FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-224

PHYSICIANS MEDICAL CENTERS
a/a/o MILDRED FIELDS,

Appellant,

v.

ALLSTATE FIRE & CASUALTY
INSURANCE COMPANY,

Appellee.

On appeal from the County Court for Duval County.
Scott Mitchell, Judge.

April 6, 2022

JAY, J.

Physicians Medical Centers—the plaintiff below—appeals the trial court's Order Entering Final Judgment and Certifying a Question of Great Public Importance. *See* Florida Rule of Appellate Procedure 9.160(d). The question certified reads:

> Does the following provision in Allstate's policy form AU10636-1 create ambiguity as to its election to calculate reimbursements only using the permissive payment methodology pursuant to *Virtual* and *Orthopedic Specialists*:

> **Unreasonable Or Unnecessary Medical Expenses**
>
> If an **injured person** incurs medical expenses which **we** *deem to be unreasonable* or unnecessary, **we** may refuse to pay for those medical expenses and contest them.

(Bold in original, emphasis added.)

We restate the certified question as follows:

> Does Allstate's "**Unreasonable or Unnecessary Medical Expenses**" limitation in its policy negate its clear and unambiguous election to utilize the permissive payment methodology in section 627.736(5)(a)2., Florida Statutes (2009), and create an ambiguity by which Allstate can effectively choose either the permissive methodology or the reasonableness methodology in section 627.736(5)(a)1.?

For the reasons that follow, we answer the certified question in the negative and affirm the final judgment in favor of Allstate.[1]

I. FACTS

The above issue was argued before the trial court in opposing motions for summary judgment. The facts are not disputed. Allstate issued a policy of insurance on February 9, 2009, which provided personal injury protection ("PIP") coverage to the assignor, Mildred Fields. Ms. Fields was involved in a motor vehicle accident on March 24, 2009. She sought medical treatment for her accident-related injuries from Physicians Medical Centers ("Physicians"), her assignee through a valid assignment of benefits. Thereafter, Physicians submitted its medical bills to Allstate in the amount of $1,262.00 for dates of treatment from April 2, 2009, through April 6, 2009. Upon receipt of the bills,

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[1] The version of the PIP statute in this case is the 2009 version, the year the policy in question was executed. *See Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873, 876 (Fla. 2010) (holding the statute in effect when the contract is executed governs).

Allstate issued payment in the amount of $629.74, which was calculated according to the Medicare fee schedule in section 627.736(5)(a)2.f., Florida Statutes (2009). In response, Physicians filed a breach of contract action seeking to recover 80% of its charged amounts, minus the amounts already paid, as allowed in section 627.736(5)(a)1.

The parties filed cross-motions for summary judgment. A certified copy of Allstate's policy was filed with Allstate's motion. An endorsement located in Part III, sub-part A, of the policy—entitled "Personal Injury Protection"—provides that Allstate will make payments as follows:

> In accordance with the Florida Motor Vehicle No-Fault Law, **Allstate** will pay to or on behalf of the **injured person** the following benefits . . .
>
> 1. Medical Expenses
>
> Eighty percent of reasonable expenses for **medically necessary** medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services.

(Emphasis in original.) Sub-Part B goes on to outline the policy's "Limits of Liability." Relevant to the issue at hand, it states in part:

> Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited to, all fee schedules.

Then, appearing in an entirely separate section of the policy, under the title "Unreasonable or Unnecessary Medical Expenses," is the following language:

> If an **injured person** incurs medical expenses which **we** deem to be unreasonable or unnecessary, **we** may refuse to pay for those medical expenses and contest them.

(Emphasis in original.) Allstate refers to this statement as the "UNRUN" provision. The provision continues:

> If the **injured 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. . . . **We** will pay the reasonable expenses incurred at our request.

(Emphasis in original.)

