IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-71
L.T. CASE NO. 4D21-2308; COWE20-22728

UNITED AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

LAUDERHILL MEDICAL CENTER, LLC, (a/a/o Robert White),

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

Cole, Scott & Kissane, P.A.
Lakeside Office Center
600 North Pine Island Road, Suite 500
Plantation, FL 33324
Phone: (954) 343-3907
Fax: (954) 474-7979
michael.rosenberg@csklegal.com
gregory.willis@csklegal.com

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

STATEMENT OF THE ISSUES

United Automobile Insurance Company ("United Auto" or "Petitioner") seeks discretionary review of the Fourth District Court of Appeal's November 9, 2022 Opinion affirming the trial court's order granting final summary judgment in favor of the Respondent Lauderhill Medical Center, LLC (a/a/o Robert White) ("Respondent"), finding that a Florida PIP insurer, a private payor, is required to set a price of an unlisted CPT code (97039), even though the statutorily responsible Medicare local administrative contractor did not set a price. *See United Auto. Ins. Co. v. Lauderhill Med. Ctr. LLC,* 350 So. 3d 754 (Fla. 4th DCA 2022) (A. 3 – 8). The result is that the Fourth District's opinion impermissibly changes the function of a Florida PIP insurer from a private payor to a quasi-local public administrator – a Medicare Administrative Contractor, in violation of Florida and Federal law.

In addition to impermissibly expanding the role of a Florida PIP insurer, the Fourth District's opinion directly conflicts with this Court's opinion in *MRI Associates of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.*, 334 So. 3d 577 (Fla. 2021) that permits a Florida PIP insurer to reimburse a reasonable charge not to exceed the schedule of maximum charges. Under *MRI Associates* and its progeny, a Florida PIP insurer must comply with all parts and subparts of Florida's PIP statute.

The Fourth District's decision also directly conflicts with the Second District Court of Appeal's decision in *Allstate Fire and Casualty Insurance Co. v. Perez ex rel. Jeffrey Tedder, M.D., P.A.*, 111 So. 3d 960 (Fla. 2d DCA 2013) which requires a Florida PIP insurer to use a recognized CPT code in lieu of a CPT code that no longer exists but was billed by a medical provider. This is not the circumstance of the action below.

Finally, the Fourth District's decisions directly conflicts with this Court's decision in *GEICO Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147, 153 (Fla. 2013) (internal citations omitted), which holds,

> "The PIP statute is unique, in that it abolished 'a traditional common-law right by limiting the recovery available to car accident victims' and in exchange, required PIP insurance that was recoverable without regard to fault." "Without a doubt, the purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment so that the injured insured may get on with his [or her] life without undue financial interruption.' "

The Fourth District's opinion creates chaos and confusion, antithetical to the mandate of the Florida legislature as it relates to PIP. This Court should exercise its discretion and accept review of the Fourth District's opinion and, ultimately, quash the opinion on review.

STATEMENT OF THE CASE AND FACTS

On November 4, 2020, the Respondent filed a complaint against United Auto, alleging a single cause of action for underpayment of PIP

benefits arising from an automobile accident that occurred on December 1, 2019. (R. 4 – 6). In its answer to the Complaint, United Auto asserted an affirmative defense that it properly paid pursuant to the PIP policy and under section 627.736(5)(a)1., Florida Statutes. (R. 8 – 11). The parties filed cross-motions for summary judgment on the issue of proper payment. (R. 29 – 103). In its motion for summary judgment, the Respondent argued that United Auto underpaid CPT code 97039 by paying under the Workers' Compensation fee schedule, rather under Medicare Part B. (R. 101 – 103). United Auto contended it properly paid Respondent. (R. 29 – 100).

It is undisputed that CPT 97039, although recognized by the Medicare Part B fee schedule, *was not priced by* Medicare. Because Medicare does not reimburse CPT 97039, United Auto looked to the Workers' Compensation fee schedule, which provides an actual reimbursement amount. The trial court granted summary judgment in favor of the medical provider, finding that United Auto "is required to determine a price for the service rendered under 97039, not merely apply the worker's compensation fee schedule to the CPT code billed" and "that for status C codes the carrier is required to determine the relative value for the services rendered." (R. 321 – 323). The Fourth District Court of Appeal affirmed, finding:

> the workers' compensation schedule applies only if the services provided are not reimbursable under Medicare Part B. If a CPT

> code, such as 97039, has no set price but is still reimbursable under the Medicare fee schedule, then the PIP statute would allow a reasonable amount up to 80% of 200% of the allowable amount, instead of the workers' compensation schedule.

