IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY

Defendant/Petitioner,

vs. CASE NO. SC01-2444

DINO KAKLAMANOS and
KEELY KAKLAMANOS

Plaintiffs/Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
DCA Case No.: 1D00-2974

INITIAL BRIEF OF DEFENDANT/PETITIONER ALLSTATE INSURANCE COMPANY

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STATEMENT OF THE CASE AND FACTS

I. Nature Of The Case

This matter is on review from a First District Court of Appeal decision granting a petition for writ of certiorari and quashing a decision by the circuit court sitting in its appellate capacity. The opinion below is reported at Kaklamanos v. Allstate Ins. Co., 796 So.2d 555 (Fla. 1st DCA 2001).

II. Statement Of Facts

The underlying facts are undisputed. Plaintiffs/ respondents, Dino and Keely Kaklamanos ("the Kaklamanoses"), filed suit against defendant/petitioner, Allstate Insurance Company ("Allstate"), on April 7, 1999. *(Pet. Cert. App. At A50-A52)*.

[1] The Complaint was an action for damages arising from the alleged breach of a contract for Personal Injury Protection ("PIP") insurance. It alleges that Allstate "failed and/or

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[1] In this brief, "*Pet. Cert. App. at __*" refers to the referenced page in the appendix filed by the Kaklamanoses with their petition for writ of certiorari in the district court. References to the petition for writ of certiorari itself are to "*Pet. Cert. at __.*" While the pages of the petition as submitted were not numbered, Allstate has cited to specific pages by counting from the first page. References to the appendix submitted by Allstate in response to the petition are to "*Resp. App. at __.*"

refused to make full payment (80%) for the Plaintiff’s reasonable and necessary medical related expenses” involving a bill from Nu-Best Diagnostics (“NBD”) in the amount of $650.00. *(Pet. Cert. App. at A51)*. The Complaint sought a judgment for damages for the amount Allstate purportedly owed for this specific medical bill and did not seek non-monetary relief. *(Pet. Cert. App. at A51-A52; Pet. Cert. at 4)*.

The Complaint is based on an insurance contract that includes the following:

> **Unreasonable or Unnecessary Medical Expenses**
>
> If an insured person incurs medical expenses which ***we*** deem to be unreasonable or unnecessary, ***we*** may refuse to pay for those medical expenses and contest them.
>
> If the insured person is sued by a medical services provider because ***we*** refuse to pay medical expenses which ***we*** deem to be unreasonable or unnecessary, ***we*** will pay resulting defense costs and any resulting judgment against the insured person. ***We*** will choose the counsel. The insured person must cooperate with us in the defense of any claim or lawsuit. If ***we*** ask an insured person to attend hearings or trials, ***we*** will pay up to $50.00 per day for loss of wages or salary. ***We*** will also pay other reasonable expenses incurred at ***our*** request.

(Resp. App. at A52-A53) (emphasis in original).

Allstate advised NBD that it would not pay the $650 bill in full. However, consistent with its policy language, Allstate further advised NBD that it would “indemnify, defend and hold harmless Keely Kaklamanos from any lawsuit brought by Nu-Best Diagnostic Labs” to enforce the bill. *(Resp. App. at 66)*. In response to Requests for Admissions, the Kaklamanoses admitted that NBD never filed suit against them and that they had not paid NBD any portion of the charges at issue. *(Resp. App. at A11, A13)*.

Based on the policy language and the Kaklamanoses' responses to Allstate's Request for Admissions, Allstate moved for summary judgment. *(Pet. Cert. App. at A47-A49)*. Allstate asserted that no genuine issue of material fact existed and Allstate was entitled to judgment because the Kaklamanoses sustained no damages due to Allstate's refusal to pay NBD. *(Pet. Cert. App. at A47-A49)*. In response, the Kaklamanoses filed no opposing affidavits, depositions, or documentary evidence demonstrating the existence of a genuine issue of fact. In particular, the Kaklamanoses presented no evidence to the trial court showing that NBD had pursued them in any way as a result of non-payment of the bill. *(Pet. Cert. at 5; Pet. Cert. App. at A23).*

III. <u>Course Of Proceedings Below</u>

The county court granted Allstate's motion for summary judgment on February 1, 2000. *(Pet. Cert. App. at A43-A45)*. The court held that, because the Kaklamanoses paid nothing for the disputed bill and NBD did not pursue them for payment, they had "no damages to pursue in this action nor can any result in the future," given Allstate's promise of defense and indemnification. *(Pet. Cert. App. at A44)*. The county court entered final judgment on February 8, 2000. *(Pet. Cert. App. at A46).* On direct appeal, the circuit court affirmed the summary final judgment without opinion. *(Pet. Cert. App. at A1).*

The Kaklamanoses then petitioned the First District Court

of Appeal for a writ of certiorari. The First District accepted review on the ground that the circuit court "applied the incorrect law," which it viewed as a "sufficiently egregious or fundamental" legal error, and quashed the circuit court's judgment. Kaklamanos v. Allstate Ins. Co., 796 So.2d 555, 557-58 (Fla. 1st DCA 2001). The First District disagreed with the circuit court and found that the Kaklamanoses "adequately alleged that they sustained damages as a result of Allstate's failing to pay NBD's bill for thirty days," in violation of Florida's PIP statute, § 627.736, Fla. Stat. Id. at 559.

