IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2036

THIRD DISTRICT CASE NO. 3D06-458

CUSTER MEDICAL CENTER,
A/A/O MAXIMO MASIS,

Petitioner,

vs.

UNITED AUTOMOBILE INSURANCE COMPANY,
A Florida corporation,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, Custer Medical Center, was the Plaintiff in the trial court, the Respondent before the District Court and will be referred to as Custer. The Respondent, United Automobile Insurance Company, was the Defendant below, the Petitioner before the District Court and will be referred to as United Auto. The Insured was Maximo Masis and will be referred to Masis. The symbol "R." will designate the record before the Third District and the symbol "A." will designate the appendix to this brief..

STATEMENT OF THE CASE AND FACTS

The Respondent rejects the Petitioner's statement of the case and facts since it is incomplete and does not present an accurate account of the proceedings.

On September 11, 2002, the Custer filed a complaint against the United Auto for Breach of Contract for PIP benefits. (R. 63). On May 19, 2004, United Auto filed its amended answer and affirmative defenses wherein it generally denied that all conditions precedent had been met and raised the affirmative defense that the Masis breached the contract and violated the PIP statute by failing to abide by the condition precedent of attending an independent medical examination. (R. 40, 63). Custer did not file a reply to United Auto's affirmative defense and never asserted any reason for Masis' failure to attend the independent medical examination.

Trial commenced on August 25, 2004. There were two issues to be tried. The first was Custer's complaint that United Auto breached its contract with Masis by failing to pay for treatment rendered by Custer to Masis that Custer contended was reasonable, related and necessary to the accident that occurred on January 1, 2002. The second was United Auto's affirmative defense that regardless of whether the treatment was reasonable, related and necessary, United Auto was not responsible for payment because Masis did not fulfill the condition precedent of attending an independent medical examination. (R. 151-164).

Custer's first witness, Jean Masel, testified that the Masis was a passenger in his car when the accident occurred. (R. 165-166).

Custer's next witness was Dr. Inchauski, a medical doctor. Custer employed Dr. Inchauski and his sole contact with Masis was on January 23, 2002 when he examined Masis. He testified that all of the treatment Masis received was reasonable, related and necessary. He testified that the physical therapy was recommended by a chiropractor who saw Masis before he did. Dr. Inchauski could not state if Masis ever reached maximum medical improvement since he only saw Masis once. (R. 179-195).

On cross examination, Dr. Inchauski testified that he never discharged Masis. (R. 196). He admitted that he was not the treating physician and that Dr. Hoffsfelder, a chiropractic physician, was the treating physician. (R. 200). Dr. Inchauski told Masis to

return in two weeks so he could be reevaluated and, if necessary, the course of treatment could be modified. Masis did not return for the follow-up. After January 23, 2002, Masis was never seen by a doctor and treated for six weeks without medical supervision. (R. 206-209). He then admitted that Masis was never discharged by anyone from Custer. The doctor then testified that he found the treatment was reasonable, related and necessary since individuals with the type of problems Masis had typically need two to three months of treatment. (R. 215-216). On redirect, he admitted that based on the degree of the injuries more than three months of treatment might be needed. However, he could not say exactly how much treatment Masis needed since he only saw Masis once. (R. 230).

Custer's next witness was Anthony Gregory, United Auto's litigation adjuster. He testified that on January 11, 2002, United Auto received an attorney's representation letter. (R. 240, 436). On March 27, 2002, United Auto sent Masis' attorney a letter scheduling an independent medical examination for April 11, 2002. (R. 314, 401). United Auto received the bills on March 28, 2002. (R. 235, 433). Masis did not appear for the April 11, 2002, independent medical examination. On April 12, 2002, the Insurer sent another letter, scheduling another independent medical examination for April 29, 2002. (R. 315-316, 403). Masis did not appear for the second independent medical examination. On May 10, 2002, United Auto notified Masis' attorney that

based on Masis' failure to attend the IME's of April 11 and April 29, 2002,United Auto, based on the policy terms and conditions, the case law and the PIP statute, denied benefits as of April 11, 2002. (R. 434). On June 20, 2002, the United Auto received a letter from Masis' attorney advising that he no longer represented him. (R. 244, 137).

