IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-2036
THIRD DCA CASE NO.: 3D06-458

CUSTER MEDICAL CENTER,
(a/a/o Maximo Masis),

Petitioner,

vs.

UNITED AUTOMOBILE
INSURANCE COMPANY,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF
On Discretionary Review from the Third District Court of Appeal

---

MARLENE S. REISS, ESQ.
Fla. Bar No. 864048
Counsel for Petitioner Custer Medical
Two Datran Center, Suite 1612
9130 South Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 670-8010
Facsimile: (305) 670-2305

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

LAW OFFICES OF MARLENE S. REISS, ESQ., P.A.
9130 SOUTH DADELAND BOULEVARD ♦DATRAN II - SUITE 1612 ♦MIAMI, FLORIDA 33156
PHONE: 305-670-8010 ♦FAX: 305-670-2305 ♦EMAIL: REISSAPPLAW@BELLSOUTH.NET

INTRODUCTION

The Petitioner, CUSTER MEDICAL CENTER (a/a/o Maximo Masis), seeks review of the Third District Court of Appeal's decision in *United Auto. Ins. Co. v. Custer Medical Center (a/a/o Maximo Masis)*, 990 So.2d 633 (Fla. 3d DCA 2008), *review granted*, 2009 WL 2931672 (Fla., August 31, 2009).

The Third District accepted second-tier certiorari review, quashing the circuit appellate court's decision, which reversed the trial court's entry of a directed verdict in favor of United Automobile Insurance Company. The directed verdict was entered on the erroneous premise that a physical examination of the insured, which is obtained by an insurer pursuant to Fla.Stats. §627.736(7), is a condition precedent to coverage, without regard to whether the insurer has proven that the insured "unreasonably refused" to attend an examination. The §627.736(7) examination is not condition precedent. Rather, it is a condition subsequent. Moreover, §627.736(7)(b) provides that an insurer may avoid liability for subsequent benefits if an insured "unreasonably refuses" to attend the requested examination. As such, §627.736(7)(b) provides an affirmative defense, which must be pled and proven by the insurer.

The Petitioner submits that the Third District's Opinion conflicts with this Court's decisions in *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003);

U.S. Security Inc. Co. v. Cimino, 754 So.2d 697 (Fla. 2000); *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987), and their progeny.

Petitioner Custer Medical Center is a medical provider, which was the valid assignee of a United Auto insured, Maximo Masis. Custer Medical and Mr. Masis are referred to herein by name.

The Respondent, United Automobile Insurance Company, was the defendant in the trial court, and is referred to herein by name.

Citations to the record on appeal appear herein as (R -), and refer to the original index issued by the Third District Court of Appeal. The transcript of the trial proceedings appear herein as (T -).

STATEMENT OF THE CASE AND FACTS

This case has a rather tortured history. It began in 2002 as a claim for personal injury protection (PIP) benefits in county court, in which United Auto alleged an affirmative defense pursuant to Fla.Stats. §627.736(7), arguing that it was relieved of any obligation to pay any PIP benefits because the insured did not appear for two scheduled physical examinations.

The underlying facts are set forth in the circuit appellate court's opinion, dated February 14, 2006. (United's A-1 to Petition for Writ of Certiorari).

United's insured, Maximo Masis, was injured in a car accident on January 1, 2002. *Id.* Mr. Masis sought treatment from Custer Medical Center, which submitted medical bills to United Auto for payment of PIP benefits. *Id.*

On March 28, 2002, United received Custer's medical bills in the amount of $4,250. *Id.*

One day earlier, on March 27, 2002, United sent Mr. Masis's

attorneys a letter scheduling an "Independent Medical Examination" (IME) for April 11, 2002. *Id.* Mr. Masis did not appear for the IME.

On April 12, 2002, United sent another letter, scheduling another IME for April 29, 2002. *Id.* Mr. Masis did not appear for the second IME.

United suspended Mr. Masis's PIP benefits as of April 11, 2002, on the basis that he "unreasonably refused" to attend his scheduled IME. *Id.*

Custer sued United. *Id.* Among its affirmative defenses, United alleged that Mr. Masis failed to attend two scheduled independent medical examinations. (United's A-25 to Petition for Writ of Certiorari). The case proceeded to trial.[1]

At trial, Masis's United policy was put into evidence without objection. (T 87). The policy stated, in pertinent part:

[1] On May 23, 2007, the record below was supplemented with the trial transcript, dated August 24, 2004, in response to the Third District's order, dated May 22, 2007.

> A person seeking coverage must:
>
> [S]ubmit to mental or physical examinations at "our" expense when and as often as "we" may reasonably require. A copy of the medical report shall be forwarded to such person if requested in writing. If the person ***unreasonably*** refuses to submit to an examination, "we" will not be liable for ***subsequent*** personal injury protection benefits.

(Policy at 14, ¶3)(emphasis added).[2]

Custer presented its case with the testimony of Mr. Masis's treating physician and Custer's records and billing custodian to prove that the treatment rendered to Mr. Masis was medically reasonable, related and necessary, and that the billed amounts were reasonable. (T 29-81,100-123). Custer also presented the testimony of United's litigation adjuster, who testified that United received Custer's bills on March 28, 2002. (T 93).

[2] On January 29, 2008, the trial exhibits were filed in the Third District in response to the court's order, dated January 28, 2008.

Immediately following the Plaintiff's case, United moved for directed verdict arguing that Masis's failure to appear for the April 12, 2002, IME was "unreasonable" as a matter of law. *Id.*[3]

After protracted argument, the trial court found as a matter of law that, "two failures to appear without objections to the notices that were sent constitute an unreasonable refusal to submit to the medical examination as requested," and granted a directed verdict in favor of United. (T 167-168). Thus, United obtained a directed verdict prior to putting on any evidence whatsoever to prove its affirmative defense.

Custer appealed to the circuit court, arguing that the directed verdict was premature, because the issue of whether an insured's failure to attend a physical examination is "unreasonable" is a factual question for the jury. (Custer's Initial Brief). Custer further argued that it was never Custer's burden to demonstrate the reasonableness of Mr. Masis's failure to appear, because United had alleged the

[3] At trial, when United moved for directed verdict, Custer's counsel proffered factual questions relating, *inter alia*, to the IME notices sent by United, and the fact that the insurance policy itself says that United would not be responsible for "subsequent" benefits following an "unreasonable refusal" to attend an IME. Nonetheless, the trial court directed a verdict in United's favor. (T 148, 155, 157).

failure to appear as an affirmative defense and, thus, had the burden to prove its defense. (Custer's Initial Brief.) The circuit appellate court reversed, determining that the directed verdict was premature, because it was not the Plaintiff's burden to prove United's affirmative defense. (United's A 1-3 to Petition for Writ of Certiorari).

The circuit court reversed the directed verdict and remanded for a new trial determining, in pertinent part:

> In 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.

(United's A - 3 to Petition for Writ of Certiorari).

United sought second-tier certiorari review of the circuit court's decision. (United's Petition for Writ of Certiorari).

