

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-2046

EDUARDO J. GARRIDO D.C., P.A.,
as assignee of Apolonio Chavez,

Petitioner,

-v-

UNITED AUTOMOBILE INSURANCE COMPANY

Respondent

**On Petition for Discretionary Review from the
Third District Court of Appeal of Florida
Case No.: 3D08-998**

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

The Petitioner, EDUARDO J. GARRIDO D.C., P.A., filed a Notice to Invoke this Court’s discretionary jurisdiction pursuant to Art. V § 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(iv), seeking express and direct conflict review of the decision of the Third District Court of Appeal in *United Auto. Ins. Co., v. Eduardo J. Garrido D.C., P.A., as assignee of Apolonio Chavez*, 990 So.2d 574 (Fla. 3rd DCA 2008).

Throughout this brief, the Petitioner, EDUARDO J. GARRIDO D.C, P.A., will be referred to as the “Petitioner”; and Respondent, UNITED AUTOMOBILE INSURANCE COMPANY, will be referred as “United.”

STATEMENT OF FACTS & CASE

The Petitioner filed a lawsuit in the Dade County Court against United for breach of contract arising from United's failure to pay personal injury protection insurance benefits. A.3 In the trial court proceedings, United alleged as an affirmative defense that certain bills submitted by Petitioner were late and thus, barred pursuant to § 627.736(5)(c)(1), *Fla. Stat.* (2003). A.4.

The Petitioner moved for summary judgment asserting that there is no genuine issue of material fact whether United waived the time limit as a bar against payment where United's pre-suit conduct was unequivocal and inconsistent with asserting the time bar.¹ United did not present evidence demonstrating that United intended to assert the time bar; which would otherwise create a genuine issue of material fact on waiver. The trial court granted summary judgment based on waiver. United then appealed.

United argued in the circuit appellate proceedings that the trial court applied the incorrect law when it granted summary judgment based on waiver because legislature intended the time limit to submit bills for payment under § 627.736(5)(c)(1) is jurisdictional and cannot be waived.² A.4. The circuit

¹ Petitioner filed a reply to United's answer and affirmative defenses in which Petitioner alleged that United waived the statutory time limit as a defense to payment based on United's pre-suit conduct.

² The circuit panel opinion is reported in the Florida Law Weekly Supplement. *See United Auto. Ins. Co., v. Eduardo J. Garrido D.C., P.A., as assignee of*

appellate court construed § 627.736(5)(c)(1) and concluded that that the time limit to submit bills is not jurisdictional, but instead a condition precedent to payment, which like any other condition precedent, can be waived. A.4. After the circuit court concluded that the time limit is intended as condition precedent that is subject to waiver, the circuit court affirmed the trial court's entry of summary judgment where United's pre-suit acts amounted to waiver of the time limit as a bar against payment to the exclusion of a genuine issue of material fact. A. 5-6. United then petitioned the Third District for a writ of certiorari. The Third District granted the petition.³ A.1-2.

Apolonio Chavez, 15 Fla. L. Wkly. Supp. 435a (Fla. 11th Jud. Cir. App. 2008). A copy of the opinion is attached in the supporting appendix to this brief. *See* A.3-7.

³ Petitioner filed a timely motion for rehearing; which was denied on September 24th, 2008. Petitioner filed a Notice of Invoking Discretionary Jurisdiction on October 22nd, 2008

SUMMARY OF ARGUMENT

The decision of the Third District expressly and directly conflicts with binding precedent from this Court and other District Courts of Appeal holding that a misapplication of correct law is not remedial by certiorari; and that a District Court cannot review the sufficiency of the evidence on second tier review. In the present case, the circuit court applied the correct law, i.e., the PIP statute, in deciding an issue for which there is no controlling precedent: *i.e., whether the time limit under § 627.736(5)(c)(1) to submit bills is intended as a jurisdictional bar that cannot be waived; or a condition precedent to payment that can be waived?* The Third District, despite binding precedent prohibiting the District Court from doing so, evaluated the sufficiency of the evidence; and concluded that the circuit court's finding that United's pre-suit acts demonstrated waiver to the exclusion of a genuine issue of material fact is a violation of a clearly established principle of law. A. 2. The District Court reached that conclusion even though the circuit court applied the correct law in evaluating the evidence; *i.e., binding precedent holding that a waiver can arise from a party's inconsistent acts with asserting a known right. See A. 5-6.*