After Custer rested, (R. 282), the United Auto moved for a directed verdict on its independent medical examination affirmative defense based on the fact United Auto established that Masis was properly notified of the independent medical examination, that he failed to attend and that the Custer had failed to show any reason why the Masis did not attend either of the independent medical examination appointments. (R. 296-297). Custer's counsel argued that it was a jury question whether the United Auto's request for the independent medical examination was reasonable since the treatment ended. (R. 300). The trial court rejected this position since the law allows an insurer to request an independent medical examination at any time. (R. 301). The trial court then asked Custer's counsel if he was going to argue to the jury that because Masis was no longer treating it would be unreasonable to submit to an independent medical examination. Custer's counsel stated that this was not his position. His position was the United Auto's request for an independent medical examination four months after the treatment began was unreasonable. (R. 306-307).

The trial court granted the directed verdict. The trial court held that United Auto did not waive its right to rely on the on the April 11 no show when it rescheduled the independent medical examination, where Masis failed to appear without contacting the United Auto. (R. 311-3122). The trial court also held that since the bills were received by United Auto on March 28, 2002 and the benefits were suspended on April 11, 2002, United Auto was not responsible for the bills since under the statute the bills were not payable until 30 days after receipt. Finally, the trial court held that since United Auto provided proper notice of the examinations and since Custer failed to bring forth any evidence of Masis reason for failing to attend the independent medical examination, United Auto was entitled to a directed verdict as a matter of law. (R. 319).

Custer then appealed to the appellate division of the circuit court of the eleventh judicial circuit. The circuit court reversed and held that "[i]n this case, the trial judge failed to consider the evidence in a light most favorable to the non-moving party. There is no legal authority supporting United's position that failure to appear is "unreasonable" as a matter of law. United claimed the affirmative defense that the failure to appear was unreasonable. United therefore had the burden to show, by evidence, that the failure to attend the IME was unreasonable. Nor does the simple showing of failure to appear shift the burden of proof to the Plaintiff to prove why the insured failed to appear. There was no evidence in the Plaintiff's case as to why Mr. Masis failed to appear.

Therefore, in the absence of evidence supporting the affirmative defense, the directed verdict is premature." (R. 19).

United Auto sought certiorari review of a decision of the circuit court appellate division that reversed a directed verdict rendered in United Auto's favor at the conclusion of Custer's case. The trial court's reason for directing the verdict was that United Auto's insured and assignor, Maximo Masis, failed to satisfy a contractual condition precedent under the policy of insurance sued upon, by failing to report for two consecutive independent medical examinations without explanation. (A.-2).

The Third District found that a plain reading of section 627.736(7) makes it clear that an insured's submission to an IME is a condition precedent to coverage. The Third District citing to *United Auto. Ins. Co. v. Prof'l Med. Group*, 14 Fla. L. Weekly Supp. 1021, 1021-22 (Fla. Cir. Ct.2007), *De Ferrari v. Gov't Employees Ins. Co.*, 613 So.2d 101, 103 (Fla. 3d DCA 1993) *United Auto. Ins. Co. v. Zulma*, 661 So.2d 947, 948 (Fla. 4th DCA 1995) found that this is a clearly established principle of law. (A. 2-3).

The Third District then held that United Auto's requests for Masis to present himself for an independent medical examination were not patently unreasonable. Since neither Masis nor his counsel responded to the requests at any time during the nearly two-month period during which United Auto sought to schedule an independent medical examination of its insured, the trial court correctly directed a verdict in favor of the

insurer. The Third District citing to *Griffin v. Am. Gen. Life & Accident Ins. Co.*, 752 So.2d 621, 623 (Fla. 2d DCA 1999) then quashed the circuit court's contrary ruling since it departed from the clearly established principle of law that the party seeking to enforce a contract has the burden to prove the satisfaction of a condition precedent to the contract's existence. The Third District the granted the writ of certiorari and directed the court to reinstate the directed verdict. Custer filed a motion for rehearing and motion for rehearing en banc which were denied. Judge Ramirez filed a dissent to the denial of the motion for rehearing en banc. (A. 3).