As a basis for second-tier certiorari jurisdiction, United argued that the circuit

court's ruling departed from the essential requirements of law "since at the close of the Respondent's case the facts established that the failure to attend was unreasonable since the Respondent did not present any evidence to concerning [sic] the reason for the Insured's failure to attend the IME and thus the burden never shifted to the Insurer to prove that the refusal was unreasonable." (Petition for Writ of Certiorari at 6). As further basis for the Third District's second-tier certiorari jurisdiction, United alleged that the circuit court's decision caused a "material injustice since it would require [United] to continue to litigate when it is not so required." (United's Petition at 10). "Additionally, the circuit court's decision established a erroneous [sic] rule of general application concerning the affirmative defense of failing to appear at an IME which is binding in PIP cases within the eleventh judicial circuit, but is also persuasive precedent in all other circuits. Therefore this decision results in a miscarriage of justice that warrants the exercise of this Court's certiorari jurisdiction." (United's Petition at 10).

The Third District accepted certiorari jurisdiction, issuing its original opinion on September 5, 2007. That opinion quashed the circuit court's decision based on *Griffin v. Stonewall*, 346 So.2d 97 (Fla. 3d DCA 1977) in which the Third District "long ago held in identical circumstances that an insured's failure to comply with a condition precedent that he appear for an independent medical examination

constituted grounds to enter judgment for the insurer," citing *Goldman v. State Farm Gen. Ins. Co.*, 660 So.2d 300 (Fla. 4th DCA 1995).

In its Motion for Rehearing, Custer pointed out that the Third District relied on case law that was not applicable in this case. *Goldman v. State Farm Gen. Ins. Co.*, 660 So.2d 300 (Fla. 4th DCA 1995), was a homeowner's case - - not a PIP case, and *Griffin v. Stonewall*, 346 So.2d 97 (Fla. 3d DCA 1977) dealt with an earlier version of the PIP statute that did not include the "unreasonable refusal" language that is critical in this case.[4]

In a second corrected opinion denying Custer's Motion for Rehearing and Motion for Rehearing *En Banc*, the Third District stated:

> Consistent with the communication that United sought to have with its insured before suit was filed, United's defense at trial was simply that Masis failed to satisfy a reasonably established condition precedent to payment of his medical bills.
>
> A plain reading of this statute [Fla.Stats. §627.736(7)] makes clear that an insured's submission to an IME is a

[4] The "unreasonably refuses to attend" language was not added until 1976 and would not have been applicable to a policy which pre-dated the amendment. Thus, under the pre-1976 statute applicable in *Griffin*, all that an insurer had to demonstrate was a mere failure to attend the IME, *not* that the insured "unreasonably refused" to attend. *See* §627.736(7)(b), Fla.Stats. (1976).

> condition precedent to coverage. *See Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300, 304 n.5 (Fla. The DCA 1995). ...
>
> . . . . .
>
> It is clear in this case that United's requests for Masis to present himself for an IME were not patently unreasonable. *See Tindall, II v. Allstate Ins. Co.*, 472 So.2d 1291 (Fla. 2d DCA 1985).
>
> . . . . .
>
> Neither Masis nor his counsel responded to the requests at any time during the nearly two-month period during which United sought to schedule an IME of its insured. On these undisputed facts, the trial court correctly directed a verdict in favor of the insurer. *See Griffin v. Am. Gen. Life & Accident Ins. Co.*, 752 So.2d 621, 623 (Fla. 2d DCA 1999).

Custer Medical, supra, at 635.

The Third District quashed the circuit court's opinion, directing the circuit court to reinstate the directed verdict. Custer's Motion for Rehearing *En Banc* was denied, with a lengthy dissent by one judge. *See Custer Medical Center (a/a/o Maximo Masis) v. United Auto. Ins. Co.*, 990 So.2d 633 (Fla. 3d DCA 2008), *rehearing denied*, Ramirez, J. dissenting to denial of rehearing *en banc.*

Custer invoked this Court's discretionary jurisdiction, alleging conflict between the Third District's decision in this case and this Court's decisions in

Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885 (Fla. 2003); *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000); and *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987).

On August 31, 2009, this Court issued its Order accepting jurisdiction.

ISSUES ON APPEAL

I. THE THIRD DISTRICT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *ALLSTATE INS. CO. v. KAKLAMANOS*, 843 So.2d 885 (FLA. 2003); *U.S. SECURITY INC. CO. v. CIMINO*, 754 So.2d 697 (FLA. 2000); *DORSE v. ARMSTRONG WORLD INDUS., INC.*, 513 So.2d 1265 (FLA. 1987) TO CONFER CONFLICT JURISDICTION ON THIS COURT.

II. THE PHYSICAL EXAMINATION OF AN INSURED OBTAINED BY AN INSURER IN AN ACTION FOR PERSONAL INJURY PROTECTION (PIP) BENEFITS, PURSUANT TO FLA.STATS. §627.736(7), IS NOT A CONDITION PRECEDENT TO COVERAGE - - AN INSURED'S ALLEGED "UNREASONABLE REFUSAL" TO ATTEND SUCH A PHYSICAL EXAMINATION, WHICH RELIEVES THE INSURER OF LIABILITY FOR SUBSEQUENT BENEFITS, IS AN AFFIRMATIVE DEFENSE THAT MUST BE PLED AND PROVEN BY THE DEFENDANT INSURER.

SUMMARY OF THE ARGUMENT

This case involves a provision of Florida's Personal Injury Protection (PIP) Statute, Fla.Stats. §627.736(7), which allows an insurer to request that an insured submit to a physical examination. The statute provides that "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." Fla.Stats. 627.736(7)(b).

On second-tier certiorari review, the Third District held that the obligation to attend such an examination is a condition precedent to coverage, and the insured's simple failure to attend relieves the insurer of *any* obligation to pay *any* medical bills incurred by the insured.

I. The Third District Did Not Have Second-Tier Certiorari Jurisdiction

The Third District did not have second-tier certiorari jurisdiction on the sole basis that it disagreed with the circuit appellate court's interpretation of the statute. *See Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003). The circuit court applied the correct law, i.e., Fla.Stats. §627.736(7) and this Court's decisions in *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000) and *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987). In the absence of any departure from the essential requirements of law, the Third District did not have

jurisdiction to review and quash the circuit court's decision.

II. The Third District's Decision Ignores the Plain Language of Fla.Stats. §627.736(7) and Conflicts With Decisions of This Court

On the merits, the Third District's decision conflicts with this Court's decisions in *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000) and *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987), and ignores the language of Fla.Stats. §627.736(7).

By holding that a simple failure to attend a physical examination pursuant to Fla.Stats. §627.736(7) is unreasonable as a matter of law, the Third District's decision conflicts with *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000) in which this Court held that "there are scenarios where the insured 'reasonably refuses to submit' to the examination." 754 So.2d at 702. Until the Third District's decision in this case, there was no case holding that a simple failure to attend two scheduled medical examinations entitled an insurer to deny PIP benefits as a matter of law. Nor was there any case law holding that a physical examination pursuant to §627.736(7) is a condition precedent to coverage or a condition precedent to filing suit.