Allstate filed a timely motion for rehearing, as well as a motion for certification, both of which were denied without opinion on October 5, 2001. Allstate's notice to invoke the discretionary jurisdiction of this Court was timely filed on November 1, 2001. In its jurisdictional brief, Allstate argued that the decision by the First District expressly and directly conflicted with this Court's decision in Ivey v. Allstate Ins. Co., 774 So.2d 679, 683 (Fla. 2000), and the Second District Court of Appeal's decision in Caravakis v. Allstate Indemnity Co., 806 So.2d 548 (Fla. 2d DCA 2001).

This Court entered an Order on April 30, 2002, accepting jurisdiction in this matter, consolidating this case with Caravakis, setting a briefing schedule requiring petitioners (Allstate in this case, and Caravakis in Caravakis) to submit merits briefs, and scheduling oral argument.

SUMMARY OF THE ARGUMENT

By granting the petition for writ of certiorari and quashing the circuit court's appellate decision, the First District misapplied a long line of Florida cases – including this Court's decision in Ivey – limiting the scope of certiorari jurisdiction. As this Court reaffirmed in Ivey, a district court should grant certiorari only when the circuit court decision violates "a clearly established principle of law." Absent controlling precedent on the disputed issue, then, district courts lack the authority to issue writs of certiorari.

Here, there was no controlling law on the key substantive issue when the First District granted the petition. No appellate decisions addressed the relevant policy provision, and the First District's opinion failed to cite any Florida cases remotely on point. Further, the analysis the First District adopted was not even suggested by the Kaklamanoses in their petition for writ of certiorari.

Because the First District's decision was not based upon the circuit court's violation of any "clearly established principles of law," it was little more than an effort to express its dissatisfaction with the circuit court decision. This was an improper use of a writ of certiorari, and the decision should be quashed.

In addition, because this Court has discretion to decide any issues presented once it accepts jurisdiction, this Court should exercise its discretion to correct the First District's error on the merits of its ruling. In reversing the circuit court's decision, the First District ignored fundamental principles of standing, as well as the overwhelming number of cases holding that insureds have suffered no actual injury, and therefore have no standing to sue their insurance companies, under substantively identical facts. The First District also misconstrued the Florida law on which it purported to rely for its decision.

Contrary to the First District's suggestion, the Florida no-fault statute's 30-day payment requirement does not alter the requirement that insureds must first suffer an actual injury sufficient to confer standing before they may sue their insurers. Indeed, courts in states with identical statutes have dismissed plaintiffs' claims in these circumstances for that very reason. Also, this Court has rejected the argument that, just because a PIP insurer fails to pay a claim within 30 days, it *must* pay that claim; rather, this Court ruled that insurers may still contest the PIP claim. United Auto. Ins. Co. v. Rodriguez, 808 So.2d 82, 87 (Fla. 2001).

Fundamentally, the First District incorrectly assumed that any time an insurer pays less than the full amount billed, the medical provider will disagree with that decision. The result is

that insureds may sue their insurers even if the provider fully accepts the insurer’s payment as reasonable. Accordingly, the First District’s decision opens the door to a flood of lawsuits against insurers in Florida. The inevitable result will be a potential windfall for insureds at the expense of both insurers and judicial economy.

ARGUMENT

THE FIRST DISTRICT IMPROPERLY EXERCISED CERTIORARI REVIEW, BECAUSE THERE WAS NO CLEARLY ESTABLISHED PRINCIPLE OF LAW ON THE SUBSTANTIVE STANDING ISSUE, AND THE FIRST DISTRICT'S DECISION TO GRANT CERTIORARI RELIEF WAS BASED ON NOTHING MORE THAN ITS DISAGREEMENT WITH THE CIRCUIT COURT'S INTERPRETATION OF THE APPLICABLE LAW ON STANDING.

Less than two years ago, this Court reaffirmed the limited scope of review afforded to district courts reviewing decisions from circuit courts sitting in their appellate capacity. See Ivey v. Allstate Insurance Company, 774 So.2d 679 (Fla. 2000). This Court observed, "[d]istrict courts have never been allowed to review decisions, under the guise of certiorari jurisdiction, simply because they are dissatisfied with the result of a decision of a circuit court sitting in its appellate capacity." Id. at 683. Despite this warning, and decades of Florida cases limiting certiorari jurisdiction, the First District granted a writ of certiorari and quashed the circuit court decision based solely upon its own analysis of legal issues that were neither addressed by the circuit court nor raised by the Kaklamanoses in their petition. This was error.

A. Certiorari Is Proper Only When The Circuit Court Violates A Clearly Established Principle Of Law

In Ivey, this Court held that "[t]he proper inquiry under certiorari review is limited to whether the circuit court afforded procedural due process and whether it applied the correct law." Ivey, 774 So.2d at 682 (citing Haines City

Community Development v. Heggs, 658 So.2d 523, 528 (Fla. 1995)). Certiorari is not proper to correct "simple legal error." Id. (quoting Stilson v. Allstate Insurance Company, 692 So.2d 979, 982 (Fla. 2d DCA 1997)). As this Court observed nearly two decades ago, "[t]he district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error." Combs v. State, 436 So.2d 93, 95 (Fla. 1983).