At the hearing on the motions for summary judgment, the parties acknowledged that the PIP coverage in the Allstate policy contained language identical to that found in the policy reviewed by the Florida Supreme Court in *Allstate Insurance Co. v. Orthopedic Specialists*, 212 So. 3d 973, 974–75 (Fla. 2017). But Physicians argued that *Orthopedic Specialists* protected them by requiring the insurer to give notice to the insured and the provider about whether the insurer clearly and unambiguously elected to calculate reimbursement under either the "reasonableness" or the "permissive" methodology. Physicians went on, however, to assert that *Orthopedic Specialists* did not apply because of the UNRUN provision in the Allstate policy. Physicians contended that the provision created an "impermissible hybrid" of the payment methodologies set forth in the referenced statutory provisions; was not addressed in *Orthopedic Specialists*; and created an ambiguous contract.

The trial court initially agreed and granted summary judgment in favor of Physicians. Allstate filed a Motion for Rehearing and Motion for Certification of a Question of Great Public Importance. After holding a subsequent hearing on Allstate's motion, the court reversed its position and ruled in favor of Allstate, noting that the policy of insurance issued by Allstate in *Orthopedic Specialists*, included the UNRUN language. The court reasoned that while the Florida Supreme Court did not

expressly decide whether the UNRUN clause created an ambiguity—because it was reviewing the lower court's decision under a de novo standard of review it could have done so. Therefore, the trial court concluded:

> The fundamental holding by the Florida Supreme Court in *Orthopedic Specialists* was a determination that the Allstate policy properly noticed providers of the fee schedule limitation election. In order for this Court to rule for [Physicians], this Court would have to issue a ruling which directly contravenes the *Orthopedic Specialists* opinion. It would also require this Court to speculate as to the degree to which arguments regarding the "Unreasonable Or Unnecessary Medical Expenses" provision raised in the case at bar were considered by the Florida Supreme Court in *Orthopedic Specialists*, if at all, and if considered, whether the ruling would have been different. This Court is unwilling to engage in such speculation, and believes to do so would be contrary to the rules of *stare decisis* and controlling precedent.

Physicians responded by filing Plaintiff's Motion to Certify a Question of Great Public Importance. Following a hearing on that motion, the trial court entered final summary judgment in favor of Allstate based on its earlier ruling that notwithstanding the UNRUN clause, it did not fail to give Physicians sufficient notice of its intent to use the permissive methodology in section 627.736(5)(a)2., as required by *Orthopedic Specialists*. However, the court judicially noticed several decisions from the Fourth Circuit in which multiple circuit courts—sitting in their appellate capacities—addressed virtually identical language and ruled that the UNRUN provision did create an ambiguity. Moreover, finding the arguments presented by both parties to be "compelling," the court determined that there was "still a bona fide issue about whether the language challenged . . . creates an ambiguity as to Allstate's reimbursement methodology," and acknowledged that the question addressed "a large volume of lawsuits, including various PIP insurance policies in Florida." Consequently, it granted Physicians' motion and certified the question quoted above.

II. ANALYSIS

A. *STARE DECISIS*

Before we consider the certified question, we must address the merits of Appellee's contention that we can simply answer the certified question in the negative because *Orthopedic Specialists* is *stare decisis* on the subject. This is true, according to Allstate, *not* because the supreme court actually considered whether an UNRUN provision in a PIP policy creates an ambiguity in the policy, but because it could have or might have considered it due to the breadth of the de novo standard of review the supreme court employed to review the issue, which authorized it to cast a wide enough net so as to capture and resolve the UNRUN question. We disagree.

Allstate's *stare decisis* argument builds on the requisite standard of review and various rules of construction applicable to construing insurance contracts. First among these is the de novo standard of review. That standard enables a higher court "to make its own determination as to the correct principle of law that should have been applied to a particular set of facts . . . [and] the presumption [of correctness] is . . . overcome by a showing that the trial court applied an erroneous principle of law." Philip J. Padovano, *2 Florida Practice § 19:3 Appellate Practice* (2022 ed.). Because the supreme court in *Orthopedic Specialists* was reviewing an issue of law, it appropriately applied the de novo standard of review:

> "Because the question presented requires this Court to interpret provisions of the Florida Motor Vehicle No–Fault Law—specifically, the PIP statute—as well as to interpret the insurance policy, our standard of review is de novo."