While United Auto's petition was pending in the Third District, Custer's trial counsel filed in the county court a notice of voluntary dismissal with prejudice since the matter was amicably resolved by the parties. (A.-8).

Custer then sought this Court's discretionary review which was granted.

SUMMARY OF THE ARGUMENT

The Third District held that under the PIP statute and United Auto's policy that an insured's submission to an independent medical examination is a condition precedent to coverage. Under well established contract law, a condition precedent is a condition which calls for the performance of an act after a contract is entered into, upon the performance or happening of which its obligation to perform is made to depend. *Cohen v. Rothman*, 127 So.2d 143, 147 (Fla. 3d DCA 1961). There must be at least a substantial performance of the condition precedent in order to authorize a recovery under the contract. *Id*.

This Court in *U.S. Security Ins. Co. v. Cimino,* 754 So.2d 697, 699(Fla. 2000) found that the combined effect of § 627.736(7), Florida Statutes and Security's policy is to allow Security to require Cimino to attend a PIP examination in order to continue receiving benefits. Likewise the Second District in *Tindall v. Allstate Ins. Co.*, 472 So.2d 1291, 1293 (Fla. 2 DCA 1985) held that an unreasonable refusal of a claimant to attend an examination alleviates the insurer of any further liability for PIP benefits.

Since the law is that attendance at an independent medical examination is required to continue to receive benefits, the independent medical examination requirement meets the well established definition of a contractual condition precedent. Under the independent medical examination requirement, an insured's continued ability to obtain

PIP benefits is condition on an insured's attendance at such an examination. Thus, the Third District's holding is correct.

At trial United Auto's defense was that Masis failed to comply with the independent medical examination condition precedent without explanation. The Third District found that the affirmative defense of unreasonable failure to attend an independent medical examination is established by proving notice and the failure to attend without explanation. *Universal Medical Center of South Florida v. Fortune Insurance Company*, 761 So.2d 386, 387 (Fla. 3d DCA 2000). The burden then shifts to the insured to establish that the refusal to submit to the examination was reasonable. *U.S. Security Ins. Co. v. Cimino*, 754 So.2d 697, 702 (Fla. 2000).

The Third District found that United Auto proved that it notified Masis of the independent medical examination and he failed to attend without an explanation. The Third District then held that since Custer did not present any evidence concerning Masis' reason for not attending, then United Auto was entitled to a directed verdict on its affirmative defense. Therefore, the Third District correctly exercised its certiorari jurisdiction and quashed the circuit court's decision which held that it was United Auto's burden to establish the reason for Masis' failure to attend the examination.

ARGUMENT

THE THIRD DISTRICT CORRECTLY EXERCISED IS SECOND TIER CERTIORARI JURISDICTION AND QUASHED THE DECISION OF THE APPELLATE DIVISION OF THE ELEVENTH CIRCUIT THAT HELD THAT WHERE UNITED AUTO PLEAD THE AFFIRMATIVE DEFENSE OF FAILURE TO ATTEND AN INDEPENDENT MEDICAL EXAMINATION WITHOUT EXPLANATION THAT THE BURDEN TO PROVE THE EXPLANATION FOR THE FAILURE TO APPEAR WAS PART OF THE AFFIRMATIVE DEFENSE.

The law is well settled that under § 627.736(7), Florida Statutes, an insured's submission to an independent medical examination is a condition precedent to continuing to obtain personal injury protection benefits. *U.S. Security Ins. Co. v. Cimino,* 754 So.2d 697, 699(Fla. 2000)(The combined effect of the statute and the policy is to allow Security to require Cimino to attend a PIP examination in order to continue receiving benefits.); *Tindall v. Allstate Ins. Co.*, 472 So.2d 1291, 1293 (Fla. 2 DCA 1985)(an unreasonable refusal of a claimant to attend an examination alleviates the insurer of any further liability for PIP benefits). The Third District so held and therefore applied the correct law.

