IN THE SUPREME COURT OF FLORIDA

CASE NO. ____________________
THIRD DCA CASE NO. 3D06-458

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

Petitioner,

vs.

UNITED AUTOMOBILE
INSURANCE COMPANY,

Respondent.
____/

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

MARLENE S. REISS, ESQ., P.A.
Counsel for Plaintiff 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

Petitioner CUSTER MEDICAL CENTER (a/a/o Maximo Masis), pursuant to Fla. Const. art. V, §3(b)(3); Fla.R.App.P. 9.030(a)(2)(A)(iv); and 9.120(d), petitions the Court to exercise its discretionary jurisdiction on the basis that the Third District Court of Appeal's Opinion, dated September 10, 2008, directly conflicts with prior decisions of this Court, prior decisions of other Florida district courts of appeal, and the Third District's own precedent.

Specifically, the Third District's opinion directly conflicts with this Court's decision in *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003), which sets forth the standard that a district court should exercise its discretionary certiorari jurisdiction *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *See also Ivey v. Allstate Ins. Co.*, 774 So.2d 679 (Fla. 2000); *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523 (Fla. 1995); *Combs v. State*, 436 So.2d 93 (Fla. 1983).

The opinion also directly conflicts with this Court's decision in *U.S. Sec. Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000), which holds that a simple failure to attend an independent medical examination (IME), when seeking personal injury protection (PIP) benefits, is not unreasonable as a matter of law, recognizing that there may be scenarios in which an insured "reasonably refuses to submit" to an examination. *Id*. at 702.

The opinion also conflicts with this Court's decision in *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265, 1268, n.5 (Fla. 1987), and opinions from other district courts of appeal, which place the burden on a defendant to prove its affirmative defenses. *Braid Sales and Marketing, Inc. v. R & L Carriers, Inc.*, 838 So.2d 590 (Fla. 5th DCA 2003); *Pierson v. State Farm Mutual Auto. Ins. Co.*, 621 So.2d 576 (Fla. 2d DCA 1993).

BACKGROUND

This case arose out of a claim for PIP benefits, brought by a medical provider as the assignee of a United Auto insured. United Auto asserted an affirmative defense that it was not liable for any benefits, because the insured did not attend an IME. At trial, the Plaintiff presented evidence to prove its *prima facie* case, i.e., that the bills incurred were reasonable, related and necessary. At the close of the Plaintiff's case, the county court entered a directed verdict in favor of United Auto, finding that a simple failure to attend an IME is unreasonable as a matter of law.

Sitting in its appellate capacity, a panel of the 11th Judicial Circuit reversed the directed verdict, applying Fla.Stats. §627.736(7)(b), which relieves the insurer from liability for subsequent benefits in the event an insured "unreasonably refuses" to attend an IME, and finding that United Auto did not meet its burden of proving its affirmative defense.

The Third District accepted certiorari jurisdiction, quashing the circuit court's opinion, relying first on *Griffin v. Stonewall Ins. Co.*, 346 So.2d 97 (Fla. 3d DCA 1977), to conclude that a mere failure to appear at an IME is an "unreasonable refusal" as a matter of law. In the first opinion, the district court merely cited *Kaklamanos*, *supra; Heggs, supra;* and *Combs, supra*, with no explanation of how those cases conferred certiorari jurisdiction on the court.

On a Motion for Rehearing, the Petitioner pointed out that *Griffin, supra*, was inapplicable, because it was decided before the 2001 amendment to the PIP statute, which included the "unreasonable refusal" language for the first time. The district court denied rehearing and rehearing *en banc*, issued a new and entirely different opinion, this time quashing the circuit court's decision on grounds that were never raised by either party below. (Opinion at 1-6). The Motion for Rehearing *En Banc* was denied with a lengthy dissenting opinion. (Opinion at 6-14, Ramirez, J., dissenting).

In the new opinion, the court relied on *Griffin v. Amer. Gen. Life and Accident Ins. Co.*, 752 So.2d 621 (Fla. 2d DCA 1999), quashing the circuit court's opinion on a “conditions precedent” analysis, an issue which had never been litigated below and which the district court raised on its own for the first time. (Opinion at 9, Ramirez, J., dissenting). *Griffin v. Am. Gen. Life & Accident Ins. Co.*, *supra*, was a <u>life insurance case</u> which held that the claimant had the burden to prove the satisfaction of a condition precedent to the policy’s existence, i.e., attendance at a medical examination. Based on *Griffin v. Am. Gen. Life & Accident Ins. Co.*, *supra,* the district court concluded that it had certiorari jurisdiction because of a clear departure from the principles of law, again simply citing *Kaklamanos, supra; Heggs, supra; and, Combs, supra*. (Opinion at 5-6).