By holding that an insured's obligation to attend a §627.736(7)(a) physical

examination is a "condition precedent" to coverage, the Third District has added a requirement that does not appear in the statute, and has ignored the language of§627.736(7)(b), which provides an avoidance of liability for the insurer, i.e., an affirmative defense that must be proven by the insurer.

The decision conflicts with this Court's decision in *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987), in which the Court held that a defense by which one of the defendants sought to avoid liability in a products liability action had to be proven by that defendant. 513 So.2d at 1269. The Third District has shifted the burden of proving an insured's "unreasonable refusal" to attend a physical examination to the insured.

The Third District's decision has far-reaching implications to the extent that PIP insurance is mandatory coverage that every Florida citizen who owns an operable vehicle must purchase. The statute requires all claimants to submit to a physical examination when requested by the insurer, but not as a condition precedent to either coverage or access to the courts.

The Court should find that conflict jurisdiction exists and should quash the Third District's decision on the bases that: (1) no second-tier certiorari existed below; (2) a §627.736(7) examination is not a condition precedent; and, (3) an insurer has the burden of proving its affirmative defenses that an insured has

"unreasonably refused" to attend an examination.

ARGUMENT

I. THE THIRD DISTRICT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *ALLSTATE INS. CO. v. KAKLAMANOS*, 843 So.2d 885 (FLA. 2003); *U.S. SECURITY INC. CO. v. CIMINO*, 754 So.2d 697 (FLA. 2000); *DORSE v. ARMSTRONG WORLD INDUS., INC.*, 513 So.2d 1265 (FLA. 1987) TO CONFER CONFLICT JURISDICTION ON THIS COURT.

a. The Opinion Conflicts With This Court's Decision in *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003)

As the stated basis for accepting second-tier certiorari jurisdiction, the Third District cited *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003), in order to quash the circuit court's opinion. The circuit court held that the county court prematurely entered a directed verdict in favor of United Auto at the close of Plaintiff Custer's case, where no evidence was presented by United to prove that Mr. Masis's failure to appear for a physical examination requested by United was unreasonable. *Custer*, *supra* at 635.

In *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003), this Court discussed the standard for second-tier certiorari jurisdiction, further refining the evolving standard as set forth in *Ivey v. Allstate Ins. Co.*, 774 So.2d 679 (Fla. 2000), *Haines City Community Dev. v. Heggs*, 658 So.2d 523 (Fla. 1995), and

Combs v. State, 436 So.2d 93 (Fla. 1983).

In *Ivey*, *supra*, the Court held that the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error. "A district court should exercise its discretion to grant certiorari review *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Kaklamanos*, *supra* at 889, (emphasis in original), *citing Ivey*, *supra* at 682.

This Court concluded in *Kaklamanos* that "clearly established law" can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. *Kaklamanos*, however, does not permit a district court to create a newly established principle of law in order to quash a circuit court's decision on that basis. *Kaklamanos*, and all of the cases preceding it that deal with second-tier certiorari jurisdiction all lead to the conclusion that there must be departure from clearly established law.

Here, the Third District "created a new legal principle" unfounded in any controlling case law, rule, statute or constitutional law, and then concluded that the circuit court departed from it! *Custer*, *supra* at 639, Ramirez, J., dissenting from denial of rehearing *en banc*. The new legal principle created by the panel decision is that an insured's simple failure to appear for two scheduled physical

examinations is "unreasonable" as a matter of law - - a conclusion that is contrary to this Court's decision in *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000), as we explain below. In addition, the Third District has created the new legal principle that a physical examination pursuant to Fla.Stats. §627.736(7) is a "condition precedent" to coverage, which must be proven by the insured. There is nothing in the statute or any case law to support the notion that a physical examination is a condition precedent to coverage, as the Third District suggests, or a condition precedent to filing suit, as United's policy suggests.

The dissent from the Third District's denial of rehearing *en banc* found that the panel abused the certiorari remedy where the circuit court's "well reasoned unanimous decision" relied on extensive case law regarding motions for directed verdict and where the Third District panel merely "[paid] lip service to the standard of review in granting certiorari review - that the circuit court appellate division departed from the essential requirements of law, which the circuit court apparently did by concluding otherwise than [the] panel opinion." *Custer, supra* at 639, Ramirez, J., dissenting from denial of rehearing *en banc*. The dissent also noted that until the Third District's decision was issued, "there was simply no case holding that the failure to attend two scheduled medical examinations, as a matter of law, entitled the insurer to deny PIP benefits." *Custer, supra* at 638, Ramirez, J.,

dissenting from denial of rehearing *en banc*. Similarly, there is no case holding that a physical examination pursuant to Fla.Stats. §627.736(7) is a condition precedent of any sort.

In fact, the circuit court followed "clearly established law" consisting of this Court's decision in *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000), and the Third District's own decision in *Universal Medical Center of So. Fla. v. Fortune Ins. Co.*, 761 So.2d 386 (Fla. 3d DCA 2000), in which the court reversed a final judgment in favor of Fortune after a bench trial where the trial court found that the insured had "unreasonably refused" to attend a physical examination. *See Custer, supra* at 638, Ramirez, J., dissenting from denial of rehearing *en banc*.

Thus, the Third District's actual basis for certiorari jurisdiction - - a departure from newly created principles of law which have no basis in "clearly established law" - - conflicts with *Kaklamanos, supra*, and its predecessors, *Ivey, supra; Heggs, supra; and Combs, supra.*

b. The Opinion Conflicts With this Court's Decision in *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000)

This Court dealt specifically with Fla.Stats. §627.736(7) in *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000), which the Third District's decision wholly ignores.

In *Cimino, supra,* U.S. Security's insured sought PIP benefits for injuries

that she sustained in an car accident. U.S. Security scheduled Ms. Cimino for a physical examination, pursuant to Fla.Stats. §627.736(7)(a).[5] Cimino requested that her attorney be permitted to attend the physical examination with a hand-held video camera and reported to the physician's office with her attorney. The physician refused to perform the exam. U.S. Security rescheduled the exam, but warned Cimino that her attorney would not be allowed to attend, and that her failure to attend would result in termination of her PIP benefits. In analyzing the presence of an attorney during a medical examination as an issue of first impression, the Court examined the requirements of §627.736(7)(a)-(b) and addressed the issue of whether Cimino's refusal to attend her examination without her attorney was "unreasonable." *Cimino, supra* at 702.

> The language of the contract at issue here and section 627.736 contemplate a situation, such as this one, where the insured "reasonably refuses to submit" to an examination. By using the term "unreasonably refuses to submit" in both the conditions section of the policy and subsection 627.736[7](b), it is logical to deduce there are

[5] Although the Third District's opinion refers to the missed examinations as "independent medical examinations," (IMEs), the No-Fault Statute does not mention the term "independent medical examination," when it refers to the physical examination that an insurer may request of an insured. Although we submit that an examination requested by, purchased by, and scheduled by an insurer is not "independent," United Auto and many court decisions routinely refer to §627.736 examinations as IMEs. Therefore, the Court will see that "physical examination" and "IME" are used interchangeably.