(A. 3 – 8). This Opinion conflicts with established precedent for the reasons that follow.

ARGUMENT

I. The Fourth District's Opinion Directly Conflicts with this Court's opinion in *MRI Associates of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.*, and the Second District's Opinion in *Allstate Fire and Casualty Insurance Co. v. Perez ex rel. Jeffrey Tedder, M.D., P.A.* because it requires United Auto to act as a Medicare Administrative Contractor and not in accordance with the PIP statute.

This Court has jurisdiction to review a decision of a district court that expressly and directly conflicts with another district court or the Florida Supreme Court on a question of law. *Fla. R. App. P.* 9.030(a)(2)(A) and Article 5, § 3(b)(3), Fla. Const. The Fourth District's opinion directly conflicts with this Court's opinion in *MRI Associates of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.*, 334 So. 3d 577 (Fla. 2021), *Allstate Fire and Casualty Insurance Co. v. Perez ex rel. Jeffrey Tedder, M.D., P.A.,* and similar cases requiring Florida PIP insurers to abide by the clear and unambiguous dictates of Florida's PIP statute.

This case highlights the fact that Florida appellate trial courts are inconsistently treating Florida PIP insurers either as a quasi-Medicare

Administrative Contractor or as a private payor—in each case to the detriment of the Florida PIP insurer. This inconsistency has led Florida PIP insurers unclear as to how to reimburse any given CPT code submitted by a medical provider.

In this action, the procedure at issue is "vibe therapy" wherein the medical provider chose to assign CPT Code 97039 as the code to seek healthcare reimbursement. But CPT Code 97039 is a status "C" code which "directs local contractors to value the service and assign the reimbursement on a case-by-case basis." (AB. at 12 (citing 70 Fed. Reg. 70160-61).

Congress has determined that *only* a local Medicare Administrative Contractor has the authority to determine allowable amounts and not private payors, such as United Auto. *See, e.g., Oklahoma Procure Management, LLC v. Sebelius*, No. CIV-12-680-L, 2013 WL 1389985 at *1 (W.D. Okla. Apr. 4, 2013) ("It is undisputed that the codes at issue in this case have Status Indicator "C", which means the payment amount is to be established by the regional contractors."). It is further undisputed that services falling under CPT code 97039 have no RVU values and the local MAC, FCSO, had not established a payment amount. See R. 250 ("We are finalizing our proposal and our contractors will value CPT codes 97039 and 97139"). United Auto determined that CPT Code 97039 was not reimbursed by Medicare and

looked to the Workers' compensation fee schedule located in Rule 69L-7.020, Florida Administrative code. Having found a reimbursement amount for 97039, United Automobile reimbursed the Provider.

Notwithstanding that Medicare **recognizes** CPT code 97039, *but does not price* CPT code 97039, (and rather than looking to the Worker's compensation fee schedule as required by Florida's PIP statute), the Fourth District's opinion now requires Florida PIP insurers to determine the most analogous CPT code payment actually reimbursed by Medicare. And further, while both the trial court purport to tell United Auto what to do, both opinions are devoid of how to accomplish this new dictate which ultimately ends up being nothing more than an educated guess. And, in what administrative forum does the provider challenge reasonableness that is established by an insurer? *See, e.g., Oklahoma Procure Management, LLC v. Sebelius*, No. CIV-12-680-L, 2013 WL 1389985 at *1 (W.D. Okla. Apr. 4, 2013).

On the one-hand, the Fourth District's opinion violates federal law (only a local Medicare Administrative Contractor may price a status "C" code) and treats United Auto as a "quasi-Medicare Administrative Contractor"—requiring it to take on the role of Medicare to set a price for the recognized but non-reimbursable CPT code. On the other hand, Florida and federal courts classify Florida PIP insurers as private payors—unable to alter the

integrity of the RVUs that form the basis to determine the reimbursement amount. This dichotomy of treatment is antithetical to the concept of "virtual and swift payment" contemplated by the Florida legislature and the Florida Supreme Court, and is leading and will continue to lead to conflicting court decisions.