Dissenting from the court’s denial of the Motion for Rehearing *En Banc*, Judge Ramirez wrote:

> I respectfully dissent from our denial of rehearing en banc because I believe our opinion in this case abandons long standing precedent and abuses the extraordinary remedy of certiorari by granting a writ in this matter. Our opinion quashes a well-reasoned unanimous decision of the circuit court reversing a trial judge who granted a directed verdict at the conclusion of plaintiff Custer Medical Center’s case, on an *affirmative defense*, before the defendant, United Automobile Insurance Company, had put on one scintilla of evidence. Not only was the circuit court eminently correct in reversing such a clear violation of procedure, it relied on numerous decision out of our Court, as well as the Second and Fifth District Courts of Appeal.
>
> ● ● ●
>
> The panel opinion ends by paying 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 our panel opinion. In my opinion, the panel has gone out of its way to create a new legal principle, that the failure to attend two examinations, as a matter of law, constitutes an unreasonable refusal under section 627.736. In believe this holding is contrary to <u>Cimino</u>.

(Opinion, Ramirez, J. dissenting at 7, 14)(footnote omitted)(citing *U.S. Security Ins. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000) .

<u>ARGUMENT</u>

a. The Opinion Conflicts With This Court's Decision in <u>*Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 889 (Fla. 2003)</u>

The Third District's opinion conflicts with this Court's decision in *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. 2003), because the circuit court did not depart from clearly established principles of law. In fact, the circuit court followed well-established law in reversing the directed verdict.

The district court merely cited *Kaklamanos*, *supra*, with no explanation of how it conferred jurisdiction on the court, other than to simply say, "[w]e conclude that the circuit court appellate division departed from the essential requirements of law when it concluded otherwise." (Opinion at 5). The "otherwise" to which the district court refers is its own "conditions precedent" analysis, an issue which was *not* the basis of the circuit court's decision, and which was never litigated below or raised by either party. In the dissent's words, "[t]he panel opinion ends by paying lip service to the standard of review in granting certiorari review... ." (Opinion at 14, Ramirez, J., dissenting).

The standard for certiorari review set forth in *Kaklamanos, supra*, as well as other decisions of this Court, is that, "[a] district court [may] 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 added); *see also Ivey, supra; Heggs, supra, Combs, supra*. (Opinion at 5).

The opinion conflicts with *Kaklamanos, supra*, because the case on which the district court relied, *Griffin v. Am. Gen. Life & Accident Ins. Co., supra*, did not set forth any "clearly established principles of law" that were even remotely applicable to this case. There could be no departure from clearly established principles of law under a "conditions precedent" analysis, because an IME cannot be a "condition precedent" in a PIP case, and no case says otherwise.[1] Moreover,

---

[1] As the dissent points out, the Third District turned what was always an "affirmative defense" into a "condition precedent." (Opinion at 9, Ramirez, J., dissenting).

> This novel approach was neither argued below nor even advocated in the petition for certiorari. Changing the state of the pleadings at the appellate level constitutes, in

neither the circuit court, nor the parties, ever addressed that issue.

Rather than a violation of clearly established principles of law, the circuit court's decision followed the well-established principle of law that a defendant must prove its affirmative defenses, by relying on both this Court's decision in *U.S. Security Ins. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000), and the language of §627.736(7)(b), which relieves the insurer of its obligation to pay *subsequent* PIP benefits "[i]f a person *unreasonably refuses* to submit to an examination, ..." Fla.Stats. §627.736(7)(b).

Griffin v. Am. Gen. Life & Accident Ins. Co., *supra*, on which the district court relied, does not apply in PIP cases, and did not provide any clear principle of law for the circuit court to follow. *Griffin* was a life insurance case, which discussed medical examinations as they relate to life insurance policies - - not PIP policies. (Opinion at 9-13, Ramirez, J., dissenting).

> my view, a clear violation of due process.

