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IN THE SUPREME COURT OF FLORIDA

CASE NO. **SCOO-111**
DCA CASE **NOS.** 99-01348, 99-01481

UNITED AUTOMOBILE INSURANCE COMPANY

Defendants/Petitioners,

vs.

MARISOL RODRIGUEZ,

Plaintiff/Respondent

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

As reflected in the decision of the District Court below (A1), United Automobile Insurance Company ("United Auto") sought discretionary review from a final summary judgment entered in a Dade County Court action to recover personal injury protection ("PIP") benefits. The County Court had certified the following question, which it determined to be of great public importance:

> IN AN ACTION TO RECOVER MEDICAL BENEFITS IN A LAWSUIT UNDER FLA. STAT. § 627.736 WHERE THE ONLY DEFENSE BY AN INSURER IS THAT THE MEDICAL TREATMENT WAS NOT RELATED, NOT REASONABLE AND/OR NOT NECESSARY, MUST AN INSURER OBTAIN THE REPORT REQUIRED UNDER FLA. STAT. § 627.736(7) CONSTITUTING "REASONABLE PROOF" WITHIN 30 DAYS OF RECEIVING WRITTEN NOTICE OF THE FACT OF A COVERED LOSS AND OF THE AMOUNT OF SAME BEFORE IT CAN DEFEND ON THE BASIS THAT THE MEDICAL BILLS ARE NOT REASONABLE, NOT RELATED AND/OR NOT NECESSARY?

The District Court accepted jurisdiction and, on its own motion, consolidated the case with ***Perez v.*** *State Farm,* on the basis that both cases presented identical questions of law. (A1, 1-2).

The facts, as set forth in the opinion, are as follows:

I. Facts

A. *United Automobile Ins. Co. v. Rodriguez*

> Marisol Rodriguez sustained injuries in an automobile accident and made a PIP claim to her insurer, United Auto, on October 1, 1997. United Auto admitted coverage and waived all defenses except as to the reasonableness, relationship, and medical necessity of the bills incurred.

On October 17, Ms. Rodriguez submitted her claimed medical bills to United Auto. **As** of November 26, United Auto had not received a report indicating that these claimed medical bills were unreasonable, unrelated, or unnecessary.

On December 17, Ms. Rodriguez submitted more medical bills for payment. On January 16, United Auto submitted Ms. Rodriguez's medical bills for review to a doctor who issued a report to United Auto on January 19, 1998, outside the thirty-day statutory time period.

Ms. Rodriguez sued to recover the amount of the unpaid medical bills plus interest. § 627.736(4)(b), ***(c),*** Fla. Stat. (1997). She moved for summary judgment on the grounds that the insurer had only thirty days from the date of receipt of the medical bills to obtain a report constituting "reasonable proof' that the treatments were not reasonable, related, or necessary and that absent same, the insurer could not defend on that basis, thereby entitling her to final summary judgment.

United Auto conceded that it did not obtain reasonable proof within the thirty-day period and did not raise any coverage defense. However, United Auto argued that the failure to obtain the report did not compel payment of the bills, but only subjected it to paying interest and attorney's fees should liability be established. The trial court entered final summary judgment in favor of Ms. Rodriguez for the amount of the medical bills plus accrued interest and certified the question stated herein.

B. *Perez v. State Farm*

On March 24, 1996, Ms. Perez sustained personal injuries as a result of an automobile accident. She sought treatment for her injuries and submitted medical bills to State Farm under the PIP coverage of her automobile insurance policy. State Farm failed to pay the bills; Ms. Perez filed a lawsuit against State Farm for payment of these bills.

Ms. Perez moved for summary judgment on the grounds that the defendant had no reasonable proof to establish that it was not responsible for the payment of her claimed medical bills within the thirty-day statutory period. She argued "that failure to obtain such proof within the statutory period means the insurer must pay the bills, in their entirety, at the expiration of the 30-day period."

The trial court entered summary judgment in Ms. Perez's favor, ruling that it is the "responsibility on the **part** of **an** insurer to pay within **30** days absent reasonable proof within that time that they are not responsible for payment." On appeal, the circuit court appellate division reversed the trial court in a two-to-one decision, although State Farm conceded "that it failed to obtain reasonable proof that it is not responsible within the 30-day period."

(Al, 3-5). In answering the questions presented, the District Court stated:

> The answer to the certified question in United Auto's appeal should be abundantly clear based on this court's unanimous *en banc* decision in ***Fortune*** *Ins. Co. v. Pacheco,* 695 **So.** 2d 394 (Fla. 3d **DCA** 1997). We answer this certified question with a resounding "yes," based on, now twenty-five years of established law and affirm the final summary judgment entered for Ms. Rodriguez. Based on the same reasoning we quash the Appellate Division decision challenged in Ms. Perez's certiorari petition. . . .

(Al, 5-6). In support of its ruling, the Court found that:

> Section 627.736(4)(b), Florida Statutes (1997), provides that PIP insurance benefits "shall be overdue if not paid within **30** days after the insured is furnished with written notice of the fact of a covered loss and of the amount of same." This section also provides that "any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer." The PIP statute clearly requires that the insurer must obtain, within thirty days, a medical report providing "reasonable proof" that it is not responsible for payment. Here, the insurers failed to obtain such a report and, hence, must promptly pay the claim plus accrued interest.
>
> The insurers' contentions that while they failed to obtain a report within the statutory period, they can only be required to pay interest and attorney's fees is not persuasive.
>
> Based on *Pacheco,* the trial court in both cases before us correctly concluded that "reading the PIP statute ***in*** *pari materia,* the insurer must

obtain the required report within **30** days." Having failed to do so, the insurers must pay the claims. The final summary judgment in Ms. Rodriguez's favor is therefore affirmed.

