

IN THE FLORIDA SUPREME COURT

CASE NUMBER: SC10-1368

Third DCA Case No: 3D10-1595

JOSE VEGA,

Petitioner,

vs.

**UNITED AUTOMOBILE INSURANCE
COMPANY,**

Respondent.

PETITIONER'S BRIEF ON JURISDICTION
On Discretionary Review from the Third District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Petitioner, Jose Vega, prevailed by summary judgment in a personal injury protection action against the Respondent, United Automobile Insurance Company, over payment of its PIP claim. United appealed to the eleventh circuit appellate court, which reversed the summary judgment holding that the striking of the peer review was error, citing to United Automobile Insurance Company v. Santa Fe Medical Center, 21 So.3d 60 (Fla. 3d DCA 2009) and Partners in Health Chiropractic v. United Automobile Insurance Company, 21 So.3d 858 (Fla. 3d DCA 2009). Petitioner, sought certiorari review from the Third District Court, which denied the petition on the authority, inter alia, of United Automobile Insurance Company v. Santa Fe Medical Center, 21 So.3d 60 (Fla. 3d DCA 2009), petition for review pending, No. SC09-2100, proceedings stayed (Fla. January 5, 2010). This is a pipeline case decided on the basis of the Third District's Santa Fe en banc decision which has been stayed by this Court pending its decision in the case of Custer Medical Center a/a/o Maximo Masis v. United Automobile Insurance Company, 990 So.2d 633 (Fla.3d DCA 2008), Certiorari Jurisdiction Accepted 8/31/09, Case No. SC08-2036.

SUMMARY OF THE ARGUMENT

This Court has conflict jurisdiction of this pipeline case pursuant to *Art. V, §3(b)(3) Fla. Const. (1980)* based on express and direct conflict between the district court's opinion and various decisions of the Florida Supreme Court and various district courts of appeal. The Court should exercise its discretion to eliminate the inconsistent views within Florida about the same questions of law, relating to the public policy of the No Fault Law, the statutory test of 'reasonable proof,' it's timeliness, 'Paper IME's' and the interplay and application of subsections 627.736(4)(b) and (7)(a), Florida Statutes.

The Santa Fe en banc opinion on which the Third District relied in denying certiorari review to Petitioner, Jose Vega, expressly and directly conflicts on the public policy of 'swift and virtually automatic payment' of No Fault claims enumerated by this Court's decisions in Ivey v. Allstate Ins.. Co., 774 So2d 679 (Fla. 2000), United Auto. Ins. Co. v. Rodriguez, 808 So.2d 82(Fla. 2001), Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885(Fla.2003), State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So.2d 1067(Fla.2006), Allstate Ins. Co. v. Holy Cross Hosp., Inc., 961 So.2d 328(Fla. 2007) and most recently in Menendez v. Progressive Exp. Ins. Co., Inc., 35 So.3d 873 (Fla. 2010). It also expressly and directly conflicts with this Court's holding in Rodriguez that the penalty provisions were intended to

promote the prompt resolution of PIP claims, and that if the benefits are not paid within thirty days and the insurer does not have reasonable proof that it is not responsible for the payment, the payment is "overdue."

The Santa Fe en banc opinion upon which this present case was decided expressly and directly conflicts with the public policy of reduction of litigation resulting from auto accidents by prompt payment of medical bills, as enumerated by this court in Chapman v. Dillon, 415 So.2d 12 (Fla.1982) and with Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla.1974), as well as other district courts in Dunmore v. Interstate Fire Ins. Co., 301 So.2d 502 (Fla. 1st DCA 1974) and Martinez v. Fortune Ins. Co., 684 So.2d 201, 203 (Fla. 4th DCA 1996), *review denied*, 695 So.2d 699(Fla.1997), by holding that an insurer can deny a claim without reasonable proof, based on the insurer's subjective belief that the claim is not reasonable, related or necessary, thus encouraging, rather than discouraging litigation. The district court opinion converts the phrase 'has reasonable proof' into 'later obtains' proof.