212 So. 3d at 975 (quoting *Virtual Imaging*, 141 So. 3d at 152).

Second, the supreme court considered the rules of construction of the policy. Undergirding Allstate's argument is one such rule, which requires that the insurance contract be examined both in context and as a whole, giving full effect to every provision of the policy. *Id.* at 976.

Finally, Allstate, as the petitioner in *Orthopedic Specialists* relies on its first-hand knowledge that the policy involved also contained an UNRUN provision, and that an amicus brief filed in the case argued that Allstate's fee schedule election was ambiguous because of it. Allstate further points to the fact that the amicus brief was referenced in Justice Pariente's dissent. *Id.* at 981.

In short, according to Allstate, all of these factors, when taken together, lead to the unmistakable conclusion that the supreme court's decision to uphold Allstate's choice of reimbursement in its PIP policy dispositively established that the UNRUN provision did not render the policy ambiguous. Thus, Allstate submits that *Orthopedic Specialists* is *stare decisis* on the issue raised by Physicians in this appeal. We respectfully disagree.

"The legal doctrine of *stare decisis* derives from the Latin maxim '*stare decisis et non quieta movere*,' which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem." *Ramos v. La.*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part). The "essential principles of *stare decisis* may be described as follows: (1) an issue of law must have been heard and decided, 1B *Moore's Federal Practice* ¶ 0.402[2], p. 30; [and] (2) if 'an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed,' *id.* at 37; . . . ." *Equal Emp't Opportunity Comm'n v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986).

Applying these principles to Allstate's *stare decisis* argument convinces us that it lacks merit. First, there is nothing in the supreme court's decision in *Orthopedic Specialists* that even remotely suggests that the UNRUN issue was heard and decided. While it may have been raised in the amicus brief, Justice Pariente in her dissent—where she looked at the other claims made in that brief—did not address it. In this respect, the second principle is relevant: "if an issue is not argued, or though argued *is ignored by the court*, or is reserved, the decision does not constitute a precedent to be followed. . . ." *Trabucco*, 791 F.2d at 4 (emphasis added) (quoting 1B *Moore's Federal Practice* ¶ 0.402[2], p. 37).

Instead, "[t]he principal evidence of what has been decided is a court's written opinion." *Id.* at 2 (citing 1B *Moore's Federal Practice* ¶ 0.402[2], at 33). Based on the latter principle, we are bound by "what was decided" in the supreme court's *written opinion* in *Orthopedic Specialists*.

Therefore, we conclude, as did the trial court, that to accept Allstate's argument would require us to speculate as to the degree to which arguments regarding the UNRUN provision raised in the case at bar were considered by the supreme court, if at all; and if they were considered, whether the supreme court's ruling would have been different. To hold otherwise would disregard the vital underpinnings of *stare decisis*. Rather, *Orthopedic Specialists* is binding precedent for its holding that the language in Allstate's PIP policy in that case "provides legally sufficient notice of Allstate's election to use the permissive Medicare fee schedules identified in section 627.736(5)(a)2. to limit reimbursements," and is not ambiguous. *Orthopedic Specialists*, 212 So. 3d at 977. The decision approved a model for insurers to replicate in their own polices in order to "'g[ive] sufficient notice of [their] election to limit reimbursements by use of the fee schedules.'" *Id.* at 974 (quoting *Allstate Fire & Cas. Ins. v. Stand–Up MRI of Tallahassee, P.A.*, 188 So. 3d 1, 3 (Fla. 1st DCA 2015)). That is all.[2]

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[2] Allstate filed a Notice of Supplemental Authority as to the recent Florida Supreme Court decision in *MRI Associates of Tampa, Inc. v. State Farm Mutual Automobile Insurance Co*., 2021 WL 5832298, 46 Fla. L. Weekly S379 (Fla. Dec. 9, 2021), claiming it is "pertinent" to the issues of "whether [*Virtual Imaging*] and [*Orthopedic Specialists*] require that, when a PIP carrier makes an election to limit reimbursement to the statutory fee schedule, the fee schedule must be elected as the sole method of calculating PIP reimbursements" and "whether the 'Unreasonable Or Unnecessary Medical Expenses' section of [Allstate's] policy is consistent with the policy's election to limit PIP reimbursements to the statutory fee schedules."

