**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SCOO-112
DCA CASE NOS. 99-01348, 99-01481

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant/Petitioner,

v.

JUANA MARIA PEREZ,

Plaintiff/Respondent.

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

# RESPONDENT'S BRIEF ON JURISDICTION

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## CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned certifies that this brief was printed in proportionately spaced **14** point Times New Roman type.



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## INTRODUCTION

Throughout this Brief, the Respondent, Juana Maria Perez, will be referred to as "Perez." Her PIP carrier, the Petitioner, State Farm Fire and Casualty Company, will be referred to as "State Farm."

## STATEMENT OF THE CASE AND FACTS

As reflected in the decision of the District Court below, Perez sought certiorari review of a Circuit Court Appellate Division decision reversing a final summary judgment. The District Court consolidated the Perez case with the case of Rodriguez v. United Automobile Insurance Company. These two cases dealt with the issue of whether an insurer under Fla. Stat. $627.736 must obtain the report required under Fla. Stat. §627.736(7) constituting "reasonable proof' within 30 days of receiving written notice of a covered loss and amount of same before the insurer could defend on the basis that the medical bills are not reasonable, not related and/or not necessary.

The facts as set forth in the opinion:'

> On March 24, 1996, Ms. Perez sustained personal injuries as a result of an automobile accident. She sought

[1] State Farm has cited facts that are not in the District Court's opinion although this Court has repeatedly emphasized that, for the purpose of determining conflict jurisdiction, it is limited to the facts as stated in the District Court's opinion. Hardee v. State, 534 So. 2d 707, 708 n.* (Fla. 1988); Dep't of Health and Rehab. Serv. v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888, 889 (Fla. 1986).



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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."

The Third District quashed the decision by the Circuit Court in its Appellate Capacity. In support of its ruling, the District Court found:

Section 627.736(4)(b), Florida Statutes (1997), provides that PIP insurance benefits "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." 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


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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 statutory 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, 695 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 correctly concluded that "reading the PIP statute in pari materia, the insurer must obtain the


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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.

## SUMMARY OF ARGUMENT

This Court should not accept jurisdiction of the instant action since there is no direct and express conflict between the decision of the Third District and other District Courts. The Third District held that pursuant to Fla. Stat. §627.736 that where the only defense by an insurer is that the medical treatment was not reasonable, related and necessary, the insurer must obtain the report required under Fla. Stat. §627.736(7) constituting "reasonable proof' within 30 days of receiving written notice of a covered loss and of the amount of same before it can defend on the basis that the medical bills are not reasonable, related and necessary. The Fifth and Fourth District have not addressed the issue decided by the Third in the case

*subjudice* and as such, have not held otherwise. The cases cited by State Farm are factually and legally distinguishable. The first case dealt with whether an insurer is required to attend an IME. The second case dealt with who had the burden of proof once the insurer had complied with the §627.736 by obtaining a report based on an IME constituting "reasonable proof' that the medical treatment was not reasonable, related and necessary. The third case dealt with the time frame in which an insurer can demand arbitration of a PIP claim. There is simply no express and direct conflict between the Third District and other Districts.

## ARGUMENT

### THIS COURT SHOULD NOT EXERCISE JURISDICTION BECAUSE THE DISTRICT COURT'S OPINION DOES NOT CONFLICT WITH JONES, DERIUS OR EVERGLADES.

Perez respectfully submits that this Court should not accept jurisdiction to review the Third District's decision since there is no express and direct conflict with decisions of other district courts of appeal. See **Art.** V, §3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). To constitute such a conflict, the opinion must (1) announce a rule of law that conflicts with other appellate expressions of law, or (2) apply a rule of law to produce a different result in a case involving substantially the same controlling facts as a prior case. City of Jacksonville **v.** Florida First Nat'l Bank of Jacksonville, 339 ***So.*** 2d 632, 633 (Fla.

1976). The conflict must appear "within the four corners of the decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Under Rule 9.030(a)(2)(A)(iv), this Court's jurisdiction to review a case involving express and direct conflict is discretionary. Therefore, this Court must decide not only whether jurisdiction exists, but also whether to exercise it.

Contrary to State Farm's claim, the decision under review is not in conflict with Jones v. State Farm Mut. Auto. Ins. Co., 694 So. 2d 394 (Fla. 5th DCA 1997), Derius v. Allstate Indemnity Co., 723 So. 2d 271 (Fla. 4th DCA 1998), and Fortune Ins. Co. v. Everglades Diagnostic, Inc., 721 So. 2d 384 (Fla. 4th DCA 1998). None of the cases cited by State Farm addresses the issue that was on appeal in the sub judice case; therefore, there is no express and direct conflict with the decisions of the Third District and other District Courts.