JURISDICTIONAL STATEMENT

This Court has discretion to review an opinion of a district court of appeal that expressly and directly conflicts with decisions of the Supreme Court or other district courts of appeal on the same point of law. *Art. V, §3(b)(3) Fla. Const.*

(1980); *Fla. R. App. P. 9.030(a)(2)(A)(iv)*. The court should exercise its discretion and place this case in the pipeline for review to eliminate the inconsistent views within Florida about the same questions of law. Wainwright v. Taylor, 476 So.2d 669(Fla. 1985); Zambos M.D. v. Meier, 875 So.2d 5 (Fla. 5th DCA 2004).

ARGUMENT

I. The pipeline opinion of the district court citing to its en banc Santa Fe decision pending before the Supreme Court expressly and directly conflicts with decisions of the Florida Supreme Court and other district courts, on the dual public policies of: (i) ‘swift and virtually automatic’ payment of PIP claims; and,(ii) reduction of litigation, court congestion and expense; as well as the interpretations of ‘reasonable proof’ and ‘denial’ of claims. The court should review this case to eliminate the conflicting and inconsistent views within Florida about the same questions of law.

The district court’s decision based upon the Santa Fe opinion expressly and directly conflicts with, and expresses views inconsistent with, decisions of the Florida Supreme Court, and its sister district courts. It conflicts on questions of law relating to the No Fault Law’s public policy of prompt or ‘swift and virtually automatic’ payment of PIP claims, and the policy of reduction of litigation, court congestion and expense. The opinion conflicts with the meaning of ‘reasonable proof,’ and ‘denial’ of a claim, saying that subsection (4)(b) allows an insurer to not pay, and/or deny a claim, based solely on the insurer’s subjective belief that the claim is not reasonable, related or necessary, without having any ‘reasonable

proof.’ The court’s application of the statute directly conflicts with the dual public policy goals of swift payment and reduction of litigation. Instead, it promotes delay and further litigation because medical providers will be forced to sue and litigate to final judgment and appeal, in order to get their claims paid. The district court’s opinion expressly and directly conflicts on ‘swift’ payment with Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla.1974)(‘prompt’/‘speedy’ payment at 16-17); Chapman v. Dillon, 415 So.2d 12 (Fla.1982)(‘prompt’ payment at 17-18); Ivey v. Allstate Ins. Co., 774 So.2d 679(Fla.2000)(‘swift and virtually automatic payment’ at 683-684); United Auto. Ins. Co. v. Rodriguez, 808 So.2d 82(Fla.2001)(same at 88,90-91-J. Pariente and J. Andstead concurring with J. Lewis dissent, concurred in by J. Quince: “the purpose of the no-fault statutory scheme is to provide "swift and virtually automatic payment [to] the injured insured," citing Ivey); Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885(Fla.2003)(same at 879); State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So.2d 1067(Fla.2006)(same at 1077), and Allstate Ins. Co. v. Holy Cross Hosp., Inc., 961 So.2d 328(Fla. 2007)(same at 332).

The district court’s opinion also expressly and directly conflicts with opinions of the Florida Supreme Court and the courts of other districts on the No Fault Law’s public policy of reducing or eliminating, rather than increasing litigation. Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla.1974)(at

17:“provision for first-party payment of claims will obviate the necessity to bring a cause of action in many cases, thereby reducing court congestion and delay and assuring prompt reimbursement of essential losses”); Chapman, supra at 18 (Fla.1982)(recognizing the legislature's objective of insuring prompt recovery of expenses without protracted litigation);Williams v. Gateway Insurance Company, 331 So.2d 301(Fla.1976)(“It was the legislature's intent in enacting the Florida Automobile Reparations Act to encourage settlements and to minimize litigation.”) The foregoing authorities are all consistent with the public policy as reflected in the preamble to *Laws 2001-271*(amending sections 627.736(4) and (7)) which reflects the public policy of prompt payment and reduced litigation:

Be It Enacted by the Legislature of the State of Florida:

Section 1. Legislative findings.—The Legislature finds that the Florida Motor Vehicle No-Fault Law is intended to deliver medically necessary and appropriate medical care quickly and without regard to fault, and without undue litigation or other associated costs. [Underlining Added.]

The dimensions of the district court’s conflict cannot be understood without considering the meaning of ‘reasonable proof,’ and when it must be obtained, as well as what constitutes a ‘denial’ and when it occurs.