This Court has repeatedly held that a district court should grant a petition for writ of certiorari only where the circuit court decision resulted in "'violation of a clearly established principle of law resulting in a miscarriage of justice.'" Heggs, 658 So.2d at 529 (quoting Combs, 436 So.2d at 96). Limiting certiorari jurisdiction to such cases prevents improper use of certiorari to obtain a second appeal. See, e.g., Combs, 436 So.2d at 96.

B. In The Absence Of Controlling Precedent, A Circuit Court Appellate Decision Cannot Violate A Clearly Established Principle Of Law

Because a district court's certiorari jurisdiction is limited to correcting violations of clearly established principles of law, certiorari necessarily is limited to those situations in which the applicable law is "clearly established." Accordingly, absent controlling precedent on the disputed issue, district courts lack authority to issue writs of certiorari. See Ivey, 774 So.2d at 682-83 (quoting Stilson v. Allstate

Insurance Company, 692 So.2d 979, 982 (Fla. 2d DCA 1997)).

In Stilson, as in this case, the circuit court affirmed on appeal a county court summary judgment for an insurer in a suit seeking PIP benefits. The issue was whether the insured's injuries from a rock thrown into his car arose out of use of a motor vehicle, as required by § 627.736(1), Fla. Stat. While the Second District found summary judgment improper based on its interpretation of applicable law, the Second District refused to grant certiorari because the lower court decision did not violate a clearly established principle of law:

> In this case, the error occurred because the established law provided no controlling principle and the resulting monetary loss for Ms. Stilson, while unfortunate from her perspective, is not sufficient by itself to be a miscarriage of justice. Both the county court and the circuit court were aware of the general law announced in Novak. Unfortunately, there is no Florida case squarely discussing an object intentionally thrown at a moving car. Without such controlling precedent, we cannot conclude that either court violated a "clearly established principle of law."

Stilson, 692 So.2d at 982. See also Caravakis v. Allstate Indemnity Company, 806 So.2d 548, 549-50 (Fla. 2d DCA 2001) ("when established law provides no controlling precedent, the circuit court cannot be said to have violated a clearly established principle of law"); Sjuts v. State, 754 So.2d 781, 784 (Fla. 2d DCA 2000) (denying petition for writ of certiorari because no Florida cases addressed the issues involved).

C. Because There Was No Controlling Authority On

The Standing Issue In Dispute Here, The District <u>Court Improperly Granted The Writ Of Certiorari</u>

No controlling authority exists on the critical legal issue this case presents. Specifically, the issue here and in the consolidated Caravakis case is whether an insured may sue an insurer for failing to pay a medical bill when the insured has not paid the bill, the medical provider has not pursued the insured for payment, and the insurer has agreed to defend, indemnify and hold harmless the insured in the event the provider engages in collection activity.

As the Second District observed in Caravakis, at the relevant time no Florida appellate cases addressed the Allstate policy provision, much less its application to the facts presented. See Cavarakis, 806 So.2d at 550. Indeed, the First District's opinion fails to cite a single case decided at any time in Florida under similar facts.

Instead, the First District held, without citation to any authority, that "[a]n insured may be damaged by an insurance company's failure to pay a claim even if the insured has not already paid or been sued by a medical provider." Kaklamanos, 796 So.2d at 560-61. The court reasoned - again without authority addressing the relevant policy language – that Allstate's policy was a contract of indemnity against liability, which entitled an insured to sue upon receiving reasonable and necessary medical treatment that resulted in a debt. Of the two

cases the First District cited, only one involved an insurance policy, and neither involved an analogous issue or set of facts. In fact, both cases were decided before 1972, when Florida's no-fault automobile insurance law took effect. See Gaines v. MacArthur, 254 So.2d 8 (Fla. 3d DCA 1971); Reliance Mut. Life Ins. Co. v. Booher, 166 So.2d 222 (Fla. 2d DCA 1964).

Perhaps the best illustration of the inherent problem with the First District's opinion is that it all but ignored the legal arguments the Kaklamanoses raised in the petition itself. Rather than arguing that Allstate's policy was a contract of indemnity against liability and that they sustained damage, notwithstanding the defense and indemnification provision, when Allstate refused to pay the NBD bill, the Kaklamanoses raised two entirely separate arguments. First, they argued that the indemnification provision impeded their access to the courts. *(Pet. Cert. at 8).* Second, they claimed the policy provision was invalid because it was inconsistent with Florida's no-fault insurance law. *(Pet. Cert. at 9-10).* The First District rejected both contentions summarily. See Kaklamanos, 796 So.2d at 561 n.7. Ironically, then, the Kaklamanoses themselves failed to identify or raise the very principle of law the First District implicitly determined was "clearly established."