> scenarios where the insured "reasonably refuses to submit" to the examination. In a situation where the insured wants an attorney or other third party present at the examination, the burden is on the party opposing the third party's presence to prove that the presence is unreasonable.

Cimino, supra at 702.

In this case, the dissent from the Third District's denial of rehearing *en banc* concluded that the panel's decision "runs counter" to this Court's decision in *Cimino*, "a discussion of which is conspicuously absent from [the] panel opinion." *Custer, supra* at 638, Ramirez, J., dissenting from denial of rehearing *en banc*.

By holding that two missed appointments automatically forfeits PIP coverage, a conclusion that is wholly unsupported by the statute and United's own policy, the Third District deleted the word "unreasonable" from the statute.[6]

In short, the Third District's decision simply ignores *Cimino, supra*, and the plain language of the statute, in order to reach the conclusion that a simple failure to attend two scheduled physical examinations constitutes an "unreasonable refusal" as a matter of law.

---

[6] As we explain in greater detail below,§627.736(7) was amended in 1976 to include the "unreasonably refuses" language. Prior to that amendment, an insured's simple failure to attend a physical examination relieved the insurer of liability. See *Griffin v. Stonewall*, 346 So.2d 97 (Fla. 3d DCA 1977). Subsequent to the statute's amendment requiring proof of an "unreasonable refusal" in order to avoid liability, the Third District was not free to ignore the language.

c. The Opinion Conflicts With this Court's Decision in
***Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987)**

Well established law from every district, including this Court's decisions in *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987), *Hough v. Menses*, 95 So.2d 410 (Fla. 1957), and *Chambers v. Chambers*, 102 So.2d 171 (Fla. 1958)(same), establishes that an affirmative defense must be proven by the defendant who asserts the defense - - not the plaintiff.

The Third District's opinion turns what the Legislature established as an affirmative defense in §627.736(7)(b) into a "condition precedent," placing the burden on the plaintiff to prove that an insured's non-attendance at a physical examination is not an "unreasonable refusal." *Custer*, *supra* at 633.[7]

In *Dorse*, the plaintiff sued multiple defendants, including Eagle-Picher Industries, for wrongful death related to asbestos exposure while working as a coppersmith constructing naval vessels during World War II. Eagle-Picher asserted a previously unrecognized affirmative defense, the "government contractor defense," alleging that it manufactured and sold asbestos-containing materials to the Navy pursuant to government contracts, which required strict compliance with contract specifications. The Court was asked by the Eleventh

[7] The Petitioner explains below why a physical examination, pursuant to Fla.Stats. §627.736(7) is not - - and cannot be - - a condition precedent.

Circuit Court of Appeals to answer the certified question of whether Florida recognized the defense. This Court concluded that the defense was available to Eagle-Picher, recognizing that "[a]s an affirmative defense, the burden of proving each element will rest on the one asserting it," and proceeded to set forth the elements of the defense. *Dorse, supra* at 1269, n.5. *See also Hough v. Menses*, 95 So.2d 410 (Fla. 1957)("[t]he burden is on the defendant to prove his affirmative defenses, ..."); *Chambers v. Chambers*, 102 So.2d 171 (Fla. 1958)(same).

Florida district courts, including the Third District, have always required a defendant who asserts an affirmative defense to prove the defense. *See Cullum v. Packo*, 947 So.2d 533 (Fla. 1st DCA 2006)("Packo raised the failure to cure as an affirmative defense and would thus bear the burden of proving the affirmative defense."); *Braid Sales and Marketing, Inc. v. R & L Carriers, Inc.*, 838 So.2d 590 (Fla. 5th DCA 2003)(defendants had the burden to prove at trial its affirmative defense based upon Carmack Amendment); *Pierson v. State Farm Mutual Auto. Ins. Co.*, 621 So.2d 576 (Fla. 2d DCA 1993)(insurer's burden to prove cancellation as affirmative defense); *Henderson Development Co., Inc. v. Gerrits*, 340 So.2d 1205 (Fla. 3d DCA 1976)(burden on defendant to prove affirmative defense of bona fide purchaser).

In this case, the dissent from the Third District's denial of

rehearing *en banc* stated, "The panel opinion fails to explain why the circuit court departed from the essential requirements of law by placing the burden on United to prove its affirmative defense. . . . To quash the circuit court opinion, the panel turns what was always an 'affirmative defense' into a 'condition precedent.'" *Custer*, 990 So.2d at 636.[8]

[8] One of the problems with the Third District's opinion is that it reframed the pleadings on appeal. United asserted an affirmative defense to the effect that Mr. Masis unreasonably failed to attend his scheduled examinations. As the dissent notes, throughout the litigation below the parties consistently treated the alleged failure to attend physical examinations as an affirmative defense. *Custer, supra* at 636, Ramirez, J., dissenting from denial of rehearing *en banc*.

> To quash the circuit court opinion, the panel turns what was always an "affirmative defense" into a "condition precedent." This novel approach was neither argued below nor even advocated in the petition for writ of certiorari. Changing the state of the pleadings at the appellate level constitutes, in my view, a clear violation of due process.

Id.

For these reasons, the Court will not see any arguments below with regard to the "condition precedent" analysis applied by the Third District. Since the alleged failure to appear at the scheduled examinations was never litigated as a failure to comply with a condition precedent, Custer never had the opportunity - - or any reason - - to argue why a §627.736(7) physical examination is *not* a condition precedent.

The Third District's opinion directly conflicts with this Court's decision in *Dorse, supra*, and its earlier decisions in *Hough, supra*, and *Chambers, supra*., as well as every district court decision that has followed the well established principle that a defendant must prove its own affirmative defense.

II. THE PHYSICAL EXAMINATION OF AN INSURED OBTAINED BY AN INSURER IN AN ACTION FOR PERSONAL INJURY PROTECTION (PIP) BENEFITS, PURSUANT TO FLA.STATS. §627.736(7), IS NOT A CONDITION PRECEDENT TO COVERAGE - - AN INSURED'S ALLEGED "UNREASONABLE REFUSAL" TO ATTEND SUCH A PHYSICAL EXAMINATION, WHICH RELIEVES THE INSURER OF LIABILITY FOR SUBSEQUENT BENEFITS, IS AN AFFIRMATIVE DEFENSE THAT MUST BE PLED AND PROVEN BY THE DEFENDANT INSURER.

On the merits, the Third District's conclusion that an insured's appearance at a scheduled physical examination, pursuant to Fla.Stats. §627.736(7), is a condition precedent to coverage is not supported by the statute, case law, or United's own policy. Neither the language of the PIP Statute nor any case suggests that such an examination is a condition precedent to coverage. Nor does the Statute or any case suggest that attendance at such an examination is a condition precedent to filing suit, as United's policy suggests.