The first case cited by State Farm, Jones v. State Farm Mut. Auto. Ins. Co., 694 So. 2d 394 (Fla. 5th DCA 1997), is factually and legally distinguishable from the case at bar. In Jones, the trial court granted the defendant's motion for final summary judgment because the plaintiff had failed to attend an independent medical examination ("IME"). The District Court reversed the trial court since there were issues of fact as to whether Jones' refusal to attend the IME was unreasonable. The Fifth District did not have before it the issue of whether State

Farm must have "reasonable proof' within 30 days of receiving notice of a covered loss and amount of same before it can defend on the basis that the medical bills are not reasonable, not related and/or not necessary. The Third District properly found that any discussion by the Fifth District as to consequences of not having "reasonable proof' within 30 days of receiving written notice of the fact of a covered loss and amount of same was dicta. Perez v. State Farm Fire and Cas. Co., 1999 WL 816552 (Fla. 3d DCA 1999). Accordingly, there is no express and direct conflict with the sub iudice opinion.

Similarly, in the second case cited by State Farm, Derius v. Allstate Indemnitv Co., 723 So. 2d 271 (Fla. 4th DCA 1998), there is no express and direct conflict with the sub iudice opinion. In Derius, the court considered Fla. Stat. §627.736(7) and how that statute affected the traditional notions of burden of proof. Interestingly, the factual account establishes that Allstate paid for three months worth of treatment starting in March of 1994 and obtained a report on June 7, 1994, which arguably constituted "reasonable proof." Id. at 272. Hence, there was no 30-day issue because the defendant paid for all the medical bills prior to the IME and cut-off PIP benefits for any medical bills subsequent to the IME. Since the defendant had the requisite IME to cut-off benefits, the issue was whether it was the plaintiff or defendant who had the burden to prove the reasonableness and

medical necessity of the medical bills. The Fourth District Court of Appeal held that the plaintiff had the burden. Because Derius involved different issues than the case sub judice, there is no express and direct conflict between the case at bar and Derius.

The third case cited by State Farm, Fortune Ins. Co. v. Everglades Diagnostice, Inc., 721 So. 2d 384 (Fla. 4th DCA 1998), is also factually and legally distinguishable to the case at bar. In Everglades the insurer received medical claims that it denied within thirty days of their receipt, but demanded arbitration a year later. The court decided that the insurer could compel arbitration after thirty days had passed from the date when it received notice of a claim and the amount of same.[2] The issue was not whether the insured was required to have "reasonable proof' within 30 days. In fact, the insurer denied the claims within thirty days and thus, could arguably allege that it had "reasonable proof' within the statutory time frame. The court in Everglades held that the arbitration provision did not require that arbitration be requested within thirty days and therefore, there is no "30-day requirement on the enforcement of the subsection (5) arbitration provision." Everglades at 385. The Everglades case simply dealt with the time frame in which

[2] This Court recently decided that the arbitration provision of $627.736, Fla. Stat,, was unconstitutional. Nationwide Mut. Fire Ins, Co. v. Pinnacle Medical, Inc., 2000 WL 123791 (Fla. 2000).



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an insured could demand arbitration. Therefore, the case at bar and Everglades reviewed different sections of 5627.736, Fla. Stat., to wit: Everglades looked at the arbitration provision under subsection (5) and the sub iudice decision looked at the conditions precedent an insurer must meet before it can deny a claim under subsection (4). Accordingly, there is no express and direct conflict between the holdings of these two cases.

State Farm has not met its burden of proving that there is an express and direct conflict between the opinion the Third District in the case at bar and the opinions of the Fourth and Fifth District. In fact, State Farm made this same argument to the Third District, which was rejected by the court.

## CONCLUSION

For the foregoing reasons stated above, this Court should decline to exercise jurisdiction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**WE HEREBY CERTIFY** that a true and correct copy of the foregoing motion was furnished by mail to: State Farm's co-counsel, James K. Clark, Esquire, James Clark and Associates, One SE Third Avenue, Suite 1800, Miami, FL 33 13 1, and Shelley Senecal, Esquire, Hightower & Rudd, P.A., 2300 New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132 and United Automobile's co-counsel, Steven Stark, Esquire, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., NationsBank Tower, 17th Floor, 100 SE Second Street, Miami, FL 33131, and Norma G. Kassner, Esquire, Dracos & Associates, P.A., 3909 NE 163rd Street, Suite 204, North Miami Beach, FL 33160 on this 16th February 2000.

JOHN H. RUIZ, ESQUIRE