[2]

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[2] While the First District held that "the circuit court applied the incorrect law," the circuit court decision itself

The contrast with the Second District's decision in Caravakis is striking. While both courts faced the identical legal issue in the identical procedural context, the Second District declined to grant the petition for writ of certiorari because, in the absence of controlling precedent, the petitioner failed to satisfy the threshold requirements for certiorari. Caravakis, 806 So.2d at 549-550. The First District in Kaklamanos, however, granted the petition and used the opportunity to announce a new interpretation of the insurance policy in dispute. In doing so, the First District gave in to the "`great temptation . . . to announce a `miscarriage of justice' simply to provide precedent where precedent is needed.'" Ivey, 774 So.2d at 683 (quoting Stilson, 692 So.2d at 983). Because this was an improper exercise of its discretion to grant petitions for writs of certiorari, the First District decision should be quashed.

THE CIRCUIT COURT CORRECTLY AFFIRMED THE COUNTY COURT RULING THAT THE KAKLAMANOSES LACKED STANDING TO SUE ALLSTATE OVER A DISPUTED MEDICAL BILL WHEN THEY PAID NOTHING FOR THE MEDICAL BILL, HAD NOT BEEN PURSUED IN ANY WAY BY THE MEDICAL PROVIDER FOR THE UNPAID BALANCE, AND WERE FULLY PROTECTED BY THE DEFENSE AND INDEMNIFICATION PROVISION IN THEIR INSURANCE POLICY.

The First District compounded its error in even reaching the merits of the circuit court decision by engaging in a flawed

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was a per curiam affirmance without opinion. *(Pet. Cert. App. at A1)*. See Kaklamanos, 796 So.2d at 557 n.1. While the Fourth District Court of Appeal has held that certiorari is not necessarily foreclosed by the absence of a written circuit court opinion, see Rich v. Fisher, 655 So.2d 1149, 1150 (Fla. 4th DCA 1995), it is difficult to conceive how a district court could determine that a circuit court applied the incorrect law absent such an opinion. Further, the absence of a written opinion necessarily limits the effect of the alleged error, further suggesting that certiorari is inappropriate. See Department of Highway Safety and Motor Vehicles v. Alliston, 27 Fla. L. Weekly D610 (Fla. 2d DCA, March 13, 2002) ("an order that provides a result without written opinion and therefore cannot act as precedent in future cases will generally not merit certiorari review in the district court, even if the district court might disagree with the result").

analysis of the substantive issue. The First District held that the Kaklamanoses may sue for sums Allstate declined to pay (as Allstate had a right to do under the Florida PIP statute) as unreasonable or unnecessary, even though the Kaklamanoses made no out-of-pocket payments and their providers did not pursue them for any unpaid balances. Kaklamanos, 796 So.2d at 560-61. In so ruling, the First District ignored the overwhelming number of cases directly on point holding that insureds suffer no actual injury and have no standing to sue in these circumstances. In addition, the First District misapprehended the Florida law on which it purported to rely for its decision. Accordingly, this Court should also exercise its discretion to correct the First District's substantive error. See, e.g., Savoie v. State, 422 So.2d 308 (Fla. 1982) (once this Court accepts jurisdiction, it may consider any issue raised in the courts below).

A. To Establish Standing, A Party Must Show He Suffered Actual Or Tangibly Threatened Injury

One who does not have standing may not properly invoke the jurisdiction of the court. See, e.g., Fla. Dep't of Agric. & Consumer Servs. v. Miami-Dade County, 790 So.2d 555, 558 n.4 (Fla. 3d DCA 2001) (citing Chiles v. Thornburgh, 865 F.2d 1197, 1209-1211 (11th Cir. 1989)). To establish standing, a party must show he has suffered an actual or tangibly threatened injury. Id. Such an injury "must be distinct and palpable," not

"abstract, conjectural or hypothetical." Peregood v. Cosmides, 663 So.2d 665, 668 (Fla. 5th DCA 1995), review denied, 673 So.2d 29 (Fla. 1996)(citations omitted).

As the county court correctly recognized, the Kaklamonses failed to show they suffered any actual or threatened injury. *(Pet. Cert. App. at A44)*. In response to Allstate's motion for summary judgment, the Kaklamanoses submitted no evidence that they sustained damages. They did not suggest that their medical providers pursued them in any way for the unpaid balance, and, in fact, conceded there was no such collection activity. *(Pet. Cert. at 5; Pet. Cert. App. at A22; Resp. App. at A11, A13).*

Indeed, even if a provider did pursue the Kaklamanoses, they would suffer no injury. Pursuant to the plain language of its policy, Allstate has promised to defend and indemnify the Kaklamanoses as to any claim for insufficient payment their medical care providers assert:

> If the insured person is sued by a medical services provider because we refuse to pay medical expenses which we deem to be unreasonable or unnecessary, we will pay resulting defense costs, and pay any resulting judgment against the insured person[.]

(Resp. App. at A52-A53).

B. Courts Here And Across The Country Have Held That Insureds Lacked Standing In Identical Situations

Courts have repeatedly held that plaintiffs in substantively identical cases lacked standing because they suffered no injury.