Under well established contract law, a condition precedent is a condition which calls for the performance of an act after a contract is entered into, upon the performance or happening of which its obligation to perform is made to depend. *Cohen v. Rothman*,

127 So.2d 143, 147 (Fla. 3d DCA 1961). There must be at least a substantial performance of the condition precedent in order to authorize a recovery under the contract. *Id*. *See also Racing Properties, L.P. v. Baldwin*, 885 So.2d 881, 882-83 (Fla 3d DCA 2004).

The independent medical examination requirement contained within § 627.736(7)(a)-(b), Florida Statutes (2001), provides, in pertinent part, as follows:

> Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection benefits, such person shall, upon request of an insurer, submit to mental or the physical examination by a physician or physicians.... *If a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits* (emphasis added).

The "Conditions" section of Custer's policy, provides:

> [The claimant] shall submit to mental or physical examinations at the "our" expense when and as often as "we" may reasonably require... *If the person unreasonably refuses to submit to an examination, "we" will not be liable for subsequent personal injury protection benefits* (emphasis added).

(R. 426). Both the statute and contract expressly require an injured person claiming PIP benefits to accede to an insurer's request that an independent physical examination be undertaken if the insured's mental or physical condition is material to the claim, The

independent medical examination provided by this section which arises from the contractual relationship between an insured and the insurer is designed to assist the insurer in evaluating whether it is obligated to pay benefits under its policy. *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593, 596 (Fla. 3d DCA 1997). Thus an unreasonable refusal of a claimant to submit to an independent medical examination alleviates the insurer of any further liability for PIP benefits. *Id*. *See also Tindall v. Allstate Ins. Co.*, 472 So.2d 1291, 1293 (Fla. 2 DCA 1985).

According to the well established law an insured's attendance at an independent medical examination is a contractual requirement that must be performed by an insured in order to obligate the insurer to pay PIP benefits. As such, it meets the classic definition of a condition precedent and the Third District's holding of the same was correct.

Custer contends that the independent medical examination requirement is not a condition precedent to coverage since it only relieves the insurer from further liability and does not relieve the insurer from liability for bills that it received more than thirty days prior to the date of the independent medical examination. This position is meritless because it does not account for the special nature of, and protection afforded by, the PIP statute. The special nature of, and protection afforded by, the PIP statute is that upon the expiration of thirty days after the receipt of the claim, the insurer is itself in breach

of the contract which allows the insured to initiate an action for those bills. *Amador v. United Automobile Ins. Co.*, 748 So.2d 307, 309 (Fla. 3d DCA 1999).

In *Amador*, United Auto scheduled an examination under oath and when Amador failed to attend, United Auto denied coverage based on Amador's failure to preform the condition precedent of attending the examination. The Third District held that the examination under oath is a condition precedent to coverage only when the examination under oath is scheduled within 30 days after the insurer receives the bill. When an examination under oath is scheduled more that 30 days after receipt of the bill, the Court held that United Auto was in breach of the contract and Amador was no longer required to perform the condition precedent to secure coverage. The eleventh circuit appellate court has held the *Amador* applies to each set of bills and when it its untimely as to the first set of bills but timely as to the second set of bills, the insured is required to attend the examination under oath in order for the second set of bills to be covered. *United Automobile Ins. Co. v. South Miami Health Center*, 12 Fla. L. Weekly Supp. 853b (Fla. 11th Cir. App. Ct. June 14, 2005); *United Automobile Ins. Co. v. Millennium Diagnostic Imaging Center, Inc*, 12 Fla. L. Weekly Supp. 437a (Fla. 11th Cir. App. Ct. Feb. 17, 2005).

Thus, the statutory requirement that the attendance at an independent medical examination is a condition precedent to coverage of only to those bills that have been

received but are not overdue is in accordance with the special nature, and protection afforded by, the PIP statute. Therefore, Custer's contrary position should be rejected.