In contrast, the appellate decision in Perez disregarded this court's holding in *Pacheco.* Instead, it followed *Jones* ***v.*** *State Farm Mutual Automobile Insurance Co.,* 694 **So.** 2d 165 (Fla. 5th DCA 1997). ***Jones,*** however, is not dispositive of the issue in this case. *Jones* addressed **a** summary judgment granted despite the existence of genuine issues of material fact regarding whether the insured had reasonably failed to submit to an independent medical examination. In view of this fact, the Fifth District stated that the insurer was not precluded from presenting its defense. This comment, however, was clearly dicta as it was not necessary to the disposition of the case. In any event, the Eleventh Circuit Court is bound to follow the precedent in this District, *see Pardo* ***v.*** *State,* 596 ***So.*** 2d ***665*** (Fla. 1992), and its failure to do so was error; the error resulted in a miscarriage of justice.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction of the instant action to resolve a conflict between the decision of the Third District and other District Courts regarding the effect of a PIP insurer's failure to pay a claim for benefits within **30** days absent "reasonable proof' that the amounts are not owed. Under the decisions of the First and Fourth Districts, such failure subjects an insurer to statutory penalties of interest and attorney's fees, but does not change the burdens of proof or constitute a waiver of available defenses. In the Third District, any failure to pay within **30** days, absent "reasonable proof' consistenting solely of an expert report essentially precludes any defense to payment and requires an automaticjudgment for the claimant. **As** a result, conflict exists which this Court should review.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION **BASED** ON DIRECT **AND** EXPRESS CONFLICT BETWEEN THE THIRD DISTRICT'S DECISION AND OTHER DISTRICT COURT DECISIONS RELATED TO THE INTERPRETATION OF THE THIRTY **(30) DAY** PAYMENTS PROVISIONS OF THE PIP STATUTES

UAIC respectfully submits that acceptance of jurisdiction to review the District Court's decision is necessary and appropriate because it is in conflict with decisions of other district courts of appeal. The Third District Court, extending its earlier *en banc* ruling in *Fortune Ins.* Co. ***v.*** *Pacheco, 695* ***So.*** 2d 394 (Fla. 3d DCA 1997), held that the PIP insurer losses its right to defend a claim for benefits after thirty days have expired without payment. Other District Courts, however, have read the same statutes differently, narrowly interpreted the *Pacheco* decision, and concluded that the failure to pay only subjects an insurer to statutory penalties of interest and attorney's fees. ***See*** *Jones v. State Farm Mutual Automobile Ins. Co.,* 694 So.2d 394 (Fla. 5th DCA 1997); *Fortune Insurance* Co. ***v.*** *Everglades Diagnostic, Inc.,* 721 ***So.*** 2d 384 (Fla. 4th **DCA** 1998); and *Derius* ***v*** *Allstate* ***Indemnity*** *Co.,* 723 So. 2d 271 (Fla. 4th DCA 1998).[1]

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[1] Although it did not directly address *Fortune* or *Derius,* the decision under review announced a rule of law that conflicts with the rule of law set forth in those decisions. In addition, although the Third District's opinion did discuss and factually distinguish *Jones,* it also announced a rule of statutory law that conflicts with the statutory interpretation announced In *Jones.* Under the circumstances, (continued...)

In *Jones,* the accident occurred on April 1, 1995, PIP benefits were sought on April 6, 1995, and paid through June 29, 1995. As a result of injuries, which the insured's orthopedic surgeon related to the accident, the insured underwent knee surgery on September 28, 1995. The surgery bills were submitted on October 13, 1995. The insurer did not pay the bills within thirty days due to its concerns that the surgery might not be related to the accident. Rather, it scheduled the insured for **a** physical examination on November 30, **1995.** The insured then filed suit on November 20, **1995,** seeking **PIP** benefits and did not attend the physical examination. *Jones* alleged that the insured had violated § 627.737, because it failed to make payments on the claim within the thirty-day period provided for in the statute. *Jones,* 694 **So.** 2d at **166.** State Farm's moved for summary judgment asserting that it had been relieved of its obligation to the insured because of the insured's failure to attend that scheduled examination. The trial court granted its motion.

On appeal, the District Court held:

> Although *we cannot credit Jones' contention that State Farm's failure to pay Jones' surgical bills within thirty days relieved him of any further obligation under the policy and requires that judgment be entered in his favor,* we do agree with Jones that the summary judgment in favor of State Farm must be reversed. First of all, it is apparent that State Farm

---

[1](...continued)
conflict jurisdiction exists. See *e.g. Hardee v. State,* 534 So. 2d 706 (Fla. **1988);** *City of Miami v. Fla. Literary Dist. Corp.,* 486 So. 2d **569** (Fla. **1988).**

did not have reasonable proof that it was not responsible for payment of Jones' surgical bills. Despite State Farm's heroic effort on appeal to catalogue any fact or circumstance that might engender a suspicion that the knee surgery was not causally related to the accident, the best that even State Farm can say is that "State Farm had 'reasonable proof to *question* the relationship of Jones' left knee surgery. . . . *"This does not meet the statutory test of "reasonable proof to establish that the insurer is not responsible for the payment. . . . Thus, State Farm is exposed to the statutory penalties attendant to an "overdue" claim. State Farm does not, however, lose its right to contest the claim, For this reason, State Farm's failure to pay the claim in thirty days does not relieve Jones from the obligation to submit to an independent medical examination.*

166 So. 2d at **166** (emphasis).

In **1998,** the Fourth District made a similar conclusion regarding the question of whether the "30 day overdue" provision was applicable to demands for arbitration under Florida Statute **627.736**(5). In *Fortune Ins. Co. v. Everglades Diagnostics, Inc.,* **721 So. 2d 384** (Fla. 4th **DCA** 1998), the County Court relied on the Third District's decision in *Pacheco* to conclude that a carrier lost its right to request arbitration under the PIP statute because the demand was not made within the 30-day period. On certiorari review of the circuit court appellate division's affirmance, without opinion, the Fourth District found that "the [claimants] have simply read too much into the **30** day overdue provision." The Court stated that:

> Section 627.736(4)(b) says that PIP benefits paid under this section" shall be overdue if not paid within **30** days. . . ." 627.736(4)(c) says that "all overdue payments shall bear simple interest at the rate of 10 per cent per year." *As we understand these two provisions, they merely make the PIP insurer liable for interest on such claims if payment is not*

> *made within 30 days from notice. See Martinez v. Fortune Ins, Co.,* 684 So. 2d 201 (Fla. 4th DCA 1996) (statute makes claims for PIP benefits overdue when not paid within 30 days from receipt; failure of insured to pay claim within 30 days subjects insurer to interest on claim). *Hence, appropriately read, the function of the statute is to define when interest begins to accrue on unpaid PIP benefits.*

721 So. 2d at *384. See also, Allstate Ins. Co. v. Gulf Diagnostics, Inc., 724 So.* 2d 713 (Fla. 4th DCA 1999) (certiorari granted to compel arbitration pursuant to *Everglades).* Thus, the Fourth District explained its earlier decision in *Martinez* and made a specific ruling with respect to the purpose and intent of the 30 day provision and the penalty for non-compliance. The Court concluded that subparagraph (4) did not mention the arbitration provisions of subparagraph (5), or vice versa, so it was simply not free to engraft an additional consequence with respect to the 30 day provision onto the statute where none was otherwise stated. The *Everglades* Court distinguished the Third District's decision in *Pacheco,* which it found had no relevance to the arbitration issue, and limited the application of *Pacheco* when it stated:

> *Pacheco* merely holds that the insured could not be required to submit all supporting medical records before the 30 day period for payment began to run.

