Winik) and Holy Cross Hospital, Inc., (Lawrence Wiesner), complies with the font requirements pursuant to Rule 9.100(1) and 9.210(a)(2), Fla. R. Civ. P.

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