The First District's decision actually is a substantial departure from numerous Florida county and circuit court opinions on which insurers have relied for years in processing PIP and medpay claims. See, e.g., Griffith v. State Farm Mut. Automobile Ins. Co., 8 Fla. L. Weekly Supp. 411b (Fla. 6th Cir. Ct. Jan. 31, 2001); Dunn v. State Farm Mut. Automobile Ins. Co., 8 Fla. L. Weekly Supp. 132a (Fla. 6th Cir. Ct. Oct. 27, 2000); Kochinski v. State Farm Fire and Cas. Co., 7 Fla. L. Weekly Supp. 807a (Fla. Hillsborough Cty. Ct. Sept. 20, 2000); McQueen v. Allstate Indemnity Company, 6 Fla. L. Weekly Supp. 85

(Fla. Broward Cty. Ct. Dec. 7, 1998).

[3]

Moreover, the First District's decision puts Florida in a distinct minority of jurisdictions that allow standing in these circumstances. In fact, faced with the identical issue, courts in at least five other jurisdictions have held directly to the contrary.

1. Texas

For instance, the United States District Court for the Western District of Texas dismissed plaintiffs' claims in Gloria v. Allstate County Mutual Insurance Company, No. SA-99-CA-676-PM (W.D. Tex. Sept. 29, 2000), because they failed to allege any injury-in-fact as a result of Allstate's failure to pay their medical bills. *(Appendix 1)*.

[4] The Gloria plaintiffs alleged that they "suffered damages and liability to the extent of their unpaid bills plus interest," and were "subject to legal liability for the unpaid balance of their bills." Gloria, at 17.

The court ruled that plaintiffs failed to allege injury:

> What plaintiffs have pleaded is the possibility that at some time in the future their "property" will be injured by Allstate's determination of reasonable medical expenses. That the harm is not imminent or actual is particularly obvious in light of plaintiffs' allegations that Allstate's allegedly illegal conduct occurred in 1997 and 1998 and, even though the fact that plaintiffs twice amended their complaint, the amended complaint contains essentially the same general

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[3] In Burgess v. Allstate Indem. Co., 27 Fla. L. Weekly D814 (Fla. 2d DCA, April 10, 2002), the Second District Court of Appeal recently adopted - without additional support - the analysis employed by the First District in Kaklamanos on the standing issue. Thus, it is subject to the same flaws inherent in Kaklamanos.

[4] Copies of all unpublished decisions cited in this brief are contained in the accompanying appendix.

> allegations regarding possible injury as the original complaint filed in June 1999. There are no allegations that a health care provider who was not fully reimbursed by Allstate has challenged the determination of what are reasonable expenses, billed plaintiffs for the balance, threatened to sue for the balance, or threatened to resort to a collection agency for payment of the balance.

Gloria, 17-18.

Similarly, in Noah v. Government Employees Ins. Co., No. SA-00-CA-018 (W.D. Tex. Apr. 9, 2001), the court found that the plaintiff lacked standing to sue her insurer for unpaid PIP benefits, because when she filed her lawsuit she had not paid anything to her medical provider, and her fear that the provider might pursue her for unpaid bills in the future was "too speculative an injury to be the basis of an in-fact injury." Noah, 11. *(Appendix 2)*

2. Michigan

In McGill v. State Farm Mutual Auto. Ins. Co., 207 Mich. App. 402, 526 N.W.2d 12, 13 (1994), several insureds sued their insurers, alleging that the insurers wrongfully failed to pay no-fault/medical payments benefits. 526 N.W.2d at 13. The insurers asserted that the charges were unreasonable and argued that plaintiffs lacked standing because they had suffered no injury, and, in fact, would never suffer injury in light of defense and indemnification provisions like the one in this case. Id.

The court held that the insureds had suffered no injury and,

moreover, that no injury could even be threatened in light of the defense and indemnification provisions. Id. at 14. Accordingly, the court affirmed summary judgment for lack of standing. Id.

The First District tried to distinguish McGill based on a Michigan Insurance Department bulletin directing insurers to indemnify insureds in these circumstances. See Kaklamanos, 796 So.2d at 559 n.6. In fact, the bulletin shows exactly why the First District's reasoning in this case was incorrect. Obviously, both the Michigan Insurance Department, which issued the bulletin, and the court in McGill, which enforced it, believe such a provision is in no way inconsistent with the Michigan PIP statute -- a statute substantively similar to the Florida PIP statute -- and that it completely protects the injured from injury, thus obviating any standing to sue. And, of course, Florida policy provisions, including the indemnification provision here, are also approved by the Florida Insurance Department. See § 624.4412, Fla. Stat. So McGill is directly on point.

Relying on McGill, another Michigan court of appeals held that an insured lacked standing to bring suit when an insurer refused to pay in full allegedly unreasonable medical bills. See LaMothe v. Auto Club Ins. Assoc., 214 Mich. App. 577, 543 N.W.2d 42, 43 (1995), app. denied, 455 Mich. 950, 554 N.W.2d 916 (1996). According to the LaMothe court, there could be no injury

because a defense and indemnification provision in the policy, like the one in this case and McGill, "remove[d] the insured from jeopardy." Id.

3. **Massachusetts**

A Massachusetts appellate court also found McGill and LaMothe persuasive, holding that where an insurer "issue[s] a binding statement of indemnification," an insured may not bring suit as an "unpaid party." Ny v. Metro. Property & Casualty Ins. Co., 1998 WL 603138, *2-3 (Mass. App. Ct. Sept. 2, 1998). (*Appendix 3)*. The First District below attempted to distinguish Ny because the physician there accepted the insurer's payment. See Kaklamanos, 796 So.2d at 559 n.6.