721 So. 2d at 385, n.2.

The Fourth District in *Derius v. Allstate Indemnity* Co., 723 So. 2d 271 (Fla. 4th DCA 1998), dealt with a withdrawal of benefits for chiropractic treatment. The

insurer paid benefits for three months, but discontinued payments based on a medical examination and report of another chiropractor that additional treatments were neither reasonable nor necessary. The issue submitted the jury was whether any of the chiropractic treatment after June 7, 1994 was necessary and, if so, the total reasonable charges for that care. After a lengthy trial, the jury returned a verdict for Allstate, The county court certified a question, which the district court restated as follows.

> TO RECOVER MEDICAL BENEFITS IN A LAWSUIT UNDER SECTION 627.736, FLORIDA STATUTES (SUPP. 1994), MUST THE PLAINTIFF PROVE BY THE GREATER WEIGHT OF THE EVIDENCE THAT THE EXPENSES SOUGHT ARE BOTH REASONABLE AND FOR NECESSARY MEDICAL SERVICES?

723 So. 2d at 271. The court answered the question in the affirmative and stated:

> *Under this statute, an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service* or *if the service is not necessary.* In a lawsuit seeking benefits under the statute, *both reasonableness and necessity are essential elements of a plaintiff's case.* There is nothing in the PIP statute suggesting a legislative intent to alter the normal dynamics of a lawsuit by placing the burden on the defendant in a PIP case to prove that a proposed charge was unreasonable or that a given service was not necessary.

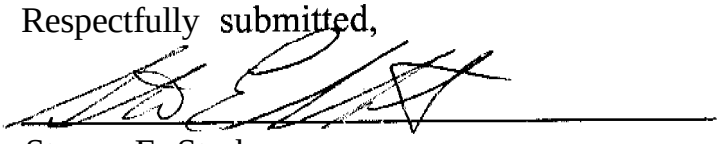
723 So. 2d at 274 (emphasis added). In addition, the court affirmed the denial of *plaintiff's* motion for directed verdict on the basis that: Allstate's reliance on the IME chiropractor's letter to withdraw payment to *Derius'* chiropractor was in compliance with the requirements of Section 627.736(7)(a). *Id.* at 275.

Thus, under *Jones,* the effect of non-compliance with the thirty-day payment requirement is clear -- the failure to pay, unless there is reasonable proof to establish that the insurer is not responsible for the payment, exposes the insurer to the statutory penalties for an overdue claim, but does not preclude the insurer from contesting the claim in the civil action. Under *Fortune,* overdue payments are also only subject to statutory interest and fees and the thirty day provision is not engrafted onto other statutory requirements. Under *Derius*, the requirement of an expert report does not change the burdens of proof at trial. The decision on review rejects those rules and extends its *Pacheco* decision in a manner that not only alters the traditional burdens of proof, but engrafts the thirty day provisions of the statute in a manner that other courts have simply refused to follow.

CONCLUSION

UAIC respectfully submits that acceptance of jurisdiction herein is appropriate to resolve conflicting interpretations related to the provision or denial of PIP coverage benefits that affects many citizens of the State of Florida and the insurance industry state-wide. Acceptance of jurisdiction over the instant action in order to obtain uniformity of decision on this important issue, is appropriate.

Respectfully submitted,



Steven E. Stark
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail this Amadoday of January, 2000 to: Alvarez, Esq., Law Offices of Alvarez & Alvarez-Zane, Sunset International Center, 7000 S.W. 97th Avenue, Suite 209, Miami, FL 33 173; Armando A. Brana, Esq., 3971 SW 8th Street, Suite 30 1, Coral Gables, FL 33 134-2937; Shelley Senecal, Esq., Hightower & Rudd, P.A., 100 North Biscayne Boulevard, 2300 New World Tower, Miami, FL 33 132; James K. Clark, Esq., James K. Clark & Associates, 1 SE Third Avenue, Suite 1800, Miami, FL 33131; and John H. Ruiz, Esq., 198 NW 37th Avenue, Miami, FL 33125.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-111
DCA CASE NOS. 99-01348, 99-01481

UNITED AUTOMOBILE INSURANCE COMPANY

Defendants/Petitioners,

vs.

MARISOL RODRIGUEZ,

Plaintiff/Respondent

ON NOTICE TO INVOKE DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

APPENDIX TO PETITIONERS' BRIEF ON JURISDICTION

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1999

JUANA MARIA PEREZ,

Petitioner,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

CASE NO. 99-1481

LOWER TRIBUNAL NO. 97-383

UNITED AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs.

MARISOL RODRIGUEZ,

Appellee.

CASE NO. 99-1348

LOWER TRIBUNAL NO. 98-410

Opinion filed October 13, 1999,

A Writ of Certiorari to the Circuit Court for Dade County, Margarita Esquiroz, Steve Levine, and Sandy Karlan, Judges.

An appeal from the County Court for Dade County, Marilyn Milian, Judge.

John H. Ruiz and Brana Alvarez for petitioner and appellee.

James K. Clark for respondent.

Fowler, White, Burnett, Hurley, Banick & Strickroot and Steven E. Stark, for appellant.

Robbins & Reynolds; Arthur Joel Berger for Marisol Rodriguez as **amicus** curiae.

Diane H. Tutt -for Fortune Insurance Company as amicus curiae.

Before JORGENSON, GREEN and SHEVIN, JJ.

SHEVIN, Judge.

United Automobile Insurance Company ["United Auto"] invokes this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(4)(a), to appeal a final summary judgment in an action to recover personal injury protection ["PIP"] benefits. In that judgment the Dade County Court certified the following question of great public importance:

> IN AN ACTION TO RECOVER MEDICAL BENEFITS IN A LAWSUIT UNDER FLA. STAT. §627.736 WHERE THE ONLY DEFENSE BY AN INSURER IS THAT THE MEDICAL TREATMENT WAS NOT RELATED, NOT REASONABLE AND/OR NOT NECESSARY, MUST AN INSURER OBTAIN THE REPORT REQUIRED UNDER FLA. STAT. §627.736(7) CONSTITUTING "REASONABLE PROOF" WITHIN 30 DAYS OF RECEIVING WRITTEN NOTICE OF THE FACT OF A COVERED LOSS AND OF THE AMOUNT OF SAME BEFORE IT CAN DEFEND ON THE BASIS THAT THE MEDICAL BILLS ARE NOT REASONABLE, NOT RELATED AND/OR NOT NECESSARY?

We accept jurisdiction and affirm the judgment.

Juana Maria Perez seeks certiorari review of a Circuit Court Appellate Division decision reversing a final summary judgment.