Next Custer contends that even if the PIP statute independent medical examination requirement is a condition precedent, United Auto's policy does not treat it as such since the policy condition that the Third District relies on states:

> No action shall lie against "us"; unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this insurance Policy...

(R. 426). Custer argues that since this condition prevents an action for PIP benefits if the independent medical examination condition precedent requirement is not fulfilled, it is not a condition precedent to coverage. Although the condition states that it is a condition precedent to maintaining an action and it does not explicitly state that it is a condition precedent to coverage, it could not mean anything else. This is a distinction without a difference since if Custer cannot maintain an action, how can Custer obtain coverage.

As United Auto just established, the well settled law is that under § 627.736(7), Florida Statutes, an insured's submission to an independent medical examination is a condition precedent to continue to obtain personal injury protection benefits. As a condition precedent, it was United Auto's option to deny the performance of the condition precedent with specificity and particularity. Fla.R.Civ.P. Rule 1.120(c). This

would have required Custer to establish as part of its case in chief that Masis attended the independent medical examination or that Masis did not attend but had a reasonable reason for not attending.

Instead United Auto generally denied that Custer performed all condition precedents and raised the affirmative defense that Masis breached the contract and violated the PIP statute by failing to abide by the condition precedent of attending an independent medical examination. By pleading the breach of a condition precedent as an affirmative defense, United Auto assumed the burden of proving its affirmative defense. *W.J. Kiely & Co. v. Bituminous Casualty Corp*., 145 So.2d 762, 763 (Fla. 3d DCA 1962).

This is the crux of the case and that is what United Auto has to prove to establish the affirmative defense of Masis' failure to attend the independent medical examination without explanation. United Auto submits that the affirmative defense of unreasonable failure to attend an independent medical examination is established by proving notice and the failure to attend without explanation. *Universal Medical Center of South Florida v. Fortune Insurance Company,* 761 So.2d 386, 387 (Fla. 3d DCA 2000). In order for Custer to rebut that Masis reasonably refused to submit to the independent medical examination would have had to file a reply. A reply to an affirmative defense is necessary to avoid an affirmative defense. *Moore Meats, Inc. v. Strawn*, 313 So.2d 660

(Fla. 1975). A reply is required only when "new matter" is sought to be asserted to avoid the affirmative defense. *Kitchen v. Kitchen*, 404 So.2d 203, 205 (Fla. 2d DCA 1981). When United Auto plead the failure to submit to the independent medical examination as an affirmative defense, it was incumbent on Custer to file a reply alleging facts establishing that the refusal was reasonable. *American Salvage and Jobbing Co., Inc. v. Salomon*, 295 So.2d 710, 712 (Fla. 3d DCA 1974)(an affirmative defense which asserts the failure to comply with policy provisions is an affirmative defense which may require an avoidance by reply). An issue that could have been, but was not asserted in a reply is not an issue properly before the court. *Tax v. Keiser*, 328 So.2d 517 (Fla. 4th DCA 1976). Thus, Custer's failure to plead facts which established that Masis reasonably refused to submit to the independent medical examination in avoidance of the United Auto's failure to attend without explanation affirmative defense precludes Custer from relying on a reasonable reason to defeat the defense. *Florida First National Bank v. Martin*, 449 So.2d 861 (Fla. 1st DCA 1984).