But the Ny court stressed not the physician's acceptance of payment, but instead the fact that the insured could not possibly be injured because he could not possibly suffer any damage based on the indemnification promise. In any event, the record here contains no evidence that the Kaklamanoses' providers would not also accept Allstate's position as to what charges were reasonable. Indeed, the only evidence on this point -- i.e., that the providers have engaged in absolutely no collection activity -- is directly to the contrary.

4. **Missouri**

A Missouri court also decided this issue in Allstate's favor. See Kinnard v. Allstate Ins. Co., No. 992-00812 (Mo. Cir. Ct. Nov. 15, 1999). (*Appendix 4).* That court dismissed a

named plaintiff's individual claim because he failed to allege he had to pay any amount for medical bills Allstate declined to pay in full:

> The pleading fails to state facts indicating how Bush's submission of [medical bills] to Allstate, and Allstate's refusal to pay "in full" gave rise to damages of $13.00. Although Bush allegedly incurred expenses, there is no allegation that he was required to pay amounts, contrary to the terms of the Allstate policy. The mere conclusion that Bush had damages of $13.00 does not show how that sum relates in any way to Allstate's alleged actions. The breach of contract claim of plaintiff Bush is therefore dismissed for failure to state a claim.

Kinnard, at 5-6.

5. Maryland

Similarly, in Ostrof v. State Farm Mut. Auto. Ins. Co., 200 F.R.D. 521 (D. Md. 2001), the court ruled that a named plaintiff who sought to represent a class of insureds whose PIP claims were allegedly wrongfully denied was "either not a member of the proposed class or may be subject to a unique defense," because it was "uncontested that he has never had to pay his health care providers the amounts that were denied him," and "[n]o suits for the fees are pending against him nor, apparently, are any such suits imminent." Ostrof, 200 F.R.D. 521.

In sum, all these cases, like the many Florida circuit and county court cases cited above, stand for the very proposition Allstate asserts here. Insureds simply lack standing to sue their insurers for failure to make full payment of allegedly

unreasonable or unnecessary medical expenses where, as here, the insurer has expressly agreed to defend and indemnify the insured in the event of any collection activity.

C. The First District Misapprehended Florida Cases Interpreting The No-Fault Law In Its Decision

While the First District attempted to base its holding, at least in part, on Florida decisions interpreting the PIP statute, those decisions do not support the ruling. For example, the First District improperly relied upon State Farm Mut. Auto. Ins. Co. v. Lee, 678 So.2d 818 (Fla. 1996), for the proposition that "petitioners adequately alleged they sustained damages as a result of Allstate's failing to pay NBD's bill for thirty days." Kaklamanos, 796 So.2d at 559. In Lee, this Court merely held that the statute of limitations for an action based on failure to pay PIP benefits begins to run when the insurer breaches its obligation to pay, which occurred once 30 days had passed "and no benefits were paid on the claim, assuming they were properly due[.]" Lee, 678 So.2d at 821.

Nothing in Lee suggests that insureds are relieved of their burden of showing actual injury before they may sue. Moreover, as this Court recognized in Lee, the limitations period would begin to run only if the unpaid benefits were "properly due." Id. See also AIU Ins. Co. v. Daidone, 760 So.2d 1110, 1112 (Fla. 4th DCA 2000) ("if [PIP] benefits are not due, they cannot be `overdue'"). Here, of course, Allstate disputes that the

medical expenses at issue are due at all, and the Kaklamanoses' providers have not disagreed.

In fact, after Lee, this Court expressly rejected the argument that an insurer *must* pay a claim simply because the insurer failed to pay within 30 days. United Auto. Ins. Co. v. Rodriguez, 808 So.2d 82, 87 (Fla. 2001) (emphasis in original). In so ruling, this Court explained that, while "the plain language of the [PIP statute] provides that an insurer is subject to specific penalties for an 'overdue' payment: ten percent interest and attorney' fees, [*n]othing in the statute provides that once a payment becomes overdue the insurer is forever barred from contesting the claim.*" Id. (emphasis added). So, if a claim is not paid within 30 days, that does not automatically entitle the insured to PIP benefits. To the contrary, the PIP statute expressly provides that insurers are obligated to pay claims only for medical treatment that is reasonable and necessary. See § 627.736(2), Fla. Stat.

For this same reason, the First District's reliance on Fortune Ins. Co. v. Pacheco, 695 So.2d 394(Fla. 3d DCA 1997) is misplaced. The First District cited Pacheco for the proposition that, "[w]hile 'payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment,' § 627.736(4)(b), Fla. Stat. (1997),. . . 'the legislature provided no [other] exceptions to

the thirty-day period, and that courts will not countenance insurers' attempts to create their own means of tolling that period.'" Kaklamanos, 796 So.2d at 559 (quoting Pacheco, 695 So.2d at 395-96). What the First District failed to recognize is that the "exceptions" referred to above are the exceptions to the "overdue" status of a PIP claim under § 627.736(4). The PIP statute includes *no exceptions* to its requirement that medical expenses be reasonable, necessary and related to the covered accident. Clearly, the passage of 30 days does not create an obligation to cover unreasonable or unnecessary bills that the insurer would not otherwise have to pay.