Perez filed an action to recover PIP benefits from her insurer, State Farm Fire and Casualty Company ["State Farm"]. In granting Perez a summary judgment, the county court ruled that State Farm was precluded from raising defenses to Perez's claims because it did not have reasonable proof that the claims were not reasonable, necessary or related within thirty days of receiving written notice of the claim.

Because both cases present the identical question of law for review, we have consolidated the cases on our own motion.

I. Facts

A. United Automobile Ins. Co. v. Rodrisuez

Marisol Rodriguez sustained injuries in an automobile accident and made a PIP claim to her insurer, United Auto, on October 1, 1997. United Auto admitted coverage and waived all defenses except as to the reasonableness, relationship, and medical necessity of the bills incurred.

On October 17, Ms. Rodriguez submitted her claimed medical bills to United Auto. As of November 26, United Auto had not received a report indicating that these claimed medical bills were unreasonable, unrelated, or unnecessary.

On December 17, Ms. Rodriguez submitted more medical bills for payment. On January 16, United Auto submitted Ms. Rodriguez's medical bills for review to a doctor who issued a

report to United Auto on January 19, 1998, outside the thirty-day statutory time period.

Ms. Rodriguez sued to recover the amount of the unpaid medical bills plus interest. § 627.736(4)(b), (c), Fla. Stat. (1997). She moved for summary judgment on the grounds that the insurer had only thirty days from the date of receipt of the medical bills to obtain a report constituting "reasonable proof" that the treatments were not reasonable, related, or necessary and that absent same, the insurer could not defend on that basis, thereby entitling her to final summary judgment.

United Auto conceded that it did not obtain reasonable proof within the thirty-day period and did not raise any coverage defense. However, United Auto argued that the failure to obtain the report did not compel payment of the bills, but only subjected it to paying interest and attorney's fees should liability be established. The trial court entered final summary judgment in favor of Ms. Rodriguez for the amount of the medical bills plus accrued interest and certified the question stated herein.

B. Perez v. State Farm

On March 24, 1996, Ms. Perez sustained personal injuries as a result of an automobile accident. She sought treatment for her injuries and submitted medical bills to State Farm under the PIP coverage of her automobile insurance policy. State Farm failed

to pay the bills; Ms. Perez filed a lawsuit against State Farm for payment of these bills.

Ms. Perez moved for summary judgment on the grounds that the defendant had no reasonable proof to establish that it was not responsible for the payment of her claimed medical bills within the thirty-day statutory period. She argued "that failure to obtain such proof within the statutory period means the insurer" must pay the bills, in their entirety, at the expiration of the 30-day period."

The trial court entered summary judgment in Ms. Perez's favor, ruling that it is the "responsibility on the part of an insurer to pay within 30 days absent reasonable proof within that time that they are not responsible for payment." On appeal, the circuit court appellate division reversed the trial court in a two-to-one decision although State Farm conceded "that it failed to obtain reasonable proof that it is not responsible within the 30-day period."

II. ANALYSIS

The answer to the certified question in United Auto's appeal should be abundantly clear based on this court's unanimous en *banc* decision in Fortune Ins. Co. v. Pacheco, 695 So. 2d 394 (Fla. 3d DCA 1997). We answer this certified question with a' resounding "yes," based on, now twenty-five years of established law and affirm the final summary judgment entered for Ms.

Rodriguez. Based on the same reasoning we quash the Appellate Division decision challenged in Ms. Perez's certiorari petition, Ms. Perez's petition demonstrates that the Appellate Division decision is a "violation of a clearly established principle of law resulting in a miscarriage of justice," Haines City Community Dev. v. Heggs, 658 So. 2d 523, 528 (Fla. 1995), we grant certiorari and quash the Appellate Division decision.

Section 627.736(4)(b), Florida Statutes (1997), provides that PIP insurance benefits "shall be overdue if not paid within 30 days after the insured is furnished with written notice of the fact of a covered loss and of the amount of same." This section also provides that "any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer." The PIP statute clearly reauires that the insurer must obtain, within thirty days, a medical report providing "reasonable proof" that it is not responsible for payment. Here, the insurers failed to obtain such a report and, hence, must promptly pay the claim plus accrued interest.

The insurers' contentions that while they failed to obtain a report within the statutory period, they can only be required to pay interest and attorney's fees is not persuasive. Since 1974, Florida courts have uniformly held that

> the statutory language is clear and unambiguous. The insurance company has thirty days in which to verify the claim after receipt of an application for benefits. There is no provision in the statute to toll this time limitation., The burden is clearly upon the insurer to authenticate the claim within the statutorv time period. To rule otherwise would render the recently enacted "no fault" insurance statute a "no-pay" plan - a result we are sure was not intended by the legislature.

Pacheco, 695 So. 2d at 395 (emphasis added) (quoting Dunmore v. Interstate Fire Ins. Co., 301 So. 2d 502, 502 (Fla. 1st DCA 1974)).

In Pacheco, Fortune Insurance sought to require that the claimant furnish all medical records before the thirty-day period would begin to run. See Pacheco, 659 So. 2d at 396. However, this court held that this interpretation would totally obliterate the thirty-day statutory provision. Pacheco goes on to advise that "once an insurer receives notice of a loss and medical expenses, it must pay within thirty days unless, pursuant to Section 627.736(4)(b), it has obtained reasonable proof to believe that it is not responsible for the payment," Pacheco, 695 So. 2d at 395 (emphasis added).

Based on Pacheco, the trial court in both cases before us[1] correctly concluded that "reading the PIP statute in pari

[1] We commend the trial judge, Judge Milian, and Circuit Court Judge Esquiroz, who dissented in the Appellate Division opinion in Perez v. State Farm, No. 97-383 at 7 (Dade Cir. Ct. May 7, 1999), for urging that the court adhere to our precedent in Pacheco.

materia, the insurer must obtain the required report within 30 days." Having failed to do so, the insurers must pay the claims. The final summary judgment in Ms. Rodriguez's favor is therefore affirmed.

In contrast, the appellate decision in Perez disregarded this court's holding in Pacheco. Instead, it followed Jones v. State Farm Mutual Automobile Insurance Co., 694 So. 2d 165 (Fla. 5th DCA 1997). Jones, however, is not dispositive of the issue in this case, Jones addressed a summary judgment granted despite the existence of genuine issues of material fact regarding whether the insured had reasonably failed to submit to an independent medical examination. In view of this fact, the Fifth District stated that the insurer was not precluded from presenting its defense. This comment, however, was clearly dicta as it was not necessary to the disposition of the case. In any event, the Eleventh Circuit Court is bound to follow the precedent in this District, see Pardo v. State, 596 So. 2d 665 (Fla. 1992), and its failure to do so was error; the error resulted in a miscarriage of justice.