II. The pipeline opinion of the district court citing to its en banc Santa Fe decision pending before the Supreme Court expressly and directly conflicts with

Rodriguez and those district court opinions which require that an insurer have ‘reasonable proof’ of its non responsibility, replacing it with an insurer’s unsupported subjective belief as to whether a claim is reasonable, related and necessary, and permitting an insurer to obtain proof at any time, thus assures more, not less litigation.

The district court’s opinion in relying on its en banc Santa Fe decision pending before the Supreme Court expressly and directly conflicts with decisions of the Florida Supreme Court and of other district courts on the issue of whether an insurer is permitted to deny or ignore a PIP claim without having reasonable proof. The Santa Fe opinion at p. 65 authorizes insurers to deny claims “if the insurer believes that the claim is not reasonable, related and necessary,” stating that an insurer can “obtain” reasonable proof “at any time to establish that the insurer is not responsible for payment of the claim.

As to when reasonable proof must be had, there is express and direct conflicts with Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885(Fla.2003)(“a payment is not deemed overdue "when the insurer has reasonable proof to establish that the insurer is not responsible for the payment" at 891-892); United Auto. Ins. Co. v. Rodriguez, 808 So.2d 82(Fla.2001)(“if the benefits are not paid within thirty days and the insurer does not have reasonable proof that it is not responsible for the payment, the payment is "overdue"-at 87; and, “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."-at 88). This opinion also expressly and directly conflicts with the district courts of the first, fourth and fifth districts. Dunmore v. Interstate Fire Ins. Co., 301 So.2d 502 (Fla. 1st DCA 1974)("the burden is clearly upon the insurer to authenticate the claim within the statutory time period"); Martinez v. Fortune Ins. Co., 684 So.2d 201, 203 (Fla. 4th DCA 1996), *review denied*, 695 So.2d 699(Fla.1997)(627.736(4)(b) requires insurer to pay the benefits within thirty days of receipt of written notice of the claim); Jones v. State Farm Mutual Automobile Insurance Co., 694 So.2d 165 (Fla. 5th DCA 1997)(finding that the fact that State Farm's adjuster may have had 'reasonable proof' to question statutory test of "reasonable proof to establish that the insurer is not responsible for the payment...." *Id.*, at 166. Jones was referenced with approval in *Rodriguez*.) As to when an insurer must have 'reasonable proof' to avoid liability, the Santa Fe opinion upon which the district court relied expressly states that the statute does not require the insurer to obtain 'proof' under subsection (4)(b) before denying a claim. It expressly and directly conflicts with Rodriguez, in which this court said that the penalty provisions of the statute were intended to promote the prompt resolution of PIP claims and that "if the benefits are not paid within thirty days and the insurer does not have reasonable proof that it is not responsible for the payment, the payment is "overdue" *Id.*, at 86; and, "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." *Id.*, at 87. The district court's opinion essentially morphs "has reasonable proof" into "later obtains." On this point, the en banc opinion relied upon by the Third District Court of Appeals also directly and expressly conflicts with the Fifth District's opinion in Palmer v. Fortune Ins. Co., 776 So.2d 1019 (Fla. 5th DCA 2001), *review denied*, 791 So.2d 1096(Fla.2001)(the burden is on the insurer to authenticate a claim within 30 days under the personal injury protection (PIP) prompt payment statute: "Fortune should have either paid the reasonable value of the submitted claims or denied coverage before the 30 day period expired," and, "the no-fault statute was designed to provide a speedy recovery of PIP benefits." *Id.*, at 1022.) While the district court's Santa Fe opinion that relied heavily on Justice Pariente's concurrence in Rodriguez (see opinion p.10-11), the opinion overlooks the portion which states that the statutory penalty "comes into play if the insurer fails to pay the bill within thirty days after written notice and did not have reasonable proof within that thirty-day period to establish that it was not responsible for the bill." [Underlining Added.]

CONCLUSION

The district court's decision is in express and direct conflict with the decisions of this court in Lasky, Chapman, Ivey, Rodriguez, Kaklamanos, Nichols, Holy Cross and Menendez and district courts. There is certiorari jurisdiction. Discretion should be exercised to grant review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was mailed to: Michael J. Neimand, Esquire, Office of the General Counsel, 1313 N.W. 167TH Street, Miami Gardens, Florida 33169-5739, this 16th day of July, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) i.e. Times New Roman 14 pt.

By: _____
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