In *Universal Medical Center of South Florida v. Fortune Insurance Company*, 761 So.2d 386, 387 (Fla. 3d DCA 2000, Universal as the assignee of Fortune's insured, sought payment from fortune for PIP benefits. Fortune refused to pay asserting that the insured breached the policy by unreasonably refusing to submit to an independent medical examination. At trial the evidence established that insured's counsel request that Fortune cancel the independent medical examination because the insured had finished treatment. Fortune did not respond to thereto until the date of the examination, and insured's counsel did not receive timely notification of the insurer's refusal to cancel timely. The Third District held that there was no evidence of a unreasonable refusal to submit to an examination. Rather the evidence established that the insured sought to cancel the examination and the insurer failed to respond and this was not an unreasonable refusal to submit to the examination. The Third District rejected the cases Fortune relied on since in those cases the insured either expressly refused to attend or failed to attend without explanation. The Court found that its prior decisions in *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593, 596 (Fla. 3d DCA 1997) and *Griffen v. Stonewall Ins. Co.*, 367 So.2d 97 (Fla. 3d DCA 1977) stood for the proposition that a failure to attend an independent medical examination without explanation was an unreasonable refusal and relieved the insurer from paying PIP benefits.

In *Griffin*, the insured, on two separate occasions, refused to be attend an IME. The insured did not provide a reason for such refusal at the time, nor was any reasonable excuse advanced before the trial court. The Third District held that the insured's refusal was unreasonable since he did not provide any explanation at the time of the refusal nor did he offer any reasonable excuse at before the trial court.

In *Silva*, after initially rescheduling and independent medical examination, U.S. Security again sent letters to Silva and her attorney rescheduling her appointment for the independent medical examination for September 2, 1993. Both letters contained the following language: "Failure to attend this examination could jeopardize your client's eligibility for future benefits in accordance with Florida Statute 627.736 Section 7(b)." Silva did not appear for the September 2 examination. On September 9 and 10, U.S. Security sent letters to Silva and her attorney requesting that Silva attend an independent medical examination on September 24, 1993. The letters further stated, "Since your client failed to attend the previous scheduled examination, we have made another appointment for him/her. Please be advised that his/her failure to attend this examination will cause his/her benefits to be suspended as of 9/2/93, the date of the prior appointment." Silva did not appear for the September 24 examination. Shortly thereafter, U.S. Security notified Silva, through counsel, that it was cutting off benefits effective September 2, 1993. It was undisputed that Silva did not give any notice of

unavailability to attend the September 2 or September 24 appointments and that she offered no excuse for her failure to attend. In sworn interrogatories she subsequently explained that she had been discharged from further medical treatment as of August 27 and that she would not be claiming payment for any medical services rendered after September 2. Under these facts the Third District held that Silva's refusal to submit to the independent medical examination without explanation was unreasonable within the meaning of § 627.736(7).

The Third District's decisions in *Griffen* and *Silva* is in accordance with this Court's decision in *U.S. Security Ins. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000). In *Cimino*, U.S. Security, in accordance with § 627.736(7), scheduled Cimino for an independent medical examination. Cimino attended with his attorney but the physician refused to perform the examination. U.S. Security rescheduled the examination but warned Cimino that her attorney would not be allowed to attend and warned her that the failure to submit to the examination would result in termination of her benefits. This Court in permitting Cimino to condition the independent medical examination upon presence of counsel, held that using the term "unreasonably refuses to submit" the statute envisions scenarios where the insured "reasonably refuses to submit" to the examination and only after the insured provides a reasonable reason does the burden shift to the insurer to establish that the failure to appear was unreasonable. *Id*. at 702.

Since *Cimino* holds that there are scenarios where the insured reasonably refuses to submit, this Court has placed the burden on the insured to establish that the reason behind the failure to submit to the examination was reasonable. It is only after an insured presents evidence that his refusal was reasonable does the burden shift to the insurer to establish that the reason was unreasonable.

This is exactly what the Third District held herein. The Third District found that during Custer's case on whether the bills were reasonable related or necessary Custer established United Auto sent a certified letter to Masis' counsel posted on March 27, 2002, notifying him that United Auto had scheduled an IME for his client on April 11. A copy of the letter also was mailed to Masis. Masis did not appear. On April 12, 2002, United Auto scheduled a second IME for April 29, 2002, employing the same methods of notification. Again, Masis failed to appear. Neither Masis nor his counsel communicated with United Auto in response to the notices. After three weeks had passed from the scheduled date for the second IME, United Auto wrote to Masis' counsel, advising it was denying personal injury protection benefits to Masis as of April 11, 2002, for Masis' failure to appear. On June 20, 2002, Masis' counsel sent United Auto a letter announcing his withdrawal of his representation of Masis. On September 9, 2002, United Auto corresponded further with Masis - again employing certified mail - and reiterated that it was declining to afford him personal injury protection benefits