A. The Statute

Florida Statutes §627.736(7) provides that an insurer may request that an insured submit to a physical examination whenever the physical condition of the injured person is material to a claim for PIP benefits. In pertinent part, the statute provides:

> (a) 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 of future personal injury protection insurance benefits, such person shall, upon the request of the insurer, submit to mental or physical examination by a physician or physicians. . . . Personal protection insurers are authorized to include *reasonable* provisions in personal injury protection insurance policies for mental and physical examination of those claiming personal injury protection insurance benefits. ... .
>
> (b) 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.

Section 627.736(7)(a)-(b), Fla.Stats. (2001)(emphasis added).[9]

The language of the statute unambiguously demonstrates that an insured's "unreasonable refusal" to attend a scheduled physical examination provides an insurer with an affirmative defense, which allows the insurer to avoid liability for

[9] The applicable version of the statute pertinent to this case is the 2001 version. Mr. Masis was injured on January 2, 2002. He purchased his policy in December of 2001.

"subsequent benefits."

B. The Policy

United's policy tracked the language of the statute, providing in pertinent part:

> A person seeking coverage must:
>
> [S]ubmit to mental or physical examinations at "our" expense when and as often as "we" may reasonably require. A copy of the medical report shall be forwarded to such person if requested in writing. If the person ***unreasonably*** refuses to submit to an examination, "we" will not be liable for ***subsequent*** personal injury protection benefits.

(Policy at 14, ¶3)(emphasis added).

However, the Third District's decision does not mention the portion of the policy that tracks the statute, and which requires United to demonstrate that Mr. Masis "unreasonably refused" to attend his scheduled examinations. Instead, the provision of the policy on which the Third District relies, states, in pertinent part:

> No action shall lie against [United], unless, as a condition precedent thereto, there shall have been full compliance with all terms of this insurance Policy ... .

Custer, supra at 634, quoting policy at Part E, Section I, "Conditions" at ¶2.

Although the Third District relied on the "Conditions" section of United's policy and inapplicable case to conclude that "an insured's submission to an IME is

a condition precedent to coverage," a plain reading of even the portion of United's policy on which the court relied demonstrates that United did not intend for attendance at an examination to be a condition precedent to *coverage*. Rather, the policy language suggests that a physical examination is a "condition precedent" to *filing suit* against United, i.e. "[n]o action shall lie against 'us,' . . .." . *Custer, supra* at 634, n.1. The policy does not mention that a failure to comply with terms of the policy will deprive the insured of *coverage* under the policy - - as the Third District construed the "Conditions" provision.

The terms under which United can either deny coverage *or* deny Custer access to the courts are set forth within and limited by the PIP statute.

The PIP Statute *does* contain certain conditions precedent to filing suit, such as the requirement that an insured send a demand letter prior to filing suit, but attendance at a physical examination is not one of them. *See* §627.736(10), Fla.Stats. (2008), formerly Fla.Stats. §627.736(11)("(a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation.") If the insurer pays the claim before the expiration of the statutory demand letter time period (currently 30 days), the insurer is relieved of the penalty provisions contained in Fla.Stats. §627.736(4)(b). There is no similar "condition precedent" language that requires

an insured to attend a §627.736(7) physical examination prior to filing suit. Indeed, imposing conditions precedent beyond those provided for in the statute would be contrary to well established law, and contrary to that portion of the PIP statute that authorizes insurers to include "*reasonable*" provisions in their policies for such examinations. *See* Fla.Stats. §627.736(7)(a).

While the "Conditions" section of United's policy requires an insured to comply with the policy's conditions, United may not impose a forfeiture of benefits in their entirety where the statute does not authorize such a forfeiture. We submit that the Third District has misread United's policy to the extent that even United's policy tracks the language of the statute, which relieves United of liability for *subsequent* benefits if an insured "unreasonably refuses" to attend an examination. Nonetheless, the Third District's decision relies on the "Conditions" provision to conclude that attendance at a physical examination is a condition precedent.

Considering the Third District's interpretation of United's policy, and considering that United's policy seeks to impose a condition precedent to filing suit (as opposed to a condition precedent to coverage), neither the Third District nor United can impose more restrictions on the insured than the statute allows.

While the terms of an insurance policy can be more expansive than the statute, they cannot be more restrictive. *See Flores v. Allstate Ins. Co.*, 819 So.2d

740 (Fla. 2002); *Carguillo v. State Farm Mut. Auto. Ins. Co.*, 529 So.2d 276 (Fla. 1988)("While an insurer may provide more coverage than is statutorily required, there is not requirements that an insured be protected to a greater extent than that statutorily mandated."); *Vasques v. Mercury Cas. Co.*, 947 So.2d 1265 (Fla. 5th DCA 2007); *Diaz-Hernandez v. State Farm Fire and Cas. Co.*, 2009 WL 3273205 (Fla. 3d DCA, October 14, 2009)(denying rehearing on the basis that "a policy provision cannot lawfully restrict the rights of a UM insured beyond those specifically provided by statute.")

Policy provisions that tend to limit or avoid liability are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy, and exclusions to coverage are construed even more strictly against the insurer than coverage clauses. *See Flores v. Allstate Ins. Co.*, 819 So.2d 740 (Fla. 2002).

In *Flores, supra*, this Court examined the applicability of a fraud exclusion in one part of a divisible insurance policy (the PIP portion of the policy) to all portions of the policy, which would result in voiding the insured's recovery of benefits under the UM portion of the policy.

Looking to legislative intent behind the No-Fault Statute, the Court stated:

> [T]he intention of the Legislature, as mirrored by the decision of this Court, is plain to provide for the broad protection of the citizens of this State against uninsured

> motorist. *As a creature of statute rather than a matter for contemplation of the parties in creating insurance policies*, the uninsured motorist protection is not susceptible to the attempts of the insurer to limit or negate that protection.

Flores, supra at 745, (emphasis in original), quoting *Salas v. Liberty Mut. Fire Ins. Co.*, 272 So.2d 1, 5 (Fla. 1972).

> In light of the overarching purposes behind the statutory protection, *conditions or exclusions must be carefully scrutinized first to determine whether the condition or exclusion unambiguously excludes or limits coverage, and then to determine, if so, whether enforcement of a specific provision would be contrary to the purpose of the uninsured motorist statute*. Furthermore, because both PIP and UM are statutorily mandated coverages, analogies to cases interpreting coverages that are not statutorily mandated, such as provision in fire, life and property insurance policies, may not necessarily be illuminating in guiding our analysis.

Flores, supra at 745(emphasis added).

Based on this Court's analysis in *Flores, supra*, the Fifth District in *Vasques v. Mercury Ins. Co.*, 947 So.2d 1265 (Fla. 5th DCA 2007), granted certiorari to quash a circuit court decision which affirmed a summary judgment in favor of Mercury Insurance Company. The circuit court interpreted a fraud exclusion in Mercury's policy to preclude coverage to a claimant injured while performing repairs on the automobile of a Mercury insured who allegedly lied during her

examination under oath. The court concluded that interpreting the policy in a manner that would defeat coverage to an innocent insured "would violate the well-articulated public policy considerations giving rise to personal injury protection benefits in this state." *Vasques, supra* at 1270.

