

**IN THE SUPREME COURT  
STATE OF FLORIDA  
TALLAHASSEE, FLORIDA**

INGENIX,

Petitioner,

vs.

SUSAN HAM, Personal Representative of the  
Estate of GERALD HAM, deceased;  
ANTHONY POLLIZZI, M.D.; VANDER M.  
WYNN, M.D.; JAMES FORENSKY, M.D.;  
PEACE RIVER ANAESTHESIOLOGY, P.A.;  
PUNTA GORDA HMA, INC.; KAREN M.  
MACKENZIE, M.D.; and SURGICAL  
OBESITY SOLUTIONS, LLC,

Respondents.

CASE NO.: SC10-1379

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**ON DISCRETIONARY REVIEW FROM THE  
SECOND DISTRICT COURT OF APPEAL  
LAKELAND, FLORIDA**

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**PETITIONER’S JURISDICTIONAL BRIEF**

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Sarah Lahlou-Amine  
Florida Bar Number: 0022709  
FOWLER WHITE BOGGS P.A.  
P.O. Box 1438  
Tampa, FL 33601  
(813) 228-7411/Fax No.: (813) 229-8313  
Attorneys for Petitioner, INGENIX

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## **STATEMENT OF THE CASE AND FACTS**

UnitedHealthcare (“UHC”) paid \$154,075.46 on Gerald Ham’s behalf for medical bills relating to a medical procedure that ultimately resulted in Mr. Ham’s death. (A:2). Mr. Ham’s Estate (“the Estate”) settled with his medical providers in a malpractice lawsuit for a total settlement amount of \$1,150,000. (A:2).

In the trial court, the Estate sought to reduce its reimbursement obligation to UHC pursuant to a formula set forth in Section 768.76(4), Florida Statutes (2008). (A:2). Ingenix, UHC’s recovery agent, disputed the application of the statutory formula, asserting that full reimbursement is required under the terms of the policy. (A:2-3). Ingenix cited *Travelers v. Boyles*, 679 So. 2d 1188 (Fla. 4th DCA 1996), for the proposition that the statute does not govern where a health insurer contracts for its own reimbursement remedy. (*See* A:2-3). The trial court ruled in the Estate’s favor on this issue, and Ingenix appealed. (A:3).

The Second District Court of Appeal affirmed with a written opinion in which it sought to distinguish *Boyles* because in that case, the settlement monies subject to reimbursement did not come directly from a “tortfeasor” as referenced in the statute. (A:3-4). Rather, the settlement monies in *Boyles* came from the plaintiff’s uninsured motorist carrier. (A:3-4). Based on this distinction, the court construed the language from *Boyles*, that the statute “is not the exclusive method for a health insurer to seek reimbursement pursuant to a policy provision,” to mean

that a health insurer may proceed under its policy instead of under the statute, but only if the statute does not otherwise apply. (A:4).

As the controlling facts of this case are the same as those in *Boyles*, Ingenix seeks to invoke this Court's discretionary jurisdiction to address the resulting conflict between the Second District and the Fourth District on the question of whether a health insurer may contract for its own reimbursement remedy rather than proceed under that provided in Section 768.76(4), Florida Statutes.

## **SUMMARY OF THE ARGUMENT**

While the Second District's opinion in this case shares the same controlling facts as those in the Fourth District's opinion in *Boyles*, it reaches the opposite conclusion. The resulting express and direct conflict is a reviewable misapplication conflict because the Second District misapplied *Boyles*, distinguishing it based on an immaterial fact.

The controlling facts in both cases involve a health insurer that provided benefits to a personal injury plaintiff in connection with an injury where the plaintiff later recovered for his injury from a third party. In this case and in *Boyles*, the health insurer sought reimbursement from its insured under the terms of its policy, not under Section 768.76(4), Florida Statutes.

*Boyles* upheld a health insurer's right to contract for an enforceable reimbursement remedy instead of proceeding under the statute. The Second District, however, rejected this right, finding *Boyles* inapplicable because the statute, which addresses recoveries from tortfeasors, did not apply in *Boyles* as the plaintiff there recovered from an uninsured motorist carrier, not a "tortfeasor."