ARGUMENT

I. The Third District's decision directly conflicts with *Ivey v. Allstate Ins. Co.*, 774 So.2d 679 (Fla. 2000); and *Haines City Comm. Dev. v. Heggs*, 658 So.2d 523 (Fla. 1995) and decisions of the District Courts prohibiting the use of second tier review to remedy a misapplication of correct law.

The Third District's decision conflicts with *Ivey v. Allstate Ins., Co.*, 774 So.2d 679 (Fla. 2000) where this Court held that misapplication of correct law is not remedial by certiorari.⁴ *See also Haines City Comm. Dev. v. Heggs*, 658 So.2d 523, 525 (Fla. 1995). Although the Third District's opinion pays 'lip service' to the standard of review, the conflict between the Third District's decision and *Ivey* is crystallized when the Third District's decision is juxtaposed with the circuit panel opinion. For instance, the question of law decided by the circuit court is whether the time limit to submit bills to a PIP insurer under § 627.736(5)(c)(1), *Fla. Stat.* (2007) is a condition precedent to payment that can be waived; or a jurisdictional bar akin to a statute of repose that cannot be waived. A. 4-5. Considering the absence of binding precedent to guide the circuit panel, the panel applied the correct law--i.e., the PIP statute---to decide the issue; and determined

⁴ The Third District's decision also conflicts with other District Court opinions where the District Courts denied second tier review because the circuit appellate court applied the correct law. *See Manatee Cty. v. City of Bradenton*, 828 So.2d 1083 (Fla. 2nd DCA 2002); *Pharmcore, Inc., v. City of Hallandale Beach*, 946 So.2d 550 (Fla. 4th DCA 2006).

that the time limit is not jurisdictional, but instead, a condition precedent to payment; which, like any other condition precedent, can be waived. A. 5.

The Third District's conclusion that the circuit court's finding that United's pre-suit acts demonstrated waiver is a violation of a clearly established principle of law also conflicts with *Ivey* and *Heggs* because the circuit court applied the correct law in evaluating the evidence in support of Petitioner's waiver defense--i.e., *binding precedent providing that a waiver can arise from a party's acts that are inconsistent with asserting a known right*. See A. 5-7.

United, in response, will argue that the Third District's decision does *not* conflict with *Ivey* and *Heggs* because the correct law the circuit court did not apply is the holding in *Coral Imaging Servs. v. Geico Idem. Ins. Co.*, 955 So.2d 11 (Fla. 3rd DCA 2006). The argument is meritless. First, the Third District did not say that the holding in *Coral Imaging* is the controlling principle in the established law on the issue decided by the circuit court. The Third District in *Coral Imaging*, moreover, did not decide whether the time limit under § 627.736(5)(c)(1) may be subject to waiver; the litigants in *Coral Imaging* did not litigate that issue. The sole issue decided in *Coral Imaging* is whether a PIP insurer must pay timely bills in excess of its policy limits submitted by one provider where the insurer exhausted benefits by paying untimely bills from another provider. In deciding the issue, the '*rule of stare decisis*' (i.e., the holding) fashioned by the Court based on the facts

and issue presented in *Coral Imaging* is that the insurer's voluntary payment of the untimely bills should be treated as 'gratuitous' and *not* counted toward the insured's benefits⁵; and the '*result stare decisis*' is that the insurer must pay in excess of its policy limits.⁶ *Id.* Nothing in *Coral Imaging*, however, deals with whether the time limit under § 627.736(5)(c)(1) may be waived as a bar against payment.⁷

Though the Third District cites *Coral Imaging* for the proposition that "*an insurer has no obligation to pay late-filed bills,*" Op. at A.2, the issue decided by the circuit appellate court did not concern whether United is obligated to pay late bills, but instead whether the time limit to submit bills under the statute can be waived as a bar against payment. *See* A. 3-7.