As applied to this case, the Third District's interpretation of United's policy as imposing a "condition precedent" to coverage - - or access to the courts as the policy more plainly suggests - - is contrary to the statute and legislative intent.

Time and again, this Court has recognized that "PIP benefits are an integral part of the no-fault statutory scheme," *Flores, supra,* at 744, "that the language of the PIP statute should be interpreted liberally to effectuate the legislative purpose of providing broad PIP coverage for Florida motorists," *Malu v. Security Natl. Ins. Co.*, 898 So.2d 69 (Fla. 2005), and that PIP benefits must be paid "swiftly and virtually automatically." *Ivey v. Allstate Ins. Co.*, 774 So.2d 679 (Fla. 2000).

Thus, the Third District's reliance on United's policy to impose a "condition precedent" on an insured, where the statute plainly does not do so, is contrary to well established law.

The statute *and* United's policy provide that United is relieved of its obligation to pay *subsequent* benefits *if* an insured "unreasonably refuses" to attend a physical examination. In the absence of *any* proof of an "unreasonable refusal,"

the circuit court correctly reversed the trial court's directed verdict. This Court should quash the Third District's opinion, because the Third District has turned a statutory affirmative defense into a "condition precedent," a result that is not supported by the statute or United's own policy, and which is wholly inconsistent with the No-Fault statutory scheme.

C. Section 627.736's Physical Examination is Not a Condition Precedent

The Third District concluded that "[a] plain reading of this statute makes clear that an insured's submission to an IME is a condition precedent to coverage." *Custer, supra* at 634.

In fact, nothing in the language of §627.736(7) suggests that attendance at a physical examination at the request of the insurer is a "condition precedent" to coverage *Id*. Indeed, the language of the statute demonstrates otherwise. Subsection (b) relieves the insurer of liability for "*subsequent"* benefits if an insured unreasonably refuses to attend the examination. Fla.Stats. §627.736(7)(b). If attendance at a physical examination were a condition precedent to *coverage*, the insurer would be relieved of liability for *all* benefits. Nothing in the language of the statute suggests that §627.736(7)(b) is a forfeiture provision. The plain language of the statute demonstrates the legislature's intent to only relieve an insurer of "*subsequent benefits*" in the event an insured unreasonably refuses to

attend an examination. Fla.Stats. §627.736(7)(b).[10]

The Third District relied on three district court cases to reach its conclusion that an insured's submission to a §627.736(7) physical examination "is a condition precedent to coverage." *Custer, supra* at 634. None of those cases are applicable in the context of an insured's unreasonable refusal to an examination pursuant to Fla.Stats. §627.736(7).

i. Goldman v. State Farm Fire Gen. Ins. Co.

First, the court cited *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300, 304 n.5 (Fla. 4th DCA 1995), in which State Farm's insureds filed a claim under their homeowner's policy for a loss sustained in a burglary. On that basis alone, *Goldman* is inapplicable to PIP cases, which are governed by the PIP statute. *See Flores v. Allstate Ins. Co.*, 819 So.2d 740, 745 (Fla. 2002)("[B]ecause both PIP and UM are statutorily mandated coverages, analogies to cases interpreting coverages that are not statutorily mandated, such as provisions in fire, life and property insurance policies, may not necessarily be illuminating. . .."); *see*

[10] As is explained in greater detail below, the Third District's decision is contrary to its own earlier decision in *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593 (Fla. 3d DCA 1997), in which the court defined "subsequent benefits" as medical bills received by the insurer *after* an insured unreasonably refuses to attend an examination, notwithstanding that medical treatment was rendered and bills were incurred prior to the unreasonable refusal to attend.

also Vasques v. Mercury Cas. Co., 947 So.2d 1265 (Fla. 5th DCA 2007).

Second, the insured's obligation under the homeowner's policy was to attend an examination under oath (EUO), not a physical examination permitted by statute. The PIP Statute is silent as to EUOs. On this basis, also, *Goldman* is inapplicable.

Finally, the footnote to which the Third District cites does not say that "an insured's submission to an IME is a condition precedent to coverage." *Custer, supra* at 634. Rather, the entire text of the footnote on which the court relies reads as follows:

> Conditions in policies of insurance are part of the consideration for assuming the risk, and the insured, by accepting the policy, becomes bound by these conditions. There are two kinds of conditions - precedent and subsequent. A condition precedent is one that is to be performed before the contract becomes effective, while a condition subsequent pertains to the contract of insurance after the risk has attached and during its existence. 30 Fla.Jur.2d *Insurance* §2563 (2002). As a general rule, conditions precedent are not favored, and courts will not construe provisions to be such, unless required to do so by plain, unambiguous language or by necessary implication. *In re Estate of Boyar*, 592 So.2d 341 (Fla. 4th DCA 1992).

Goldman, 990 So.2d at 304, n.5.

Goldman, supra does not support the Third District's conclusion. As the dissent to the denial of rehearing stated:

> *Goldman* does not say that medical examinations are a

> condition precedent to coverage. The closest language is the quotation from Florida Jurisprudence Second that " [a] condition precedent is one that is to be performed before the contract becomes effective." *Id.* Submitting to a medical examination may be a condition precedent to the issuance of a life insurance policy. . . . But evidently, it is not to obtain PIP benefits. Our panel opinion would seem to require the insured, as a condition precedent, to submit to a medical examination before he purchased the insurance policy, before the accident occurred and before United even requested that he submit to such an examination. That is the problem with recasting an affirmative defense into a condition precedent.

Custer, supra, at 637, Ramirez, J., dissenting from denial of rehearing *en banc,* (citations omitted).

Where the statute itself relieves the insurer of liability for *subsequent* benefits following an "unreasonable refusal" by the insured to submit to the requested examination, the "unreasonable refusal" *must* be an affirmative defense for two reasons; first, because the statute gives an insurer the means by to *avoid* liability (at least for some benefits); and, second, because if the provision were a condition precedent it would not relieve the insurer of only "subsequent benefits."

Section 627.736(7)(b) gives the insurer a means of avoiding liability even if all of the allegations in an insured's complaint are true - - the very essence of a true affirmative defense, i.e., confession and avoidance. *See King ex rel. Murray v. Rojas*, 767 So.2d 510, n.1 (Fla. 4th DCA 2000); *BPS Guard Services, Inc. v. Gulf*

Power Co., 488 So.2d 638 (Fla. 1st DCA 1986)("affirmative defenses" raised by defendant were not in the form of avoidance and confession, but were mere denials and, thus, were properly stricken); *Kitchen v. Kitchen*, 404 So.2d 203 (Fla. 2d DCA 1981)("All affirmative defenses are pleas by way of confession and avoidance."); *Wiggins v. Portmay Corp.*, 430 So.2d 541, 542 (Fla. 1st DCA 1983)("Affirmative defenses do not simply deny the facts of the opposing party's claim. They raise some new matter which defeats an otherwise apparently valid claim.")

Even if all of the allegations in Custer's Complaint were true, United would be relieved of liability for subsequent benefits if it could prove that Mr. Masis "unreasonably refused" to attend his physical examination.

