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 JURISDICTION

MICHAEL J. NEIMAND, ESQUIRE
The Office of the General Counsel
United Automobile Insurance Company
Trial Division
P.O. Box 140490
Miami, Florida 33114-9986
Phone: (305) 774-6160
Fla. Bar No. 239437

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Florida Statutes

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 "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 contained in the "Background" section of Petitioner's brief since it is based solely on Judge Ramirez' dissenting opinion from the Third District's denial of the motion for rehearing en banc. *Reaves v. State*, 485 So.2d 829 (Fla. 1986). The statement of the case and facts from the majority opinion follows.

On January 1, 2002, Masis was injured in an automobile accident. At the time, he was insured for personal injury protection benefits under a United Auto insurance policy with a $10,000 limit. Also in January, Masis sought medical treatment from Custer, and Custer submitted bills for treatment of Masis to United Auto. Custer then sought payment from United Auto. (A. 2).

United Auto responded to Custer's request for payment with 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. (A. 2)

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." The United Auto policy, Section I, "Personal Injury Protection," Paragraph 2, "Conditions," states: "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 ...." 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, together with attorney fees and costs. Consistent with the communication that United Auto sought to have with its insured before suit was filed and § 627.736(7), Florida Statutes (2001)[1], United Auto's defense at trial was simply that Masis failed to satisfy a reasonably established condition precedent to payment of his medical bills. (A. 2).

The trial court rendered a directed verdict 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 (IMEs) without explanation. (A. 1-2).

---

[1] Section 627.736(7), in pertinent part, 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 or future personal injury protection insurance benefits, such person shall, upon the request of an insurer, submit to mental or physical examination by a physician or physicians. The costs of any examinations requested by an insurer shall be borne entirely by the insurer.
>
> (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.

On appeal the circuit court appellate division reversed. The Third District concluded that the decision of the circuit court appellate division departed from the essential requirements of law and quashed the circuit court's decision. (A. 2).

The Court 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 Court 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 IME 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 IME 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).

SUMMARY OF THE ARGUMENT

The majority opinion establishes that neither Masis nor his counsel responded to United Auto's requests to attend an IME at any time during the nearly two-month period during which United Auto sought to schedule the IME. The majority opinion then found that under section 627.736(7) an insured's submission to an IME is a condition precedent. Based on these undisputed facts the Court, applying *Griffin v. Am. Gen. Life & Accident Ins.* Co., 752 So.2d 621, 623 (Fla. 2d DCA 1999), held that the trial court correctly directed a verdict in United Auto's favor since Custer failed to prove the satisfaction of the IME condition precedent to the contract's existence. Since the Third District found that the circuit court did not apply the foregoing clearly established principle of law, the Court had certiorari jurisdiction.

Custer attempts to create conflict by relying on Judge Ramirez' dissent. The only facts that are relevant to this Court's decision to accept or reject petitions for review of a decision of a District Court of Appeal on the ground of direct conflict

of decisions are those facts contained within the four corners of the majority decision. Neither a dissenting opinion nor the record itself may be used to establish jurisdiction. *Reaves v. State*, 485 So.2d 829 (Fla. 1986).

ARGUMENT

THE THIRD DISTRICT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH *ALLSTATE INS. CO. V. KAKLAMANOS*, 843 SO.2D 885 (Fla. 2003), *U.S. SEC. INS. CO. V. CIMINO*, 754 SO.2D 697(FLA. 2000) OR *DORSE V. ARMSTRONG WORLD INDUS., INC.*, 513 SO.2D 1265 (FLA. 1987).

The facts of this case as drawn from the majority opinion establishes that neither Masis or his counsel responded to United Auto's requests to attend an IME at any time during the nearly two-month period during which United Auto sought to schedule the IME. The majority opinion then found that under section 627.736(7) an insured's submission to an IME is a condition precedent. Based on these undisputed facts the Court, applying *Griffin v. Am. Gen. Life & Accident Ins.* Co., 752 So.2d 621, 623 (Fla. 2d DCA 1999), held that the trial court correctly directed a verdict in United Auto's favor since Custer failed to prove the satisfaction of the IME condition precedent to the contract's existence. Since the Third District found that the circuit court did not apply the foregoing clearly established principle of law, it granted the petition for writ of certiorari and quashed the opinion of the circuit court.

The Third District's opinion is not in conflict with *Allstate Ins. Co. v. Kaklamanos,* 843 So.2d 885 (Fla. 2003). A petition for second-tier certiorari may be granted only in those instances in which the lower court did not afford procedural due process or departed from the essential requirements of the law. *Allstate Insurance Company v. Kaklamanos,* 843 So.2d 885 (Fla. 2003). A failure to observe the essential requirements of law has been held synonymous with a failure to apply the correct law. *Haines City Community Development v. Heggs,* 658 So.2d 523 (Fla. 1995). Relief may not be granted unless it is determined that the circuit court departed from the essential requirements of law with a resulting miscarriage of justice. *Ivey v. Allstate Insurance Company*, 774 So.2d 679 (Fla. 2000). Here the Third District found that the circuit court failed to apply the correct 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. This failure resulted in a miscarriage of justice since it reallocated the burden of proof to establish the non existence of the condition precedent to the party who is not seeking to enforce the contract. Thus, conflict does not exist and this court should not exercise its discretionary jurisdiction.

Custer attempts to create a conflict by citing to Judge Ramirez' dissent from the order denying the rehearing en banc. See Petitioner's brief at pages 5,6,7 and

8. Custer relies on Judge Ramirez' factual findings that are in direct contravention with those of the majority opinion and are not in the majority opinion. Judge Ramirez finds that the failure to attend the IME was an affirmative defense whereas the majority found that it was a condition precedent. Based on this factual finding Judge Ramirez concludes that the circuit court did not depart from the essential requirement of the law since it was United Auto's burden to establish that Masis refusal to submit to the IME was unreasonable.

Custer cannot rely on Judge Ramirez' dissent to create a conflict. The only facts that are relevant to this Court's decision to accept or reject petitions for review of a decision of a District Court of Appeal on the ground of direct conflict of decisions are those facts contained within the four corners of the majority decision. Neither a dissenting opinion nor the record itself may be used to establish jurisdiction. *Reaves v. State*, 485 So.2d 829 (Fla. 1986).

Custer claims that the instant decision holds that the mere failure to attend two scheduled IME's, as a matter of law, entitles an insurer to deny PIP benefits and thus conflicts with *U.S. Sec. Ins. Co. v. Cimino*, 754 So.2d 697(Fla. 2000) which requires the refusal to be factually unreasonable. This contention is based on an erroneous analysis of the Court's decision. The Court's holding is that an insurer is entitled to a judgment as a matter of law when the insured fails to attend

an IME and fails to offer any evidence which would generate a fact question concerning the insured's refusal to submit to the examination was reasonable. This holding is in accord with *Tindall v. Allstate Insurance Company*, 472 So.2d 1291, 1293 (Fla. 4th DCA 1985)

Finally Custer contends conflict exists with *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987**)** which holds that it is the defendant's burden to prove its affirmative defenses. The only basis for this conflict is if the dissent's finding that the failure to submit to an IME is an affirmative defense. This cannot be done. *Reaves v. State*, 485 So.2d 829 (Fla. 1986).

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 enter an order denying discretionary jurisdiction.

Respectfully submitted,

The Office of the General Counsel
United Automobile Insurance Company
Trial Division
P.O. Box 140490
Miami, Florida 33114-9986
Fax: (305) 774 -6220
Fla. Bar No. 239437

_____
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 November 2008 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