IN THE SUPREME COURT OF E'LORIDA

CASE NO: 2000-112

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

JUNA MARIA PEREZ,

Respondent.

_____/

3rd DCA Case No.: 99-01481

JURISDICTIONAL BRIEF OF PETITIONER

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1 This brief is being submitted to the court in the format of 12 point Courier New font which complies with the court's request.

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INTRODUCTION

This is an appeal from a decision of the Third District Court of Appeal which directly and expressly conflicts with the holdings from other district courts of **appeal** on the same point of law. This jurisdictional brief will demonstrate why this court should exercise its discretionary jurisdiction to review the decision *sub judice* based upon that conflict. *See,* Art. V §3(b)(4), Fla. Cons. (1980); 9.030(a)(2)(A)(v) and (vi).

Throughout this brief, the Petitioner, STATE FARM FIRE AND CASUALTY COMPANY, will be referred to either as "Petitioner" or "STATE FARM". The Respondent, JUANA PEREZ, will be referred *to* as either "Respondent" or "PEREZ."

References to the Appendix will be indicated by the symbol "(A.)." All emphasis throughout the brief will be supplied by the writer unless otherwise indicated.

STATEMENT OF FACTS

This cause arose out of an action filed in the County Court for Miami-Dade County by a PIP insured against a no-fault insurance carrier claiming fees under section 627.736(4)(b), Florida Statutes (1997). The circuit court's opinion recites the facts giving rise to the action as follows:

> This action arose out of an automobile accident on March 24, 1996. . . Almost three months later, on June 19, 1996, State Farm received medical bills from M.C.L. Health Center totaling $4,100.00. . . . State Farm then arranged for Perez to see Dr. Stephen

Turbin, an orthopedic surgeon, for an independent medical examination. This examination took place on July 17, 1996, twenty-eight (28) days after State Farm's receipt of the bills. State Farm also obtained Perez's medical records and submitted them to Dr. Turbin, seeking his opinion as to the reasonableness, necessity and relatedness of the medical treatment.

State Farm received Dr. Turbin's opinons on July 26, 1996, thirty-six (36) days after receiving the medical bills. **He** indicated that Perez had reached maximum medical improvement as of his examination date, and that she had been discharged from medical care. . . . Dr. Turbin told State Farm that the nerve conduction studies were unwarranted. Based upon Dr. Turbin's independent medical examination and his review of Perez's medical records, State Farm reduced payment of the physical therapy treatments and denied payment for nerve conduction studies.

Perez filed this lawsuit . . . seeking payment for the medical expenses submitted on behalf of M.C.L. . . . Perez alleged that State Farm breached its insurance contract by failing to pay Perez's bill with M.C.L. in its entirety. State Farm responded by asserting that no breach occurred because the expenses did not constitute reasonable expenses for necessary medical treatment under the PIP statute. After initial discovery had taken place, Perez moved for summary judgment, asserting that "that Defendant did not have reasonable proof to establish that it was not responsible for the payment of the Plaintiff's claimed medical bills from M.C.L. Health Center within thirty (30) days of receipt of the bills from M.C.L. Health Center, Inc." The trial court granted the motion, holding that because State Farm did not have Dr. Turbin's report in its possession until more than thirty (30) days after receipt of the bills from the insured, Florida Statutes 5627.736 barred defenses to payment of any part of the claim.

(A.1-3).

The circuit court, finding that *Jones* v. *State Farm* ***Mutual*** *Automobile Insurance Company,* 694 *So.* 2d 165 (Fla. 5th DCA 1997) applied, reversed the summary judgment holding that "an insurer

may defend a PIP claim on the merits even when it does not have reasonable proof in its possession, within thirty (30) days of receiving a claim, that it is not responsible for payment of the claim. Such a claim is overdue, however, and the insured will be entitled to statutory interest and attorney's **fees** as provided by law." *Perez v. State Farm,* No. 97-383 at 6 (Dade Cir. Ct. May 7, 1999)(A.4-6).

The third district court, however, reversed and held that *Fortune Insurance Company* ***v. Pacheco,*** 695 So. 2d 394 (Fla. 3d DCA 1997) was controlling and that under the PIP statute an insurer "must obtain, within thirty days, a medical report providing 'reasonable proof' that it is not responsible for payment." ***Perez v.*** *State* ***Farm*** *Fire and* ***Cas.*** *Co.,* 1999 WL 816552, *2 (Fla. 3rd DCA 1999). In addition, it declined to follow *Jones* finding that it was not "dispositive of the issue in this case" and was "clearly dicta." ***Id,*** at *3.

POINT ON APPEAL

WHETHER THE OPINION OF THE THIRD DISTRICT COURT DIRECTLY *AND* EXPRESSLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AUTHORIZING THIS COURT TO ACCEPT JURISDICTION OF THIS MATTER TO RESOLVE THAT CONFLICT?

SUMMARY OF ARGUMENT

The Petitioner respectfully requests that this court accept jurisdiction to review the third district court's decision

because it conflicts with the decisions of other district courts of appeal. The third district held that a 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 statute differently and concluded that the failure to pay only subjects an insurer to statutory penalties of interest and attorney's **fees**.

Thus, the third district court's rule of law conflicts with *Jones* which held that an insurer who fails to pay the claim within the thirty-days is subject to interest, but is still able to contest the reasonableness and necessity of the claim.