Indeed, like the Florida statute, Texas' and Maryland's PIP statutes require insurers to pay benefits within 30 days of proof. Tex. Ins. Code art. 5.06-3(d) ("[a]ll payments of benefits prescribed under this Act shall be made periodically as the claims therefor arise and within thirty (30) days after satisfactory proof thereof"); Md. Ins. Code § 19-508 (same). Nonetheless, the Texas courts in Gloria and Noah dismissed the plaintiffs' claims because they failed to allege actual injury, and the Maryland court in Ostrof found a named plaintiff was not a member of the class he sought to represent for the same reason.

Moreover, contrary to the First District's conclusion, the Fourth District's ruling in Rader v. Allstate Ins. Co., 789 So.2d 1045 (Fla. 4th DCA 2001), far from being inconsistent with

the above cases, is also fully in accord with Allstate's position. In Rader, Allstate advised the insured that it would no longer pay her medical bills on the grounds that further medical treatment was unnecessary. The court ruled that "[t]he alleged anticipatory breach did not relieve the Plaintiff of the necessity of incurring and alleging damages in order to state a cause of action for breach of contract." Id. at 1047. Here, too, the Kaklamanoses should not be relieved of the fundamental requirement of alleging and showing actual injury to have standing to sue.

Put differently, the First District's decision rests on the Court's incorrect conclusion that Allstate's conduct could be deemed an anticipatory breach of its insurance policy merely because Allstate did not pay a portion of the Kaklamanoses' bills within 30 days. An anticipatory breach of contract may relieve the non-breaching party of its duty to tender performance and give rise to a claim for damages. See Hospital Mortgage Group v. First Prudential Development Corp., 411 So.2d 181, 182 (Fla. 1982). However, under long-established Florida law:

> A prospective breach of the contract occurs when there is an absolute repudiation of by one of the parties prior to the time when his performance is due under the terms of the contract. Such a repudiation may be evidenced by words or voluntary acts but the refusal must be distinct, unequivocal, and absolute.

Mori v. Mitsubishi Electric Corp., 380 So.2d 461, 463 (Fla. 3d DCA), cert. denied, 389 So.2d 1112 (Fla.

1980). See Peachtree Casualty Ins. Co. v. Walden, 759 So.2d 7, 8 (Fla. 5th DCA 2000) ("a definite and unconditional repudiation of the contract by a party thereto communicated to the other, is a breach of the contract, creating an immediate right of action").

The record here does *not* reflect any such unequivocal and absolute refusal by Allstate to perform its obligations. Under the Kaklamanoses' policy, Allstate must pay reasonable expenses for necessary and related medical services within 30 days of submission. Allstate is not required to pay claims, or portions of claims, which are not reasonable, related or necessary. Payment is overdue and an insurer breaches its contractual obligations only if the insurer fails to pay within 30 days without offering a contractually permitted basis for withholding tender.

There is a substantial difference between such a failure, or an insurer's prospective refusal to make further payment, on the one hand, and mere denial of a portion of certain billed amounts as unreasonable, unrelated or unnecessary, on the other. There was no outright failure or unequivocal refusal to pay here. To the contrary, Allstate simply and appropriately exercised its right to decline to pay a portion of the claim that neither the policy nor the PIP statute required Allstate to pay. In this circumstance, Allstate's only other obligation is to defend and indemnify the Kaklamanoses against any claims for insufficient payment that providers might assert.

The policy's defense and indemnification provision is analogous to an agreed-upon, contractual remedy. Where, as here, Allstate declined to pay a portion of a claim as unnecessary, unreasonable or unrelated, the contract expressly provides for an appropriate reasonable and exclusive result –defense and indemnification. It is well-established under Florida law that contracting parties have the power to specify reasonable limits on contractual remedies and that, where they do so, the chosen remedies should be enforced. See Teres Trailer Corp. v. McIlwain, 579 So.2d 237, 243 (Fla. 1st DCA 1991); Greenstein v. Greenbrook, Ltd., 413 So.2d 842, 943 (Fla. 3d DCA 1982); Black v. Frank, 176 So.2d 113, 114 (Fla. 1st DCA 1965); Nelson v. Hansard, 143 Fla. 898, 197 So 513, 513-14 (Fla. 1940).

When Allstate justifiably declined to pay a portion of the claim here, as permitted by the policy, the defense and indemnification provision became applicable. However, no medical provider ever sought to recover the unpaid balance of any medical bill from the Kaklamanoses. As a result, Allstate has never been called upon, nor could it have been, to defend or indemnify the Kaklamanoses. Likewise, Allstate never refused, or stated it would refuse, to defend or indemnify the Kaklamanoses. Consequently, Allstate has not breached its contractual obligations and cannot be deemed to have anticipatorily repudiated its duties under the policy. See

generally Hollander v. K-Site 400 Assoc., 630 So.2d 1153 (Fla. 3d DCA 1993) (a party may not assert an anticipatory breach of contract where the other party did not commit a breach).