MRI Assocs. is not relevant to our analysis in the present case. First, the supreme court was reviewing the 2012 amended version of section 627.736(5) in that case—a version of the statute that [it

B. THE CERTIFIED QUESTION

Having dismissed the notion that it could simply read between the lines and hold that *Orthopedic Specialists* implicitly answered the UNRUN conundrum, the trial court addressed the merits of the case head on, entering summary judgment in Allstate's favor. Nonetheless, taking note that both Physicians and Allstate relied on *Orthopedic Specialists*, and finding the arguments by both parties to be "compelling," the court certified a question of great public importance to this Court, which we, as we have said before, have restated as follows:

> Does Allstate's "**Unreasonable or Unnecessary Medical Expenses**" limitation in its policy negate its clear and unambiguous election to utilize the permissive payment methodology in section 627.736(5)(a)2., Florida Statutes (2009), and create an ambiguity by which Allstate can effectively choose either the permissive methodology or the reasonableness methodology in section 627.736(5)(a)1.?

The operative language in Allstate's policy, set forth in the personal injury protection section, states:

> **UNREASONABLE OR UNNECESSARY MEDICAL BENEFITS**
>
> If an **injured person** incurs medical expenses which **we** deem to be unreasonable or unnecessary, **we** may refuse to pay for those medical expenses and contest them.

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had] not previously interpreted, *id.*, *6—whereas *Virtual Imaging* and *Orthopedic Specialists* "interpreted amendments to the PIP statute that became effective in 2008." *Id.* at *1. Second, the supreme court was clear in stating that its prior decisions were not controlling. Instead, it declared that "[r]ather than being dictated by these precedents, the controversy in this case is readily answered by the statutory text, which contains provisions that were not applicable in those cases . . . ." *Id.* at *5.

(Emphasis in original.)

Physicians contends that the UNRUN language creates an ambiguity because, while Allstate, for all intents and purposes, appeared to elect the permissive methodology and the accompanying fee schedules as limitations in section 627.736(5)(a)2., the reference to reasonableness in the above-quoted section mimics the default reasonableness methodology in section 627.736(5)(a)1., creating a redundancy. As a result, Physicians says the policy is ambiguous as to which methodology was in fact chosen, and appears to permit election of both methods. This construction, argues Physicians, is contrary to the holdings in both *Orthopedic Specialists* and *Geico General Insurance Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013). Reaffirming its earlier decision in *Virtual Imaging*, the supreme court in *Orthopedic Specialists* emphasized the rule that "'in order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result.'" 212 So. 3d at 976 (quoting *Virtual Imaging*, 141 So. 3d at 157).

Our standard of review is de novo, and we are guided in our construction of the policy's terms by the following pronouncements in *Orthopedic Specialists*:

> "Policy language is considered to be ambiguous . . . if the language 'is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.'" *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785 (Fla. 2004) (quoting *Swire Pac. Holdings v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003)). "[A]mbiguous insurance policy exclusions are construed against the drafter and in favor of the insured." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). "To find in favor of the insured on this basis, however, the policy must actually be ambiguous." *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) (emphasis omitted).

212 So. 3d at 976. It continued:

> Moreover, "when analyzing an insurance contract, it is necessary to examine the contract in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire*, 845 So. 2d at 165. This Court has "consistently held that 'in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.'" *Id.* at 166 (quoting *Auto-Owners*, 756 So. 2d at 34).

Id. Upon careful consideration of the foregoing principles as they apply to this case, we do not read the disputed language as being "'susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.'" *Id.* (quoting *Travelers Indem. Co.*, 889 So. 2d at 785).