This Court is well aware of the statutory framework guiding actions for PIP benefits. *See MRI Associates of Tampa, Inc.*, 334 So. 3d at 579 ("This is the third time in the last decade that we have considered a case in which a medical services provider, as the assignee of an insured's PIP policy benefits, challenged an insurer's use of the PIP statutory schedule of maximum charges."). At issue is *how* United Auto is to reimburse a medical provider in accordance with the schedule of maximum charges. The Fourth District did not follow this Court's clear mandate and the unambiguous provisions of Florida's PIP statute.

In *MRI Associates*, this Court provided clear guidance—a Florida PIP insurer may elect to reimburse 80% of a reasonable charge, not to exceed the schedule of maximum charges. *See MRI Associates*, 334 So. 3d at 583 ("We have never held that the 'reasonable charge method' [§ 627.736(5)(a)] and the "schedule of maximum charges" [§ 627.736(5)(a)1., Fla. Stat.] are mutually exclusive methods for determining the reasonableness of

reimbursements."). As part of this framework, the Florida legislature determined:

> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

§ 627.736(5)(a)1., Fla. Stat. Thus, a Florida PIP insurer must first look to see whether the CPT code at issue is reimbursable "under Medicare Part B" and, if not, look to see whether the CPT code is reimbursable "under workers' compensation." *Id*. If the CPT code is not reimbursable under either fee schedule, then an insurer has no obligation to reimburse the medical provider.

In *Perez*, the Second District determined what was to occur when Medicare no longer recognized payment a CPT code under the Medicare Part B fee schedule. *Perez*, 111 So. 3d at 962, n. 2. In the underlying action, Medicare does recognize CPT 97039—it is simply not priced. In *Tedder*, CPT code 99245 for consultation services *was recognized* for payment under Medicare Part B in 2007 and Allstate was ordered to use that allowable amount. It was unnecessary to go to the next step and order Dr. Tedder to

resubmit his bill using the appropriate 2010 E/M CPT code representing where the visit occurs and that identifying the complexity of the visit performed. Unlike United Auto, Allstate was not ordered supplant the local MAC, FCSO, and establish a payment amount for CPT 99245 based on "local relative values" or "a flat local payment amount". CPT code 99245 was not a status "C" code like 97039 which "directs local contractors to value the service and assign the reimbursement on a case-by-case basis." This Court has jurisdiction to review the issue on appeal because the Fourth District's decision improperly interprets Florida's PIP statute and directly conflicts with *Perez*.

Further, beyond being a recognized, but not reimbursed CPT code, the service itself performed by the medical provider is not reimbursable under Florida's PIP statute. Florida statute strictly forbids a Florida PIP insurer from reimbursing a provider for massage services. §627.736(1)(a)5., Fla. Stat. and § 480.033(11), Fla. Stat. When you focus on the service as required by *Perez*, the vibe therapy in this case is the noncompensable service of massage. Rather than deny reimbursement for a non-compensable code, United Auto went to the next step described in the PIP statute—80% of the maximum reimbursable amount under the workers' compensation schedule.

CONCLUSION

Petitioner, United Automobile Insurance Company, respectfully requests that this Court accept jurisdiction of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **January 23, 2023**, a true and correct copy of the foregoing was filed with the Clerk of the Florida Supreme Court by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to the following parties registered with the e-Filing Portal system to: **John C. Daly, Esq**., Daly & Barber, P.A., 1380 North University Drive, Suite 200, Plantation, FL 33322, pipportallaw@gmail.com; christina@dalylawgroup.com; miguel@dalylawgroup.com, Counsel for the Plaintiff.

COLE, SCOTT & KISSANE, P.A.
Counsel for Petitioner
600 North Pine Island Road
Lakeside Office Center, Suite 500
Plantation, FL 33324
Telephone: (954) 343-3907
Facsimile: (954) 474-7979
E-mail: michael.rosenberg@csklegal.com
E-mail: gregory.willis@csklegal.com

By: */s/ Michael Rosenberg*
MICHAEL A. ROSENBERG
FBN: 95721
GREGORY WILLIS
FBN: 335371

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045 and Fla. R. App. P. 9.210, as amended, I hereby certify that this brief was prepared using Arial 14-point font and complies with the applicable font and word count limit requirements.

/s/ Michael A. Rosenberg
Michael A. Rosenberg, Esq.
Florida Bar Number: 95721