III. Conclusion

In summary, we answer the certified question in the affirmative and affirm the final judgment in United Automobile Insurance Co. v. Rodriquez, No. 99-1348. We also grant

certiorari and quash the appellate division decision in Perez v. State Farm Fire & Casualty Co., No. 99-1481.

Certified question answered; judgment affirmed; certiorari granted, and opinion quashed.

Appendix Part 2

Rose Marie DERIUS, Appellant,

v.

ALLSTATE INDEMNITY COMPANY, Appellee.

No. 97–0126.

District Court of Appeal of Florida, Fourth District.

June 10, 1998.

Rehearing Denied July 10, 1998.

Insured brought action against automobile insurer to recover personal injury protection (PIP) benefits for chiropractic treatments. The Fifteenth Judicial Circuit Court, Palm Beach County, Paul 0. Moyle, J., entered judgment on jury verdict in favor of insurer. Insured appealed. The District Court of Appeal, Gross, J., held that: (1) reasonableness and necessity are essential elements of an insured's case to recover PIP benefits equal to eighty percent of all reasonable expenses for necessary medical services, and (2) trial court was not required to define "necessary."

Affirmed.

1. Insurance ⇐2831(1)

Reasonableness and necessity are essential elements of an insured's case to recover personal injury protection (PIP) benefits equal to eighty percent of all reasonable expenses for necessary medical services; automobile insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary. F.S.1994 Supp., § 627.736(1)(a).

2. Insurance ⇐2853

Nothing in the statute requiring personal injury protection (PIP) benefits equal to eighty percent of all reasonable expenses for necessary medical services suggests a legislative intent to alter the normal dynamics of a lawsuit by placing the burden on the insurer to prove that a proposed charge was unreasonable or that a given service was not necessary. F.S.1994 Supp., § 627.736(1)(a).

3. Account Stated ⇐19(1)

If a health-care provider sues on an account stated and establishes the necessary elements, the burden shifts to the debtor to show that the account is incorrect due to fraud, mistake, or error.

4. Insurance ⇐3579

Trial court was not required to define the term "necessary" in instructing jury on claim for personal injury protection (PIP) benefits equal to eighty percent of all reasonable expenses for necessary medical services. F.S.1994 Supp., § 627.736(1)(a).

5. Insurance ⇐2856

Whether a given medical service is "necessary" is a question of fact for the jury on a claim for personal injury protection (PIP) benefits equal to eighty percent of all reasonable expenses for necessary medical services. F.S.1994 Supp., § 627.736(1)(a).

K. Jack Breiden of Breiden & Associates, Naples, for appellant.

Rosemary Wilder, and Richard A. Sherman of Law Offices of Richard A. Sherman, P.A., Fort Lauderdale and Gary Dickstein of Dickstein, Richardson & Reynolds, P.A., West Palm Beach, for appellee.

GROSS, Judge.

The county court has certified two questions to this court pursuant to Florida Rule of Appellate Procedure 9.160(d), which we rephrase as follows:

> TO RECOVER MEDICAL BENEFITS IN A LAWSUIT UNDER SECTION 627.7'36, FLORIDA STATUTES (SUPP. 1994), MUST THE PLAINTIFF PROVE BY THE GREATER WEIGHT OF THE EVIDENCE THAT THE EXPENSES SOUGHT ARE BOTH REASONABLE AND FOR NECESSARY MEDICAL SERVICES?
>
> IN AN ACTION FOR PIP BENEFITS, WHERE A TRIAL COURT CHARGES THE JURY USING THE LANGUAGE OF SECTION 627.736(1)(a), MUST THE COURT FURTHER DEFINE THE

TERM "NECESSARY" AS USED IN THE STATUTE?

We have accepted jurisdiction pursuant to Rules 9.030(b)(4)(A) and 9.160(d). We answer the first question in the affirmative and the second in the negative.

Appellant, Rose Marie Derius, was a passenger in a car driven by her husband, which was rear-ended on February 5, 1994. That day, she was treated at a hospital emergency room and released. Her chiropractor diagnosed a soft tissue injury in her neck and began treating her on March 2, 1994.

Allstate, Derius' insurer under the Florida Motor Vehicle No-Fault Law,[1] initially paid for the chiropractic treatments. After three months, Allstate hired another chiropractor to perform a physical examination on Derius. After the examination, the doctor reported his conclusions to Allstate as follows:

> [B]ased on my examination today, I am unable to establish the presence of any significant clinical entity which would require continued chiropractic care. In addition, subjectively the patient states that she has not improved despite three months of 3-times per week chiropractic care. Due to the lack of any clinical support for her subjective complaints, as well as the existence of the functional overlay and the reported lack of subjective progress, I am not recommending your consideration of any additional chiropractic care.

As a result of this recommendation, Allstate notified Derius that it would not pay for any chiropractic treatment after June 7, 1994. Derius continued to treat with her chiropractor until September, 1994.

Derius filed suit under the no-fault statute in the county court seeking, inter alia, to recover for her chiropractic treatments under section 627.736(1)(a), Florida Statutes (Supp.1994). Another issue developed at trial was whether Allstate should have paid $75 for an interim examination, instead of $68. In its instructions, the trial court framed the issues for the jury:

> The issues for your determination on the claims of the Plaintiff, Rose Marie Derius, against Defendant, Allstate Indemnity Company, are whether any of the chiropractic treatment after June 7, 1994 was necessary and, if so, the total reasonable charges for said chiropractic care.
>
> One additional issue for your determination is what is the total reasonable charge for the interim examination of May 11, 1994.
>
> If the greater weight of the evidence does not support the claim of Plaintiff, Rose Marie Derius, then your verdict should be for Defendant, Allstate Indemnity Company.
>
> However, if the greater weight of the evidence does support the claim of Plaintiff, Rose Marie Derius, then your verdict should be for Plaintiff, Rose Marie Derius, and against Defendant, Allstate Indemnity Company, for the total amount of those reasonable and necessary chiropractic expenses incurred after June 7, 1994 and for the interim examination dated May 11, 1994.

After a lengthy trial, the jury returned a verdict for Allstate on both issues.

[1] Section 627.736(1), Florida Statutes (Supp.1994), requires an insurer to provide personal injury protection (PIP) benefits for "loss sustained . as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle." Personal injury protection benefits include "[e]ighty percent of all reasonable expenses for necessary medical . services." § 627.736(1)(a), Fla. Stat. (Supp. 1994).

[2] Under this statute, an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary. In a lawsuit seeking benefits under the statute, both reasonableness and necessity are essential elements of a plaintiffs case. There is nothing in the PIP statute suggesting a legislative intent to alter the normal dynamics of a lawsuit by placing the burden on the defendant in a PIP case to prove that a proposed charge was unreasonable or that a given service was not necessary.