As the dissent to the panel's denial of rehearing *en banc* points out, interpreting §627.736(7) as a condition precedent to coverage would require the insured to submit to a physical examination before the policy is purchased, before any accident occurred and before the insurer ever even requests that the insured submit to such an examination. *Custer, supra* at 637, Ramirez, J., dissenting from denial of rehearing *en banc*.

The fact that the plain language of the statute relieves an insurer of liability only for "subsequent benefits" belies an interpretation that §627.736(7) is a

condition precedent, because an insurer may still be liable for bills received prior to an alleged unreasonable refusal to attend an examination. *See Silva, supra*.

ii. De Ferrari v. Government Employees, Inc.

Next, the Third District relied on its own decision in *De Ferrari v. Gov't Employees, Inc.*, 613 So.2d 101 (Fla. 3d DCA 1993), in which the court stated that "[s]ubmission to the reasonably requested I.M.E. was a condition precedent to coverage." *De Ferrari, supra* at 103.

Most notably, *De Ferrari* predates this Court's decision in *Cimino, supra*. However, *De Ferrari* is distinguishable on other bases.

In its opinion on rehearing, the Third District in *De Ferrari* specifically stated that it was issuing the reported opinion on rehearing, *"solely to clarify that the instant action sought uninsured motorist benefits only."De Ferrari, supra* at 102. That distinction is critical, because unlike uninsured motorist claims, §627.736(7) governs the insured's obligation to attend a physical examination in PIP cases. If the distinction was not critical, the Third District would not have issued an opinion on rehearing, *"solely to clarify that the instant action sought uninsured motorist benefits only."De Ferrari, supra* at 102.

The Third District's opinion in this case fails to recognize the factual distinctions between *De Ferrari* and this case, instead citing *De Ferrari* for a

general proposition that submission to an IME is a condition precedent to coverage. *Custer, supra* at 635.

In *De Ferrari,* GEICO denied coverage based upon a cooperation provision in its policy, which stated:

> The injured person will submit to examination by doctors chosen by us, at our expense, as we may reasonably require.

De Ferrari, supra at 102.

GEICO's cooperation clause gave rise to a coverage defense. United raised no coverage defense in this case.

In Ms. De Ferrari's claim for UM benefits, GEICO scheduled her for two physical examinations, one with an internist and one with an orthopedic surgeon. Ms. De Ferrari saw the internist, but her attorney notified GEICO that she would not appear for the orthopedic surgeon IME, because she had not treated with an orthopedic surgeon. Shortly thereafter, GEICO informed De Ferrari that coverage was being denied based upon her failure to attend the requested examination.

Moreover, *De Ferrari* was a summary judgment case in which the insured did not rely on unresolved factual questions disputed on appeal, but rather relied on the argument that "the insurer had never demonstrated that it was prejudiced by the insured's actions." *De Ferrari, supra* at 102. The Third District concluded that

"prejudice is not at issue when an insurer's reasonable request for an I.M.E. is refused by an insured." *Id*.

In this case, Custer argued at trial that, because Mr. Masis had finished his treatment and been medically discharged, the request for an examination was unreasonable and it was entitled to have the jury decide that issue. *Custer, supra* at 638, Ramirez, J., dissenting from denial of rehearing *en banc*.

De Ferrari, *supra*, is also distinguishable on the basis that the nature of uninsured motorist benefits is different than the nature of personal injury protection benefits. In the context of uninsured motorist benefits, the insurer has a right to mitigate all damages that can be claimed under a UM policy, i.e., past, present <u>and future</u> economic damages, and a variety of non-economic damages, such as pain and suffering. Thus, the insurer may require a claimant to attend any kind of examination which might mitigate its exposure. Therefore, it was not unreasonable for GEICO to ask its insured to attend an examination with an orthopedist even though she had not yet treated with any orthopedic physician. GEICO was entitled to obtain an orthopedist examination, because De Ferrari could sue for future orthopedic treatment.

The Third District's opinion in this case did not acknowledge the distinctions between the PIP benefits sought in this case and the UM benefits

sought in *De Ferrari*, but the dissent to the denial of rehearing *en banc* did:

> Uninsured benefits are materially different from PIP benefits because the claimant must show a permanent injury within reasonable degree of medical probability. *See* §627.737(2)(a)-(d), Fla.Stat. (1997). On the other hand, "[t]he purpose of PIP benefits is to provide up to $10,000 for medical bills and lost wages without regard to fault. *See, e.g.*, §§ 627.731, 736, Fla.Stats. (1997)." *Flores v. Allstate Ins. Co.*, 819 So.2d 740, 744 (Fla. 2002).

Custer, 990 So.2d at 638, n.4, Ramirez, J., dissenting to denial of rehearing *en banc*.

Moreover, the dissent to the denial of rehearing *en banc* questioned the applicability of *De Ferrari* to PIP cases at all, in light of this Court's decision in *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000), concluding:

> I cannot agree with the panel that submission to a medical examination can be viewed as a condition precedent for which a plaintiff has the burden of proof. The parties never made this argument, the pleadings did not treat it that way, and the circuit court properly viewed it as an affirmative defense.

Custer, supra at 638, Ramirez, J., dissenting from denial of rehearing *en banc*.

De Ferrari, supra is not applicable in this case, but the Third District relied on it to support its conclusion.

iii. United Auto. Ins. Co. v. Zulma

In concluding that "an insured's submission to an IME is a condition

precedent to coverage," the Third District relied on *United Auto. Ins. Co. v. Zulma*, 661 So.2d 947 (Fla. 4th DCA 1995). Although the opinion states that *Zulma* "indicat[es] that attendance at an IME is a condition precedent," the Fourth District suggested no such thing.

The issue in *Zulma, supra*, was whether an insurer is obligated to pay attorney's fees for the entire period of litigation, once it confesses judgment by settling the insured's claim. Attendance at a physical examination pursuant to Fla.Stats. §627.736(7) was not decided in the opinion. The only context in which the insured's attendance at an IME arose was the court's explanation that United's basis for ultimately settling the case was that "it made the decision to settle the insurance claim after it determined that <u>it would be difficult to prove that Zulma had unreasonably refused to submit to an IME</u>." *Zulma, supra* at 949(emphasis added). In fact, the opinion states:

> United Automobile argues that because it was correct in initially denying Zulma coverage based upon her failure to attend the IMEs and thus comply with an important condition precedent to coverage under the insurance policy, she is not entitled to attorney's fees for that initial period. We disagree.

Zulma, supra at 948.

It was United - - not the Fourth District - - that took the position that it was

denying benefits based on Zulma's alleged noncompliance with a "condition precedent" to coverage based on an alleged failure to attend an IME. *Id.* The Fourth District did not determine that an insured's failure to attend an IME is a condition precedent.

Ironically, United took the position that Custer advanced throughout this case, i.e., that "it would have to prove that Zulma unreasonably refused to submit to an examination." *Id.* United "made the decision to settle the insurance claim after it determined that it would be difficult to prove that Zulma had unreasonably refused to submit to an IME." *Id.*

Zulma actually supports Custer's arguments in this case - - that United had to prove its affirmative defense, i.e., that Mr. Masis unreasonably refused to attend an examination.

iv. Griffin v. Am. Gen. Life & Accident Ins. Co.