⁵ The holding or *ratio decidendi* of a decision is defined "*as the outcome of the case on the precise points discussed in the opinion stated in terms of the facts found to be material to the court's decision.*" *Adams v. Aetna Cas. & Surety Ins. Co.*, 574 So.2d 1142,1153 n. 10 (Fla. 1st DCA 1991)(emphasis added).

⁶ The '*rule stare decises*' or holding is the rule or legal standard fashioned by the Court whereas the '*result stare decisis*' is the result reached by applying the rule of legal standard to the facts of the case. *Butterworth v. Nat'l League of Professional Baseball Clubs, et. al.*, 644 So.2d 1021 (Fla. 1994).

⁷ "For a case to be *stare decisis* on a particular point of law, that issue *must* have been raised in the action, *decided* by the court, and its decision made part of the opinion of the case." 20 Am. Jur. 2d., *Courts* § 134 (2nd Ed. 2008)(emphasis added)(footnotes omitted). "[A] case is not binding precedent on a point of law where the holding is *only implicit* or *assumed* in the decision but is *not* announced." *Id.*; *See* also 21 C.J.S., *Courts* § 223 ("A case is *not* binding precedent if its holding is only implicit or assumed or the issue was decided *sub silencio.*")(emphasis added).

United will likely argue that the Third District’s decision does not conflict with *Ivey* and *Heggs* because this Court in *Allstate Ins. Co., v. Kaklamanos*, 843 So.2d 885 (Fla. 2003) expanded scope of second tier review circumscribed by *Ivey* and *Heggs*. The argument should be rejected. *Kaklamanos* did not recede from *Ivey* or *Heggs* to authorize a District Court to grant certiorari to remedy a misapplication of correct law.⁸ This Court, moreover, does not overrule its prior precedent by implication. *Government Employees Ins. Co., v. Stafstrom*, 668 So.2d 631 (Fla. 5th DCA 1996).

II. The Third District’s decision in the present case where the Third District Court weighed the sufficiency of the evidence is in direct conflict with this Court’s decision in *Florida Power & Light Co., v. City of Dania*, 761 So.2d 1089 (Fla. 2000)

The Third District’s decision conflicts with *Florida Power & Light Co., v. City of Dania*, 761 So.2d 1089, 1093 (Fla. 2000) where this Court concluded that the Fourth District erred in weighing the evidence on second tier review. The Third District in the present case weighed the sufficiency of the evidence in support of Petitioner’s waiver defense where the Third District states:

“Neither submitting untimely bills along with timely bills to an independent medical examiner for a determination of medical necessity, nor failing to check “late billing” as reason for non

⁸ Concerning the subject matter of second tier review, this Court in *Kaklamanos* only held that a clearly established principle of law is *not* solely derived from case law; but instead, can also be derived from other sources such statutes, rules of court, and constitutional law

payment on an explanation of benefits form, constitutes waiver of this provision.” Op. at A.2

The Third District then said that the “*Appellate Division’s decision to the contrary amounts to a violation of a clearly established principle of law.*” Op. at A.2.

Whether the evidence concerning United’s pre-suit conduct amounts to waiver of the statutory time bar is not a proper consideration for second tier review. Yet, the Third District judged the sufficiency of the evidence despite established precedent prohibiting a District Court from doing so. *See Florida Power & Light Co.*, 761 So.2d at 1093.

In response, we anticipate that United will rely on *Reaves v. State*, 485 So.2d 829 (Fla. 1986) in asserting that this Court cannot look at the circuit court opinion to determine jurisdiction; and that the Court is limited to reviewing the face of the majority opinion below. The committee notes to Fla. R. App. P. 9.120, on the other hand, gives the Court flexibility to review the circuit court opinion. The committee notes to the 1977 amendment to Fla. R. App. P. 9.120 states:

“An appendix must be filed containing a conformed copy of the decision of the district court. If the decision of the district court was without opinion, *or otherwise does not set forth the basis of decision with sufficient clarity to enable the Supreme Court to determine whether the grounds for jurisdiction exist, a conformed copy of the order of the trial court should also be included in the appendix.*” (emphasis added).