(Opinion at 9, Ramirez, J., dissenting).

For the reasons explained by the dissent, the district court's "conditions precedent" holding fails under an analysis of the cases on which the court relied. (Opinion at 9-13, Ramirez, J., dissenting). Although the issue of "conditions precedent" was never briefed - - because it was never litigated below[2] - - the dissent clearly explains why an insured's presence at an IME in a PIP case *cannot* be a condition precedent. In short, as the dissent states, the panel went "out of its way to create a new legal principle... ." (Opinion at 14, Ramirez, J., dissenting). The creation of a new legal principle on certiorari review cannot, by definition, cure a lower court's alleged departure from "clearly established principles of law."

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

[2] Ironically, the district court's opinion conflicts with the very case on which it relies. In *Griffin v. Am. Gen. Life & Accident Ins. Co.*, *supra*, the court acknowledged that a "conditions precedent" argument is waived if the defendant does not specifically deny an allegation that conditions precedent have been satisfied. *Griffin, supra* at 623, n.1. Had the parties litigated a "conditions precedent" defense, the Petitioner would have had the opportunity to demonstrate why an IME is *not* a condition precedent in a PIP case, and the state of the pleadings with regard to any waiver of such defense.

The opinion conflicts with *U.S. Sec. Inc. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000); indeed, ignores *Cimino* its entirety.[3] (Opinion at 13, Ramirez, J., dissenting). In *Cimino, supra*, a PIP case, this Court recognized that an insured can "reasonably" refuse to attend an IME:

> 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(b), it is logical to deduce there are scenarios where the insured "reasonably refuses to submit" to the examination.

Cimino, supra at 703.

By ignoring *Cimino, supra*, and reaching a result that is wholly contrary to *Cimino*, the opinion demonstrates the district court's lack of certiorari jurisdiction and creates a conflict with *Cimino, supra*.

c. The Opinion Conflicts With This Court's Decision in *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987), Which Requires a Defendant to Prove its Affirmative Defenses

Florida Statutes §627.736(7)(b) provides a defense to insurers by relieving them of liability for subsequent benefits when an insured "unreasonably refuses" to

---

[3] *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981)(conflict jurisdiction still exists even when the district court opinion does not explicitly reference the conflicting district court decision.)

attend an IME. Well established principles of law require a defendant to prove its affirmative defenses, which was the basis of the circuit court's decision.

The opinion conflicts with this Court's decision in *Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265 (Fla. 1987), and every district court decision that follows the clearly established principle of law that places the burden of proving affirmative defenses on the defendant. *See e.g., Braid Sales and Marketing, Inc. v. R & L Carriers, Inc.*, 838 So.2d 590 (Fla. 5th DCA 2003)(defendant's burden to prove affirmative defense based on Carmack Amendment); *Pierson v. State Farm Mut. Auto. Ins. Co.*, 621 So.2d 576 (Fla. 2d DCA 1993)(insurer's burden to prove cancellation as affirmative defense).[4]

CONCLUSION

For these reasons, the Petitioner requests that the Petition for review be granted and a briefing schedule on the merits be established.

---

[4] The dissent points out that the denial of the Petitioner's Motion for Rehearing *En Banc* also conflicts with the Third District's own prior *en banc* standards, to the extent that the opinion "tarnishes uniformity in [Third District] precedents." (Opinion at 7, n.2, Ramirez, J., dissenting). Specifically, in *Universal Med. Cntr. of So. Fla. v. Fortune Ins. Co.*, 761 So.2d 386 (Fla. 3d DCA 2000), the court placed the burden of proving an "unreasonable refusal" to attend an IME squarely on the insurer. *Fortune, supra* at 387(reversing final judgment in favor of insurer, where there was "no competent substantial evidence that the insured *unreasonably refused* to attend his first scheduled IME"). *See also Henderson Dev. Co., Inc. v. Gerrits*, 340 So.2d 1205 (Fla. 3d DCA 1976)(burden on defendant to prove affirmative defense of bona fide purchaser).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed to: Michael A. Neimand, Esq., Office of the General Counsel, *Counsel for United Auto*, P.O. Box 140490, Miami, Florida 33114, this 17th day of October, 2008.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Jurisdictional Brief has been computer 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 Custer Medical
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

H:\Docs\CASES\Masis\s ct\juris brief.wpd