The decision also conflicts with *Derius v. Allstate Indemnity Company, 723 So.* 2d 271 (Fla. 4th DCA 1998) under the third district's decision, the burden of proof shifts to the insurer who is obligated to authenticate the claim within the thirty-days.

Lastly, the decision conflicts with ***Fortune*** *Insurance Company v. Everglades Diagnostics, Inc.,* 721 So. 2d 384 (Fla. 4th DCA 1998) which defined the "thirty-day overdue" provision as merely dictating when interest begins to run for overdue PIP payments. This is contrary to the third's decision which held that the failure to pay within the thirty-day precludes any defense to payment and requires an automatic judgment for the claimant.

ARGUMENT

Section 627.736(4)(b), Florida Statutes (1997) provides when an insurer can withhold payment:

> Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. . .However, any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment.

Section (c) of the statute provides that [a]ll overdue payments shall bear simple interest at the rate of 10 percent per year." §627.736(4)(c), Fla. Stat. (1997).

The third district court refused to follow *Jones* and instead found that the fourth district's comment that a PIP insurer is not precluded from presenting a defense even if the denial is beyond the thirty-day requirement of the statute was "dicta" and thus not controlling. A close review of *Jones,* however, clearly indicates that it is remarkably similar to the case herein and the rule of law expressed is not dicta.

In *Jones,* the PIP carrier chose not to pay the submitted bills and instead scheduled the insured to be seen by an independent medical examiner. *See Jones,* 694 So. 2d at 166. When the *Jones* insured received notice of the examination, he refused to attend and instead filed a complaint seeking PIP benefits and underinsured motorists benefits. See ***Id.*** The

fourth district held that the insured's refusal to attend the medical examination was a question of fact and not for summary judgment and that while the carrier did not have reasonable proof that it did not owe the claim within the thirty-day period, this fact was not dispositive of the issue of whether the carrier could contest the claim. The court held:

> [I]t 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 casually 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' knee surgery. . .' Thus, State Farm is exposed to 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 claim in thirty days does not relieve Jones from the obligation to submit to an independent medical examination.*

See id.

Thus in Jones the non-compliance with the thirty-day requirement--failure to pay without reasonable proof-- exposed the insurer to the statutory penalties of an overdue claim, but did not preclude the insurer from contesting the claim. See ***id.*** Whereas in the third district's decision, non-compliance with the thirty-day requirement precludes the insurer from contesting the claim and requires the insurer to "promptly pay the claim plus accrued interest." *Perez,* 1999 WL 816552 at *2.

In the case *sub judice,* the Petitioner asked for the independent medical examination within thirty days and, indeed, was able to accomplish that fact on the twenty-eighth day after receipt of the disputed medical bills. The third district court has held that even though the insurance carrier has accomplished this fact within the required thirty-days, it is still precluded from contesting the claim on the grounds that the report was not received in the carrier's file until after the thirty-day period.

In addition, the rule of law expressed by the third district court conflicts with the rule announced in *Derius* ***v.*** *Allstate* ***Indemnity Company,*** where, the fourth district court recognized that the procedural requirement of an insurer to obtain a treating physician's report before terminating benefits did not alter the burden of proof. See *Derius*, 723 So. **2d** at 272. The court 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 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.

See ***id.***

Thus, the *Derius* decision emphasized that the plaintiff continues to have the burden of proof with respect to the reasonableness and necessity of medical charges. While, the third district's opinion shifts the burden of proof unto to the insurer to prove the bill is not reasonable and necessary within the thirty-day period.

The third district's decision also conflicts with *Fortune Insurance Company v. Everglades Diagnostics, Inc.*, 721 So. 2d 384 (Fla. 4th DCA 1998), in which the PIP claimant attempted to engraft the "thirty-day" provision unto the PIP arbitration provision that requires medical providers with assignments to arbitrate their PIP claims. The fourth district refused *to* engraft this "thirty-day overdue" requirement onto the statute.

This is contrary to the third district's decision which defined the thirty-day provision as requiring an insurer to pay bills, unless it obtains an independent medical examination report ("reasonable proof), within thirty-days.

> We think however, that the providers have simply read too much into the 30-day overdue provision. Section 627.736(4)(b) says that PIP benefits paid under this section 'shall be overdue if not paid within 30 days. . .' Section 627.726(4)(c) says that all overdue payments shall bear simple interest at the rate of 10 percent 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 the 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

> insurer 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.

Fortune, 721 *So.* 2d at 382. Under the decision of the third district, however, this rule is rejected and a conflict is created.

CONCLUSION

The Petitioner urges this Court to accept jurisdiction of this matter in order to resolve the conflict between the Third District Court of Appeal and other district courts of appeal as expressed in the decisions in the case *sub judice* and in ***Derius,*** *Fortune* and *Jones.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on January 24, 2000 to **HIGHTOWER & RUDD, P.A.,** Co-Counsel for Appellant, 2300 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132. Telephone: (305) 539-0909; **AMADO ALAN ALVAREZ, ESQUIRE,** Attorney for Appellee, Suite 209, 7000 S.W. 97th Avenue, Miami, Florida 33173. Telephone: (305) 271-1097; and, **JOHN H. RUIZ, ESQUIRE,** 198 North Douglas Road, Miami, Florida 33125. Telephone: (305) 649-0020; **STEVEN STARK, ESQUIRE,** Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., NationsBank Tower 17th Floor, 100 SE 2nd Street, Miami, Florida 33131; **NORMA G. KASSNER, ESQUIRE,** Dracos & Associates, P.A., 3909 NE 163rd Street,

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