Consideration of the circuit court opinion is proper because the Third District’s opinion is written in such a way that it does not enable this Court with

sufficient clarity to determine whether a conflict exists.⁹ But when the Third District's opinion is juxtaposed with the circuit panel opinion, a conflict with precedent from this Court and other District Courts of Appeal is crystallized. Needless to say, a District Court's unsupported assertion that the circuit court 'violated a clearly established principle of law' should not act as shield against further review by this Court where the District Court's opinion, when juxtaposed with the circuit court opinion, demonstrates that District Court improperly granted certiorari to remedy an alleged misapplication of correct law.

This Court should also accept jurisdiction because the Third District's decision in this case, if uncorrected, will further erode established precedent prohibiting a District Court from granting certiorari to remedy a misapplication of correct law. Like the present case, there are other cases, specifically from the Third District, where a petition for certiorari is treated as a second appeal. *See e.g., Coral Imaging Servs. v. Geico Indem. Ins. Co.*, 955 So.2d 11 (Fla. 3rd DCA 2006); *Southern Group. Indem., v. Humanitary Health Inc.*, 975 So.2d 1257 (Fla. 3rd DCA 2008). Despite the Third District's claim in those cases that the wrong law was

⁹ The Third District opinion *omits* the fact that the circuit court construed the PIP statute to decide an issue for which there is no binding precedent. The opinion also *omits* that the circuit panel, after finding that the time limit is intended as a condition precedent that can be waived, applied binding precedent to the evidence; which provides that a waiver can arise from inconsistent acts. More importantly, the Third District did not identify the '*correct*' law that the circuit panel did not apply. In light of the foregoing omissions, this Court can consider the circuit court opinion to determine jurisdiction.

applied, *see Id.*, a critical analysis of both the circuit panel opinion¹⁰ and District Court opinion reveals that the District Court disagreed with the outcome of the circuit court's application of correct law, -- *i.e.*, *the panel's interpretation of the PIP statute* -- in deciding an issue for which the established law did not provide a controlling principle--*i.e.*, binding case law to guide the circuit panel.¹¹ Thus, the Court should accept jurisdiction to prevent further inconsistency in the application of second tier review; and ensure uniformity in its application.

CONCLUSION

WHEREFORE the Petitioner, EDUARDO J. GARRIDO D.C., P.A., as assignee of Apolonio Chavez, prays that this Court to accept jurisdiction based on the foregoing arguments and authorities.

Respectfully Submitted,

Christian Carrazana, Esq.

¹⁰ The circuit panel opinions are reported in the Florida Law Weekly Supplement. *See Geico Indem. Ins. Co., v. Coral Imaging Inc., as assignee of Virgilio Reyes*, 13 Fla. L. Wkly. Supp. 421a (Fla. 11th Jud. Cir. App. 2006); *Southern Group Indem., v. Humanitary Health Inc., as assignee of Martha Lopez*, 13 Fla. L. Wkly. Supp. 1061b (Fla. 11th Jud. Cir. App. 2006)

¹¹ The Third District's recent decision in *United Auto. Ins. Co., v. Custer Medical Ctr, as assignee of Maximo Masis*, 990 So.2d 663 (Fla. 3rd DCA 2008) is another example where the District Court misapplied the standard of review in a certiorari proceeding by reconstructing the pleadings to transform an affirmative defense to a condition precedent where the plaintiff must prove during his *prima facie* case at trial that the condition was met. *Custer* is currently pending review before this Court. *See SC08-2036*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail on this ____ day of November 2008 to: Michael J. Neimand, Esq., Office of General Counsel, Attorneys for Respondent, P.O. Box 140490, Miami Fl 33114-9980.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2).

Christian Carrazana, Esq.