Allstate makes a convincing argument by proposing a fair and complete reading of the UNRUN provision in its policy to account for the section's second paragraph, which clarifies what the provision is meant to accomplish. The second paragraph states in relevant part:

> If the **injured 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 . . . .

As Allstate maintains, the entire UNRUN provision assures the insured that if Allstate declines payment for unreasonable or unnecessary expenses, the insured is protected if Allstate brings suit to collect those amounts. Placed in context then, the UNRUN provision gives notice to the insured that there might be some instances that unreasonable or unnecessary expenses might be refused, but should that happen, the insured remains protected from those decisions. But, as Allstate stresses, the UNRUN provision does not, under any fair interpretation, offer an alternative methodology for calculating reimbursement amounts;

no calculation is contemplated and there is no reference to any of the section 627.736(5)(a)1. "reasonableness" factors.

Allstate rightly concludes that *Virtual Imaging* and *Orthopedic Specialists* only require that clear and unambiguous notice to the insured and the provider be given when it chooses to apply the permissive fee schedule under subsection (5)(a)2., thereby preventing the insured from being blindsided. Allstate's policy language complied with that mandate. References in the policy to the UNRUN section, when reading the policy as a whole, do not change the statutory algorithm. Consequently, we agree with Allstate that the UNRUN limitation does not create an ambiguity. *Cf. Bartow HMA, Inc. v. Sec. Nat'l Ins. Co.*, 325 So. 3d 46, 51 (Fla. 4th DCA 2021) (concluding that the PIP policy was not ambiguous due to its suggestion that the insurer may elect either the reasonable methodology in section 627.736(5)(a)1. or the permissive methodology in section 627.736(5)(a)2., since "the policy's limits of liability provision clearly elected to limit reimbursements under subsection (5)(a)2.," and "[b]ecause the contract must be read as a whole, the reasonable expenses provision's references to the term 'mandatory' and factors mirroring subsection (5)(a)1. do not negate the insurer's notice of its intent to limit liability pursuant to subsection (5)(a)2., as provided in the policy's limitations provision"). [3]

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[3] In *Bartow HMA,* the medical provider raised the same issue as is addressed in the certified question—that the PIP policy's UNRUN provisions created an ambiguity. 325 So. 3d at 52. In ruling that "this section does not negate the insurer's notice to limit reimbursements pursuant to the fee schedules," *id.*, the Fourth District observed that the UNRUN section was "identical to that in *Orthopedic Specialists*, which was found to provide legally sufficient notice." *Id.* It continued:

> Although the supreme court did not directly address this section in *Orthopedic Specialists*, its de novo review suggests that nothing in the policy rendered the election ambiguous. *See Orthopedic Specialists*, 212 So. 3d at 975; *see also Hanna v. WCI Cmtys.*, Inc., 348 F. Supp. 2d 1322, 1329 (S.D. Fla. 2004) ("Courts have traditionally defined

III.

Accordingly, Allstate's policy is not made ambiguous by the UNRUN provision. We therefore affirm the trial court's final judgment and answer the certified question—as restated—in the negative.

AFFIRMED.

ROWE, C.J., and BILBREY, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

> 'de novo review' to mean 'that the whole process before the district court would start from scratch, as if the proceedings [below] had never occurred.'" (alteration in original) (quoting *United States v. Koenig*, 912 F.2d 1190, 1192 (9th Cir. 1990))).

Id. Obviously, we disagree with that part of the Fourth District's analysis. But the Fourth District added:

> The section is also consistent with the rest of the policy because it provides the insurer will not pay expenses it deems unreasonable. It then defines reasonable charges to include the lesser of the amounts provided in the fee schedule of subsection (5)(a)2. In short, the provision does not create an ambiguity regarding the insurer's intent to limit reimbursements. *Swire Pac. Holdings, Inc.*, 845 So. 2d at 165.

Given this alternative holding, which is substantially consistent with our own analysis, we decline to certify conflict.

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