1. §§ 627.730-627.7405, Florida Statutes (1993).

Derius points to the language of section 627.736(7)(a), which provides that

> [a]n insurer may not withdraw payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the insurer first obtains a report by a physician licensed under the same chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that treatment was not reasonable, related, or necessary.

This language is part of the independent medical examination requirement of section 627.736(7) which is "intended to give insurers an opportunity to determine the legitimacy of a claim so that an appropriate decision can be made as to whether benefits should be paid." *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593, 596 (Fla. 3d DCA 1997). The quoted language from section 627.736(7)(a) sets up a procedural requirement that an insurer cannot withdraw payment of a treating physician unless the decision is supported by an expert that the treatment does not comply with the statutory criteria. If the insurer were to act without complying with such a procedural requirement, *any* termination of payment would be ineffective. In this procedural hurdle, we do not discern a legislative intent to alter the burden of proof in a lawsuit for PIP benefits.

The cases cited by Derius are distinguishable. *Mutual Life Ins. Co. of New York v. Ewing*, 151 Fla. 661, 10 So.2d 316 (1942), involved an indemnity policy of insurance for total and permanent disability. The insurer recognized the existence of the insured's permanent and total disability and made disability payments from 1931 until October, 1940, when it discontinued payments and demanded that the insured resume paying-premiums. The issue at trial was whether the insured continued to be permanently and totally disabled in October, 1940. In such a case, the supreme court stated the rule allocating the burden of proof:

> Where , . it is established, as in this case, that a permanent and total disability existed within the purview of the policy and the insurer seeks relief from continuation of payment of indemnities theretofore paid under and within the purview of the policy[,] the burden is on the insurer to establish by the preponderance of the evidence that the condition of the insured is such that he no longer comes within the purview of the policy in this regard.

Id. at 318; see also *Aetna Life Ins. Co., Inc. v. Fruchter*, 283 So.2d 36, 37 (Fla.1973).

Unlike *Ewing*, this case does not involve a total and permanent disability policy. Nothing in the Florida Motor Vehicle No-Fault Law suggests a legislative intent that the rule in *Ewing* applies in PIP lawsuits to the issue of the termination of payments to a treating physician. *Ewing* did not involve an insurance policy that was required to comply with detailed statutory parameters.

[3] Similarly, *Public Health Trust of Dade County* v. *Holmes*, 646 So.2d 266 (Fla. 3d DCA 1994), did not deal with a PIP scenario; rather, the plaintiff hospital sued a patient on a written guaranty of payment to recover for services rendered in a critical care unit. That case's characterization of "medical necessity" as an affirmative defense, even if correct,2 is not controlling here,

2. One ground upon which the patient in *Health Trust of Dude County v. Holmes. 646* So.2d 266 (Fla. 3d DCA 1994), defended was that the services rendered were not medically necessary. The trial court placed the burden of proof on the hospital to prove the medical necessity of the services rendered and granted a directed verdict when the hospital failed to produce sufficient evidence on that issue. The hospital argued that the written guaranty relieved it of the responsibility LO prove medical necessity. The third district reversed, holding that the issue of medical necessity was an affirmative defense and that the burden of proof was therefore on the defendant patient. 646 So.2d at 267. The opinion does not quote the language of the guaranty, so we cannot gauge how the wording of the guaranty controlled the result. We question whether "medical necessity" is properly characterized as an affirmative defense in all cases where a provider sues a patient over a medical bill. In an action based on express or implied contract for medical services, the performance of only medically necessary services would seem LO be at least an implied condition where not expressly addressed. On the other hand, if a provider sues on an account stated and establishes the necessary elements of the cause of action, the burden shifts co the defendant to show that the account is incorrect due to fraud, mistake or

where the elements of a plaintiffs case are set forth in a statute. Finally, *Exhibitor,* Inc. *v.* Nationwide Mut. *Fire Ins. Co., 494* So.2d 288, 289 (Fla. 1st DCA 1986) is inapplicable, since this is not a case where the insurer is trying to show that a loss was due to a cause that was excepted under the policy. *See also State Farm, Mut. Auto. Ins. Co. v. Pridgen,* 498 So.2d 1245, 1248 (Fla.1986).

We conclude that the trial court correctly charged the jury on the plaintiffs burden of proof.

[4] As to the second certified question, we find no error in the trial court's charge to the jury. The instruction correctly stated the law applicable to the facts in evidence. *See Lynch v. McGovern, 270* So.2d 770, 771 (Fla. 4th DCA 1972); *Rivero v. Mansfield,* 584 So.2d 1012, 1014 (Fla. 3d DCA 1991), *quashed in part, approved in part, 620* So.2d 987 (Fla.1993). The decision regarding Derius' proposed instructions on the issue of necessity was within the discretion of the trial court, which should not be disturbed on appeal absent prejudicial error resulting in a "miscarriage of justice," a state of affairs that did not occur in this case. See *Gold-Schmidt v. Holman,* 571 So.2d 422, 425 (Fla. 1990).

Derius is correct that the PIP statute does not define "necessary medical . . . services." That very language has been a part of the statute since it was enacted in 1971. Ch. 71–252, § 7, at 1359, Laws of Fla. In *Palma v. State Farm, Fire & Cas. Co., 489* So.2d 147, 148-49 (Fla. 4th DCA 1986), we observed that in determining what constitutes a "necessary medical service," the statute is construed "liberally in favor of the insured." We reasoned that

> [t]he broad scope of medical services covered by the No-Fault Act is highlighted by the inclusion of benefits for remedial treatment and services for an injured person who relies upon spiritual means through prayer alone for healing in accordance with his religious beliefs.

Id at *149; see also Hunter v. Allstate Ins.* Co., 498 So.2d 514, 515-16 (Fla. 5th DCA 1986).

[5] Whether a given medical service is "necessary" under section 627.736(1)(a) is a question of fact for the jury. *Donovan v. State Farm Mut. Auto. Ins. Co., 560* So.2d 330, 331 (Fla. 4th DCA 1990), held that a plaintiff could establish both the reasonableness of charges and the necessity of a medical service without expert testimony. Other cases have noted that the "necessity" of a medical service may also be proven through expert testimony. *See Farmer v. Protective* Cas. Ins. Co., 530 So.2d 356 (Fla. 2d DCA 1988); *Banyas v. American Mut. Fire Ins.* Co., 359 So.2d 506, 507 (Fla. 1st DCA 1978). The current state of the law is that the issue of necessity in a PIP case is decided by factfinders on a case by. case basis, depending on the specific evidence introduced at trial and the arguments of counsel. The absence of a specific statutory definition accords each judge or jury broad discretion in arriving at a decision.