Finally, Relying on the fact that Mr. Masis simply did not appear at two scheduled physical examinations, the Third District relied on *Griffin v. Am. Gen. Life & Accident Ins. Co.*, 752 So.2d 621, 623 (Fla. 2d DCA 1999) for the proposition that a party seeking to enforce a contract has the burden to prove the satisfaction of conditions precedent. *Custer, supra* at 635.

Griffin, however, was a life insurance case where attendance at a physical

examination actually *was* a condition precedent to coverage. Like *Goldman, supra*, *Griffin* was *not* a claim for PIP benefits, which are governed by statute. . *See Flores v. Allstate Ins. Co.*, 819 So.2d 740, 745 (Fla. 2002)("[B]ecause both PIP and UM are statutorily mandated coverages, analogies to cases interpreting coverages that are not statutorily mandated, such as provisions in fire, life and property insurance policies, may not necessarily be illuminating. . .."); *see also Vasques v. Mercury Cas. Co.*, 947 So.2d 1265 (Fla. 5th DCA 2007).

The life insurance policy in *Griffin* contained a provision in the policy application, which stated, in pertinent part:

> [The insured agrees that:] (b) Except as stated in the Conditional Receipt, *no insurance will take effect* unless the first full premium is paid and a policy is delivered while the health of any proposed insured continues, without material change, to be as represented in the application.

Griffin, supra at 622.

The facts were undisputed that the decedent's health was not correctly represented on the application for life insurance. The court found, as a matter of law, that the status of the applicant's health at the time of application was a condition precedent *to the policy's becoming effective*, and that *the policy did not issue* because "the health of the insured did not meet the condition precedent."

Griffin, supra at 622 (emphasis added).

The critical distinction, which the Third District's decision in this case does not reconcile, is the fact that the existence of the policy in *Griffin* was conditioned upon satisfaction of the condition precedent set forth in the application. The contract did not exist until the condition was satisfied.

A policy for PIP coverage, on the other hand, comes into existence when the policy is purchased. As the dissenting opinion in *Custer* states, in the context of personal injury protection policies, "coverage is created when the policy is purchased and medical examinations could only logically take place after a 'covered' accident and proper request is made by the insurer." *Custer, supra* at 637. "The term 'coverage' refers to the amount and extent of risk covered by the insurer." *Id*., citing *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So2d 811, 813-14 (Fla. 2007). It would be illogical to request that a PIP insured submit to an examination before an accident even occurs. *Custer, supra* at 637.

Griffin does not support the Third District's conclusion that an insured's failure to attend an examination pursuant to Fla.Stats. §627.736(7) is a condition precedent to coverage.

v. U.S. Security Ins. Co. v. Silva

Finally, the Third District's decision directing the circuit court to reinstate

the directed verdict in favor of United is contrary to the Third District's own decision in *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593 (Fla. 3d DCA 1997).

The Third District has overlooked or ignored the fact that it was undisputed that United received Custer's bills *before* Mr. Masis missed his physical examination.

At trial, Custer's counsel objected to the directed verdict on the basis that United had already received Custer's bills prior to the missed physical examinations, and thus, the bills were payable regardless of the missed examinations. Thus, United was *not* relieved of its liability for those bills, pursuant to Fla.Stats. §627.736(7)(b).

The record demonstrated - - and it was undisputed - - that United received bills from Custer on March 28, 2002.[11] Mr. Masis allegedly missed two physical examinations, scheduled on April 11, 2003, and April 29, 2002.

The statute could not be more clear that an insurer is "no longer liable for *subsequent* personal injury protection benefits" if a person "unreasonably refuses" to attend a physical examination. Fla.Stats. §627.736(7)(b)(emphasis added).

In *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593 (Fla. 3d DCA 1997), *rev.*

[11] At trial, Custer presented the testimony of United's litigation adjuster, who testified that United received Custer's bills on March 28, 2002. (T 93).

denied, 700 So.2d 687 (Fla. 1997), the Third District was presented with the question of whether "*subsequent* personal injury protection benefits" refers to treatment rendered subsequent to the failure to attend a physical examination or to medical bills that are received by the insurer after the failure to attend, but incurred before the examination was scheduled. The Third District concluded that "benefits" means payments, and not medical treatment, such that "subsequent benefits" refers to benefits payable upon the insurer's receipt of the bills, even if the medical treatment was rendered and the bills incurred before the scheduled examination.

In this case, if the Third District's decision were consistent with *Silva*, the only bills that would have been affected by Mr. Masis's missed examinations on April 11, 2003, and April 29, 2003, were bills that United received *after* those dates. However, the trial court's directed verdict in favor of United foreclosed Custer from recovering *any* benefits. Even if United had proved an "unreasonable refusal" to attend the examinations, Custer was still entitled to have the jury decide its entitlement to the bills that United received on March 28, 2002, because that date preceded the scheduled examinations and the statute only relieves United of liability for "subsequent benefits" as a result of Masis's alleged unreasonable refusal to attend.

Although the Third District's decision does not reconcile its conclusion with *Silva*, the court's directions to remand for reinstatement of the directed verdict in United's favor is contrary to law.

CONCLUSION

The Petitioner respectfully requests that the Court quash the Third District's opinion in this case and, consistent with its decision in *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003), hold that the Third District did not have certiorari jurisdiction, since there was no departure from the essential requirements of law. Additionally, the Petitioner respectfully requests that the Court quash the Third District's decision on the basis that the decision conflicts with *U.S. Security Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000) and *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987). The Court should reaffirm its decisions, and hold that the issue of whether an insured unreasonably refuses to attend a physical examination pursuant to Fla.Stats. §627.736(7) is *not* a condition precedent to coverage. Rather, an insured's alleged unreasonable refusal to attend such an examination is an affirmative defense that must be proven by the insurer.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to: MICHAEL NEIMAND, ESQ., *Counsel for Respondent United Auto,* P.O. Box 140490, Miami, Florida 33114, and BERNARD BUTTS, JR., ESQ., *Trial Counsel for Petitioner Custer Medical,* 6291 Bird Road, Miami, Florida 33155, this 15th day of October, 2009.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief is generated in Time New Roman 14-point font, in compliance with Fla.R.App.P. 9.210(a).

MARLENE S. REISS, ESQ., P.A.
Counsel for Petitioner
Two Datran Center, Suite 1612
9130 South Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 670-8010
Facsimile: (305) 670-2305

By:_____

MARLENE S. REISS
Fla. Bar No. 864048

LAW OFFICES OF MARLENE S. REISS, ESQ., P.A.
9130 SOUTH DADELAND BOULEVARD ♦DATRAN II - SUITE 1612 ♦MIAMI, FLORIDA 33156
PHONE: 305-670-8010 ♦FAX: 305-670-2305 ♦EMAIL: REISSAPPLAW@BELLSOUTH.NET