Finally, apart from violating the fundamental principle that a party must have injury to have standing to sue, the First District's decision produces illogical results. The decision allows insureds to sue insurers for the unpaid amount even if the provider fully accepts the insurer's payment as reasonable. The practical effect is either a windfall to the insured or encouragement of subsequent needless litigation between the provider and the insured over the proceeds of the suit.

D. The Court Improperly Held That Allstate's Policy Indemnified Against Liability, Not Against Loss

The First District also asserted that Allstate's policy is one indemnifying against liability, as opposed to one indemnifying against loss. The First District opined that a cause of action on a contract indemnifying against liability arises once liability is incurred, while a cause of action indemnifying against loss arises only when the obligation is satisfied. See Kaklamanos, 796 So.2d at 561 (citing Gaines v. MacArthur, 254 So.2d 8, 10 (Fla. 3d DCA 1971)).

There are two fundamental problems with this analysis. First, the district court cited no authority for the proposition that the PIP portion of the policy provided indemnity against liability. This absence of citation is telling. While the

First District quoted the portion of the Gaines opinion explaining the distinction between the types of indemnification, it omitted the discussion immediately thereafter:

> "Whether a contract is one of indemnity against liability or against loss must necessarily depend upon its terms and the intent of the parties. Contracts of indemnity are, however, strictly construed, unless it clearly appears otherwise, the contract will be held to be against loss."

Gaines, 254 So.2d at 10 (quoting Case Comment, 24 Calif. L. Rev. 193 (1936) (emphasis added)).

Accordingly, the presumption in Florida is that a contract of indemnity is one against loss, not against liability. Ironically, in both cases the First District cited, the courts determined that the contracts indemnified against loss, not liability. See Gaines v. MacArthur, 254 So.2d 8 (Fla. 3d DCA 1971); Reliance Mut. Life Ins. Co. v. Booher, 166 So.2d 222 (Fla. 2d DCA 1964).

Read in its entirety, and given the presumption above, the PIP and medical payments portions of Allstate's policy plainly insure against loss, not liability. *(Resp. App. at A33-A38; A52-A53)*. Any fair reading of the defense and indemnification provision leads to that conclusion. (*Resp. App. at A52-A53)*. Indeed, none of the many courts referenced above interpreted Allstate's policy to be one against liability.

Second, even if Allstate's policy was a policy of indemnity, that conclusion begs the question. The insured still must have suffered damages to have standing. The fact that an expense or a debt is incurred, or that liability for payment attaches, does not by itself create actual injury. This is particularly

true here. The Kaklamanoses paid nothing whatsoever for the "debt," and, even if their providers pursued them for the "debt" incurred (which they have not), the defense and indemnification provision would have fully protected them.

E. The Decision Below, If Allowed To Stand, Could Lead To A Proliferation Of Groundless Suits

Because it effectively removes one of the most fundamental requirements for access to courts -- *i.e.*, standing -- the First District's decision also opens the floodgates to litigation against insurers. If insureds without actual injury may sue their insurers, Florida courts at all levels will be inundated with PIP lawsuits against insurance companies, because of the potential for attorneys' fees to the successful litigant. This will inevitably result in more congested dockets and unnecessary delay in other cases brought before the courts (as well as increased insurance premiums for all Florida insureds).

Notably, when it revised the Florida PIP statute, the Florida Legislature found that the statute "is intended to deliver medically necessary and appropriate medical care quickly and without regard to fault, and *without undue litigation or other associated costs*," and that this intent has been frustrated "at significant cost and harm to consumers by, among other things, fraud, medically inappropriate over-utilization of treatments and diagnostic services, inflated charges, and other practices" described in the Second Interim Report of the Fifteenth Statewide Grand Jury entitled "Report on Insurance Fraud Related to Personal Injury Protection." See 2001 Fla. Laws ch. 271, 2001 Fla. SB 1092.

The Legislature specifically found that the practices, including proliferation of groundless lawsuits, described in the Grand Jury Report "are matters of great public interest." Id. Indeed, one of the practices the Grand Jury Report criticized was videofluoroscopy -- the medical treatment at issue in

this case -- which the Grand Jury described as “a test many experts decry as virtually useless as employed in the treatment or diagnosis of auto accident victims.” Grand Jury Report at 7. *(Resp. App. at 19)*.

Yet, the First District’s decision threatens to allow just such a proliferation of groundless lawsuits -- including this one over videofluoroscopy. Only by reversing the First District’s decision can this Court ensure that the intent of the PIP statute is preserved.

CONCLUSION

For all the foregoing reasons, defendant/petitioner, Allstate Insurance Company, respectfully requests this Court to quash the First District Court of Appeal's decision and affirm the circuit court's decision upholding summary judgment in Allstate's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing "Initial Brief of Defendant/Petitioner Allstate Insurance Company" has been furnished to **DAVID LEE SELLERS, ESQUIRE**, 801 North 12th Avenue, Pensacola, Florida 32503, by First Class U.S. Mail this 28th day of May, 2002.

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CERTIFICATE OF COMPLYING WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing "Initial Brief of Defendant/Petitioner Allstate Insurance Company" has been prepared in Courier New 12-point font as required by Fla. R. App. P. 9.210(a)(2).

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