We do not think it is proper to require further definition of a term that the legislature has left as is for 27 years, The legislature is capable of defining "medically necessary" or "palliative care" where it chooses to do so. See §§ 440.13(1)(m) and (o), Fla. Stat. (Supp.1994). By opting not to define the phrase "necessary medical . . . services" with precision, the legislature has created a litigation model that vests great discretion in the factfinder, with the potential that different judges and juries will arrive at different results on almost identical facts. If a court were to require in every case a specific definition of a phrase that the legislature has left open, it would be rewriting each of those statutes and altering the dynamics of trial, without any indication that such a result was one that the legislature intended.

The situation presented in this case is analogous to that arising under another portion of the No-Fault Law, section 627.737(2)(b), Florida Statutes (1993), which uses the phrase "[p]ermanent injury within a reasonable degree of medical probability" without defining it. The standard jury instructions do not attempt to define the terms. In its note explaining the absence of a jury

error. See Robert C. Malt & Co. v. Kelly Tractor Co., 5 18 So.2d 991, 992 (Fla. 4th DCA 1988).

instruction on permanency, the Supreme Court Committee on Standard Jury Instructions in Civil Cases observed:

> Section 627.737(2), Florida Statutes (1991), does not define "permanent injury within a reasonable degree of medical probability" that is established by expert testimony. *Morey v. **Harper,*** 541 So.2d 1285 (Fla. 1st DCA), *review* denied, 551 So.2d 461 (Fla. 1989); ***Fay*** v. *Mincey,* 454 So.2d 587 (Fla. 2d DCA 1984); *Horowitz v. **American Mo**torist* Ins. Co., 343 So.2d 1305 (Fla. 2d DCA 1977); ***see Bohannon v. Thomas, 592*** So.2d 1246 (Fla. 4th DCA 1992). Therefore, the instructions do not attempt to define the terms, and leave their explanation to the testimony of the experts and argument of counsel. See *Rivero* v. Mansfield, 584 So.2d 1012 (Fla. 3d DCA 1991), ***quashed in part,*** approved *in part, 620* So.2d 987 (Fla.1993); ***see contra** Philon **v. Reid,*** 602 So.2d 648 (Fla. 2d DCA 1992), *review granted,* 614 So.2d 503 (Fla.), case ***dismissed*** 620 So.2d 762 (Fla.1993).

Fla.Std.Jury Instr. (Civ.) 6.1, Comment 3. The Supreme Court authorized the use of the Committee's proposed instruction on section 627.737(2). ***Standard Jury Instructions---** Civil Cases **(1.0, 6.14** MI8)*, 613 So.2d 1316 (Fla.1993). Acknowledging the approach taken by the Committee in a similar, situation, we answer the second certified question by holding that in a jury charge, a trial court is not required to define the term "necessary." The trial court correctly and adequately charged the jury in this case.

On the remaining issues, we find no error in the trial court's rulings on Derius' motions for directed verdict and mistrial. Allstate's reliance on the IME chiropractor's letter to withdraw payment to Derius' chiropractor was in compliance with the requirements of section 627.736(7)(a).

AFFIRMED,

POLEN and STEVENSON, JJ., concur.

SUNBEAM TELEVISION CORPORATION, d/b/a WSVN/Channel 7, and Post–Newsweek Stations Florida, Inc., d/b/a WPLG/Channel 10, Petitioners,

v.

STATE of Florida and Humberto Hernandez, Respondents.

No. 98-1969

District Court of Appeal of Florida, Third District.

Aug. 4, 1998.

Opinion Adopting Panel Dissent on Grant of Rehearing En Banc **Nov. 4,** 1998.

Rehearing Denied Jan. 13, 1999.

Television broadcasters filed petition for certiorari to quash order by the Circuit Court, Dade County, Roberto M. Pineiro, J., prohibiting video photography of prospective or seated jurors in high-profile criminal trial. The District Court of Appeal, Sorondo, J., held that judge's generalized concerns regarding jurors were sufficient to warrant prohibiting disclosure of jurors' names and addresses. On rehearing en banc, the District Court of Appeal held that: (1) judge's concerns were sufficient to support court order prohibiting video photography of jurors, but (2) prohibiting publication of juror information that would be disclosed in open court would be unconstitutional prior restraint.

Petition denied.

Cope, J., filed written dissent on original submission.

Sorondo, J., filed dissenting opinion on rehearing, in which Goderich, J., joined.

1. Jury ⇐144

Trial judge's generalized concerns for jurors in high-profile case were sufficient to warrant prohibiting disclosure of jurors' names and addresses.

Appendix Part 3

1

Frederick R. JENKINS, Appellant,

v.

The DEPARTMENT OF CORRECTIONS, Appellee.

No. 96-1773.

District Court of Appeal of Florida, Third District.

June 4, 1997.

An appeal from the Circuit Court for Dade County; Michael B. Chavies, Judge.

Frederick R. Jenkins, in pro. per.

Louis Vargas, General Counsel and Sheron Wells, Assistant General Counsel, for appellee.

Before COPE, GODERICH and GREEN, JJ.

PER CURIAM.

Affirmed. *See Singletary v. Jones*, 681 So.2d 836 (Fla. 1st DCA 1996).

2

Keith Edward JONES, Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee.

No. 96-2480.

District Court of Appeal of Florida, Fifth District.

June 6, 1997.

Insured brought action against automobile insurer to recover personal injury protection (PIP) and underinsured motorist (UIM) benefits. The Circuit Court, Volusia County, Patrick G. Kennedy, J., entered summary judgment in favor of insurer. Insured appealed. The District Court of Appeal, Griffin, J., held that: (1) insurer's failure to pay claim for PIP benefits within 30 days did not relieve insured from obligation to submit to independent medical examination (IME), and (2) questions in fact existed as to whether insurer could require IME in city other than city of insured's residence.

Reversed and remanded.

1. Insurance ⇐558(1.1)

Automobile insurer's breach of statutory obligation to pay claim within 30 days did not relieve insured of obligation to submit to independent medical examination (IME). West's F.S.A. § 627.737.

2. Insurance ⇐548

Insured's refusal to appear for independent medical examination (IME) scheduled in city in which he was not resident was not so unreasonable as to void coverage and relieve insurer of any obligation to provide personal injury protection (PIP) or underinsured motorist (UIM) benefits; statute required examination within municipality of insured's residence, unless there was no qualified physician to conduct examination within that municipality, and factual questions existed as to whether insurer could require insured to travel to another city. West's F.S.A. § 627.736(7)(a).

3. Judgment ⇐185.3(12)

Whether automobile insurer could require insured to travel to another city for independent medical examination (IME) was question of fact precluding summary judgment on insured's claim for personal injury protection (PIP) and underinsured motorist (UIM) benefits; neither party's motion or affidavit addressed the issue. West's F.S.A. § 627.736(7)(a).