This distinction is one without a difference. It was not the basis for the *Boyles* court's holding and is thus an invalid basis for rejecting *Boyles*'s application. Accordingly, an express and direct conflict exists, and Ingenix respectfully requests that this Court accept jurisdiction of this matter to resolve it.

## **ARGUMENT**

- 1. THIS COURT SHOULD ACCEPT JURISDICTION OF THIS MATTER BECAUSE THE SECOND DISTRICT’S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION FROM THE FOURTH DISTRICT, WHICH ALLOWS A HEALTH INSURER TO OBTAIN REIMBURSEMENT FROM AN INSURED PERSONAL INJURY PLAINTIFF UNDER THE TERMS OF ITS POLICY, RATHER THAN PROCEEDING UNDER SECTION 768.76(4), FLORIDA STATUTES.**

**A. This Case Presents a Reviewable Misapplication Conflict.**

The Second District’s opinion presents an express and direct conflict with the Fourth District’s decision in *Travelers v. Boyles*, 679 So. 2d 1188 (Fla. 4th DCA 1996). The nature of this conflict is a misapplication conflict, which this Court has jurisdiction to review. *See* Fla. Const. Art. V § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv); *Riggs v. State*, 918 So. 2d 274, 278 (Fla. 2005) (“Although the two decisions recite the same principles of . . . law, we have jurisdiction because of the Second District’s ‘application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case.’” (*quoting Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975) (*citing Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960))))). Here, the Second District created a reviewable misapplication conflict when it applied *Boyles* to produce a different result when the controlling facts of these cases are the same.

**B. In *Boyles*, the Fourth District Found a Health Insurer Is Entitled to Pursue Reimbursement Under Its Policy Instead of Under Section 768.76, Florida Statutes.**

*Boyles* held that Section 768.76, Florida Statutes, provides just one mechanism by which a health insurer may pursue reimbursement for medical benefits paid on an insured personal injury plaintiff's behalf. *See* 679 So. 2d at 1189. Subsection (4) of the statute, which addresses reimbursement, provides:

A provider of collateral sources that has a right of subrogation or reimbursement that has complied with this section shall have a right of reimbursement from a claimant to whom it has provided collateral sources if such claimant has recovered all or part of such collateral sources from a tortfeasor. Such provider's right of reimbursement shall be limited to the actual amount of collateral sources recovered by the claimant from a tortfeasor, minus its pro rata share of costs and attorney's fees incurred by the claimant in recovering such collateral sources from the tortfeasor. In determining the provider's pro rata share of those costs and attorney's fees, the provider shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorney's fees.

In *Boyles*, the health insurer sought recovery against its insured's settlement with a third party, an uninsured motorist carrier. *Id.* However, rather than asserting a statutory right to reimbursement under Section 768.76(4), the health insurer asserted its contractual reimbursement rights under the terms of its policy. *Id.*

The plaintiff claimed that the health insurer's only option for reimbursement was provided under the statute and that such reimbursement was barred because



the statute permitted reimbursement only where a plaintiff recovers from a tortfeasor. *Id.* The plaintiff argued that because he recovered from an uninsured motorist carrier, and not directly from a tortfeasor, his health insurer could not benefit from the statute's provision for reimbursement. *Id.*

In upholding a health insurer's contractual reimbursement right, the Fourth District did not rule that the source of the plaintiff's recovery was material. Instead, it agreed with the health insurer that proceeding under the statute was not its only option and that a health insurer may seek reimbursement under the terms of its policy. *Id.* Specifically, the court held, "We thus agree with Travelers that the statute [Section 768.76], although providing how collateral sources are treated under some circumstances, is inapplicable here. *Clearly it is not the exclusive method for a health insurer to seek reimbursement pursuant to a policy provision.*" *Id.* (emphasis added).

The *Boyles* court thus upheld a health insurer's freedom to contract for its own reimbursement remedy, finding that "[a] health insurer's right to provide that it will be reimbursed for payments it has made for medical expenses, where an insured recovers those losses from another source, is well established." *Id.* at 1190.