coverage because of his failure to attend the scheduled IMEs, "which [are] a condition precedent to any legal action." Again, there was no response from Masis. Thereafter, Custer, as Masis' assignee, sued United Auto for $1250 in excess of the deductible for services rendered by it. Consistent with the communication that United Auto sought to have with its insured before suit was filed, United Auto's defense at trial was simply that Masis failed to satisfy a reasonably established condition precedent to payment of his medical bills.

The Third District then found that United Auto proved its defense since it established that Masis was notified of the independent medical examination, that Masis claim would be denied if he failed to submit, and that Masis failed to attend without explanation. The Third District then held that the trial court correctly granted the directed verdict on United Auto's affirmative defense and quashed the circuit court's contrary decision. The fact that the directed verdict was done at the close of Custer's case and not at the close of United Auto's case does not change the result. Here Custer during its case in chief established that Masis received notice of and failed to attend the independent medical examination. Custer did not present any evidence of Masis reason for not attending. Since all of the evidence on United Auto's affirmative defense was before the trial court at the close of Custer's case, the directed verdict on United Auto's affirmative defense was proper at that time.

The Third District herein correctly found that the circuit court departed from the essential requirements of law since the correct law is that the elements of the affirmative defense of unreasonable failure to submit to an independent medical examination are notice and failure to appear. The burden is then on an insured established that his refusal to submit was reasonable. When an insured presents no evidence as his failure to submit then the insurer has proved his affirmative defense that the failure to attend the examination was unreasonable and the insurer is entitled to a judgment in its favor on its affirmative defense.

When an insured fails to attend an independent medical examination without explanation, it would make no sense whatsoever to place the burden on the insurer to establish that the reason was unreasonable. Once the insurer notifies the insured that benefits were being terminated for the insured's failure to attend the examination, the insurer assumes an adverse relationship with its insured. If the insurer is successful in determining that the reason for the failure to attend was unreasonable, the insurer is no longer responsible for the bills. However, the insured remains liable for the bills. Under Custer's contention, as long as the insured remains silent, the refusal to attend will be deemed reasonable and the insurer would be responsible for PIP benefits. Clearly this scenario runs counter to intent behind the independent medical examination requirement which is to provide the insurer with an opportunity to evaluate whether

benefits should be paid. *Tindall v. Allstate Insurance Co.*, 472 So.2d 1291, 1293 (Fla. 2d DCA 1985).

Since Custer failed to present any evidence concerning the reason for Masis' failure to attend the independent medical examination, Custer was not entitled to have the case go to the jury so it could argue hypothetical reasons why Masis failed to appeal. Although attorneys are given broad latitude in closing arguments, remarks must be confined to the evidence and to issues and inferences that can be drawn from the evidence. *SDG Dadeland Associates. Inc. v. Anthony*, 979 So.2d 997, 1002 (Fla. 3d DCA 2008). Inasmuch as Masis stop treating before he was discharged, Custer could not argue to the jury that the reasonable reason Masis did not attend the independent medical examination was because he was discharged from treatment. In fact the evidence is contrary thereto, since Dr. Inchauski testified that without reevaluating Masis he could not determine when Masis would have reached medical maximum improvement.

In order to avoid affirmance, Custer contends that even if United Auto proved its affirmative defense by establishing the failure to appear without explanation, Custer is still entitled to relief since United Auto received the bills on March 26, 2002 and the failure to appear occurred on April 12, 2002. Therefore Custer continues that under *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593, 596 (Fla. 3d DCA 1997) the failure to

attend the independent medical exam did not relieve United Auto from paying PIP benefits since all the bills were received before the date of the examination.