4. Insurance ⇐548

Insured's unreasonable refusal to submit to independent medical examination (IME) does not relieve automobile insurer of liability for personal injury protection (PIP) benefits for treatment prior to request for examination, West's F.S.A. § 627.736(7)(b).

Appeal from the Circuit Court for Volusia County; Patrick G. Kennedy, Judge.

Rick Kolodinsky and Jason O. Brown, of Kolodinsky, Berg, Seitz & Tresher, New Smyrna Beach, for Appellant.

Lester A. Lewis, Daytona Beach, for Appellee.

GRIFFIN, Judge.

This is an appeal of a summary final judgment entered in favor of State Farm Mutual Automobile Insurance Company ["State Farm"] on a claim for PIP coverage and underinsured motorist benefits.

On April 1, 1995, Keith Edward Jones ["Jones"] was injured in an automobile accident in New Smyrna Beach, Florida, Jones submitted an initial application for PIP benefits to his insurer on April 6, 1995. He received PIP and medical payments coverage benefits through June 29, 1995, in the amount of $3,412.75. He was ultimately scheduled for knee surgery on September 28, 1995, for injuries that his orthopaedic surgeon related to the accident. Bills for this surgery were received by State Farm on October 13, 1995. Rather than pay the bill within the thirty-day period provided for in section 627.737, Florida Statutes (1993), because of her concern that the surgery might not be related to the accident, State Farm's adjuster scheduled Jones for a physical examination on November 30, 1995, in Daytona Beach, Florida. Jones responded by filing a four-count complaint against the tortfeasor and State Farm on November 20, 1995. The complaint sought PIP benefits and alleged that State Farm had violated section 627.737 because of the failure to make payment on the claim within the thirty-day period provided for in the statute. Jones also sought underinsured motorists benefits.

Jones did not attend the physical examination scheduled for November 30, 1995. State Farm thereupon filed several motions seeking summary judgment, asserting that State Farm had been relieved of its obligations to Jones because of his failure to attend the November examination.

[1] Jones opposed the motion by filing a copy of a report from Jones' physician which had been received by State Farm on June 16, 1995. The report stated in relevant part that:

> IMPRESSION: I am quiet [sic] certain, with [sic] a reasonable degree of medical probability that this patient tore his left knee anterior cruciate ligament in his accident of 4/1/95.

Jones also filed a copy of the adjuster's deposition, in which she stated that she had made the decision to require further examination of Jones based on what she thought were indications that his condition was degenerative in nature and not related to the accident. The court entered final summary judgment in favor of State Farm on all of Jones' claims.

Although we cannot credit Jones' contention that State Farm's failure to pay Jones' surgical bills within thirty days relieved him of any further obligation under the policy and requires that judgment be entered in his favor, we do agree with Jones that the summary judgment in favor of State Farm must be reversed. First of all, it is apparent that State Farm did not have reasonable proof that it was not responsible for payment of Jones' surgical bills. Despite State Farm's heroic effort on appeal to catalogue any fact or circumstance that might engender a suspicion that the knee surgery was not causally related to the accident, the best that even State Farm can say is that "State Farm had 'reasonable proof to *question* the relationship of Jones' left knee surgery. . . " This does not meet the statutory test of "reasonable proof to establish that the insurer is not responsible for the payment, . . " Thus, State Farm is exposed to the statutory penalties attendant to an "overdue" claim. State Farm does not, however, lose its right to contest the claim. For this reason, State Farm's failure to pay the claim in thirty days does not relieve Jones from the obligation to submit to an independent medical examination.

C2-43 By the same token, we also cannot agree with State Farm that Jones' failure to appear at the earlier IME scheduled relieved it of any further duty to pay, The burden of establishing an absence of any issue of 'fact

or law that would support a summary judgment was on State Farm. To begin with, the insurance contract on which State Farm relies for its argument that Jones breached a contractual duty is not in the record. Even if we could assume the terms of the State Farm policy, Jones' refusal to appear for the November 30 IME was not so "unreasonable" as to void coverage. First, Jones argues that he was entitled to refuse to appear for the physical examination requested by State Farm because the examination was scheduled to occur in Daytona Beach, even though the statute provides that "[s]uch examination shall be conducted within the municipality of residence of the insured or in the municipality where the insured is seeking treatment." § 627.736(7)(a), Fla. Stat. (1993). Jones is a resident of New Smyrna Beach and asserts that there are orthopaedic physicians in New Smyrna Beach who could have performed the examination. State Farm complains this issue was not raised below until the day of the hearing on the motion for summary judgment, and further contends that it was entitled to schedule the examination in Daytona Beach because the statute also provides:

> If the examination is to be conducted within the municipality of residence of the insured and there is no qualified physician to conduct the examination within such municipality, then such examination shall be conducted in an area of the closest proximity to the insured's residence.

Id Obviously, the question whether the examination had to be held in New Smyrna Beach, or whether State Farm could require Jones to travel to Daytona Beach, involves issues of fact which were not addressed in the parties' motions or by affidavit. *Frielingsdorf v. Allstate Ins. Co.,* 497 So.2d 289 (Fla. 3d DCA 1986), review *denied, 506* So.2d 1040 (Fla.1987). The burden of showing an absence of a material issue of fact is on the movant. Thus, this was not an appropriate basis on which to enter the summary judgment for State Farm.[1]

The summary final judgment is reversed and the cause remanded for further proceedings.

REVERSED and REMANDED.

PETERSON, C.J., and HARRIS, J., concur.

Jeffrey BIELAWSKI, Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION, et al., Appellee.

No. 96-2974.

District Court of Appeal of Florida, Fifth District.

June 6, 1997.

Administrative Appeal from the Unemployment Appeals Commission,

Jeffrey P. Bielawski, Rockledge, pro se.

John D. Maher, Tallahassee, for Appellee Unemployment Appeals Commission.

PER CURIAM.

AFFIRMED. See *Wright v. Wright,* 431 So.2d 177 (Fla. 5th DCA 1983).

GOSHORN, HARRIS and ANTOON, JJ., concur.

1. Jones further questions the value of such a post-operative examination on the issue of whether Jones' knee injury was related to the accident. Even if Jones' refusal to submit to an examination were considered unreasonable, State Farm is not relieved from all liability for PIP payments; rather, the statute provides that "[i]f a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for *subsequent* personal injury protection benefits." § 627.736(7)(b), Fla. Stat. (1993) (emphasis added). Under this statute, State Farm would appear to remain liable for PIP benefits incurred before the request for an examination was made. *Allstate Ins. Co., 472* So.2d 1291, 1293 (Fla. 2d DCA 1985), *review denied, 484* So.2d 10 (Fla. 1986).