**C. The Second District Reached the Opposite Conclusion Regarding a Health Insurer's Right to Obtain Reimbursement Under Its Policy Instead of Under Section 768.76, Florida Statutes, Resulting in an Express and Direct Conflict.**

The Second District reached a legal conclusion contrary to that reached in *Boyles* notwithstanding that the controlling facts in both cases are the same.

- In both cases, a health insurer provided medical benefits to an insured personal injury plaintiff in connection with an injury, *see id.* at 1189; (A:2);
- In both cases, the plaintiff subsequently recovered for the injury from a third party, *see* 679 So. 2d at 1189; (A:2); and
- In both cases, the health insurer sought reimbursement from the recovery under the terms of its policy and not under Section 768.76(4), Florida Statutes, *see* 679 So. 2d at 1189; (A:2).

Under these facts, the Second District rejected a health insurer's right to contract for its own reimbursement remedy, which the Fourth District upheld. *See* (A:4); 679 So. 2d at 1189. In reaching this contrary legal conclusion, the Second District held that *Boyles* did not apply because the personal injury plaintiff in *Boyles* recovered from an uninsured motorist carrier, not from a tortfeasor. (A:4). To bolster this distinction, the Second District pointed to language in the statute that refers to a plaintiff's recovery from a "tortfeasor." (A:4); *see* § 768.76(4), Fla.

Stat. The Second District thus held that the reason the statute did not affect the health insurer's freedom to contract for its own reimbursement remedy in *Boyles* was because the *Boyles* plaintiff recovered from an uninsured motorist carrier, not directly from a tortfeasor. (A:4).

Contrary to the Second District's view, the source of the third-party recovery was not the basis for the *Boyles* court's holding that a health insurer may proceed under its policy to obtain reimbursement instead of proceeding under the statute. *See* 679 So. 2d at 1189. There is simply no language in *Boyles* that suggests this is the reason why it allowed the health insurer to pursue its alternative contractual reimbursement right. Instead, *Boyles* holds that a health insurer's contractual reimbursement right is an independent avenue of relief that a health insurer may pursue instead of proceeding under Section 768.76, Florida Statutes. *See id.* ("Clearly it [the statute] is not the exclusive method for a health insurer to seek reimbursement pursuant to a policy provision").

## **CONCLUSION**

Based on the foregoing reasons, Appellant Ingenix respectfully requests that this Court accept jurisdiction based on the express and direct conflict between the Second District's decision in this matter and the Fourth District's decision in *Boyles*.

Respectfully submitted,

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Sarah Lahlou-Amine  
Florida Bar Number: 022709  
FOWLER WHITE BOGGS P.A.  
P.O. Box 1438  
Tampa, FL 33601  
Telephone No.: (813) 228-7411  
Fax No.: (813) 229-8313  
Email: sarah.amine@fowlerwhite.com  
Attorneys for Petitioner, INGENIX

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 26, 2010, a true and accurate copy of the foregoing has been furnished by U.S. Mail to:

William E. Partridge, Esquire Grossman Roth and Partridge 1800 Second Street, Suite 777 Sarasota, FL 34236  Attorney for Appellee	H. Greg Lee, Esquire H. Greg Lee, P.A. 2014 4th Street Sarasota, FL 34237  Attorney for Estate
Evan T. Marowitz, Esquire Michaud Mittlemark & Antonacci, PA 621 N.W. 53rd Street, Suite 420 Boca Raton, FL 33487  Attorney for Defendant Polizzi, Wynn, Forensky and Peace River Anesthesiology Associates	Kevin Crews, Esquire Wicker Smith et al. Am South Bldg., Suite 401 4851 Tamiami Trail North Naples, FL 34103  Attorney for Defendant Punta Gorda HMA

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Sarah Lahlou-Amine

**CERTIFICATE OF COMPLIANCE**

I HERBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Sarah Lahlou-Amine  
Florida Bar Number: 022709  
FOWLER WHITE BOGGS P.A.  
P.O. Box 1438  
Tampa, FL 33601  
Telephone No.: (813) 228-7411  
Fax No.: (813) 229-8313  
Email: sarah.amine@fowlerwhite.com  
Attorneys for Petitioner, INGENIX