This issue was raised by Custer during the hearing on the motion for directed verdict. However Custer neither raised this issue in its appeal to the circuit court, nor was it raised in its response in the Third District. As such it was waived. *Roth v. Cohen*, 941 So.2d 496, 500 (Fla. 3d DCA 2006).

As to the merits, Custer still cannot prevail. In the instant case, United Auto notified Masis that based on his unreasonable refusal to attend the independent medical examinations scheduled for April 11, 2002 and April 29, 2002, his benefits were suspended or denied effective April 11, 2002. On March 28, 2002, the Insurer received requests for PIP benefits for treatment that occurred prior to April 11, 2002 the day benefits were suspended.

The trial court held that since the requested benefits was not payable until April 27, 2002, 30 days after receipt, the United Auto was not liable for the requested benefits since the Masis' unreasonable refusal to appear at the independent medical examination of April 11, 2002, prevented it from evaluating whether said benefits should be paid and this failure alleviated it from liability for those benefits.

This position is based on *United Automobile Ins. Co. v. Rodriguez,* 808 So.2d 82 (Fla. 2001). In *Rodriguez* this Court quashed the Third District's holding that if a PIP

insurer fails to pay benefits with 30 days after its receipt, the insurer is forever barred from contesting the claim. In so doing, this Court delineated the criteria governing payment of benefits and penalties as follows: (1) an insured may seek the payment of benefits for a covered loss by submitting reasonable proof of such loss to the insurer; (2) if the benefits are not paid within 30 days and the insurer does not have reasonable proof that it is not responsible for payment, the payment is overdue; (3) all overdue payments shall bear simple interest at a rate of ten percent per year; and (4) whenever an insured files an action for payment of PIP benefits and prevails, the insured is entitled to attorney's fees.

According to *Rodriguez*, PIP benefits are not due until 30 days after the receipt of the request for benefits. This 30 day period is given to the insurer so that the insurer may evaluate whether it is obligated to pay benefits under its policy. An independent medical examination is one method which the insurer can utilize to determine whether benefits should be paid and an unreasonable refusal of a claimant to submit to an examination alleviates the insurer of any further liability for PIP benefits. *Tindall v. Allstate Insurance Co.*, 472 So.2d 1291, 1293 (Fla. 2d DCA 1985).

Both *Rodriguez* and *Silva* deal with when benefits are payable and not when treatment is received. *Rodriguez* gives the insurer 30 days to investigate the claim to determine whether the insurer is obligated to pay the request for PIP benefits and *Silva*

establishes that an unreasonable refusal to attend an independent medical examination prohibits the insurer from determining if it is responsible for the benefits and therefore alleviates the insure from liability for requests for benefits received after the benefits are suspended. Thus it is only logical that when a request for benefits is received before the independent medical examination termination of benefits date and the request for benefits is not due until after the termination of benefits date, then said request should not be considered received by the insurer prior to the termination of benefits date. This would enforce the insurer's right to its 30 day period to evaluate the request and the failure to attend the independent medical examination would apply to requests for benefits that have been received but are not due.

To hold otherwise would curtail the insurer's 30 day period to investigate claims. It would also encourage insureds not to attend independent medical examinations and to file the request for benefits as soon as they receive the notice to attend the examination. This would effectively prevent the insurer from determining the medical necessity of the treatment contained in the request for benefits.

CONCLUSION

Based upon the foregoing points and authorities, Respondent respectfully submits that the Third District's decision does not create any conflict and therefore Respondent prays that this Court approve the Third District's decision.

Respectfully submitted,

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_____
MICHAEL J. NEIMAND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail, on this ___ day of December 2009 to: Marlene Reiss, Esq., Two Datran Center, Suite 1612. 9130 South Dadeland Boulevard, Miami, Florida 33156.

_____
MICHAEL J. NEIMAND

CERTIFICATE OF COMPLIANCE WITH FLORIDA RULE OF APPELLATE PROCEDURE 9.210

I HEREBY CERTIFY that this brief complies the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
MICHAEL J. NEIMAND