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 REPLY BRIEF
On Discretionary Review from the Third District Court of Appeal

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REPLY

The Petitioner's Brief Provides an Accurate Statement of the Proceedings

United's response on the merits states that the Petitioner "does not present an accurate account of the proceedings," but points to no "inaccuracies" in Petitioner's Statement of the Case and Facts. (Response at 1). The Petitioner's recitation of these proceedings is complete, accurate and supported by the record.

The Third District Re-framed the Pleadings to Turn United's IME Affirmative Defense Into a "Condition Precedent" Defense, Which Was Never Litigated

One of the points that Custer raises is that the Third District turned this case into a "condition precedent" case, notwithstanding that the case was never litigated on such a defense. (Petition at 23, n.8). The Third District re-framed the pleadings and turned the case into a "condition precedent" case to reach its result. To overcome the Third District's error, United attempts - - for the first time - - to frame its case below as one in which it litigated a condition precedent defense.

United's Statement of the Case and Facts alleges that the second issue to be tried "was United Auto's affirmative defense that regardless of whether the treatment was reasonable, related and necessary, United Auto was not responsible for payment *because Masis did not fulfill the condition precedent of attending an independent medical examination*." (Response at 2)(emphasis added). The record

does not support that assertion.[1]

[1] United's record citations do not support its assertions. United's record cites are to the Third District's record. "R. 40-63" is a citation to the Appendix to United's Petition for Writ of Certiorari in the Third District, where it attached a copy of the Petitioner's Initial Brief in the circuit appellate court. Petitioner's Initial Brief does not mention *any* condition precedent, because the issue of the missed IME was never litigated as a condition precedent. "R. 151-164" is a citation to United's opening argument in the trial transcript. The opening argument makes no mention of *any* condition precedent.

Rather, the record demonstrates that the parties litigated the case on United's affirmative defense that the insured failed to attend a physical examination. The *only* mention of *any* condition precedent was the allegation in the Petitioner's Complaint that it had complied with all conditions precedent, which United generally denied. United alleged a general denial to that allegation and no reply from the Petitioner was necessary.[2] (Response at 1). That was the first and last

[2] United has embarked on a lengthy argument to the effect that the burden shifted to Custer to prove that Mr. Masis's missed IME was reasonable, because Custer failed to file a reply to United's answer and affirmative defenses. (Response at 15-16). "It was incumbent on Custer to file a reply alleging facts establishing that the refusal was reasonable." (Response at 16).

First, the issue of a reply was never an issue in this case. Neither United's Answer Brief in the circuit court, nor its Petition for Writ of Certiorari in the Third District argued that there was any shifting of burdens on the basis that Custer did not file a reply. Nor was the fact that Custer did not file a reply ever arise in the county court.

Second, no reply was necessary, because Custer never sought to avoid United's affirmative defense. United did not - - and could not - - prove its affirmative defense. The whole issue in the original appeal was the fact that the county court directed a verdict in favor of United before it put on *any* evidence. The only time that a reply to United's affirmative defense would have become an issue at trial would have been if Custer had sought to introduce evidence in its case in chief as to the reason for Mr. Masis's missed IME. But Custer did *not* seek to introduce any such evidence, because it had no obligation to do so! The burden always remained on United to prove its affirmative defense.

As it must, United concedes that, because it only generally denied Custer's allegations of compliance with conditions precedent, rather than denying the allegations with specificity and particularity, the burden *did not* shift to Custer to

time that *any* condition precedent was mentioned in the proceedings below.

Next, United states that the trial court directed a verdict in favor of United because Mr. 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." (Response at 6). This assertion also is not supported by the record. In fact, the trial court found, as a matter of law, that, "two failures to appear without excuse without objection to the notices that were sent constitute an unreasonable refusal to submit to the medical examination as requested." (R 317). The trial judge never mentioned *any* failure to comply with *any* condition precedent as a basis for directing a verdict in United's favor.

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demonstrate his reasons for missing the examinations. (Response at 14). *See* Fla.R.Civ.P. 1.120(c).

For the same reasons, we disagree with United's repeated statements that it pled, litigated, and tried a condition precedent defense.[3]

Finally, United's statement that this"matter was amicably resolved by the parties," and voluntarily dismissed during the pendency of United's Petition for Writ of Certiorari is misleading and untrue. [4] (Response at 7).

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[3] United states that by pleading the "*breach of a condition precedent* as an affirmative defense," it assumed the burden of proving its defense. (Response at 15)(emphasis added). United did *not* affirmatively plead a breach of a condition precedent. It affirmatively pled that it was not liable for Custer's bills because Mr. Masis failed to appear at scheduled physical examinations. Likewise, United's statements that "United Auto's defense was that Masis failed to comply with the independent medical examination *condition precedent* without explanation; "United Auto's defense at trial was simply that Masis failed to satisfy a reasonably established condition precedent to payment of his medical bills;" and, that an issue at trial was Mr. Masis's failure to "fulfill *the condition precedent* of attending an independent medical examination" are not supported by the record. (Response at 2, 9, 21)(emphasis added).

[4] This matter was *not* settled. Custer's trial counsel entered into a global settlement with United to settle a number of its cases. *By agreement, this case was specifically excluded from that settlement.* The November 27, 2006, voluntary dismissal filed in the county court was inadvertent. If the case had not been excluded from the global settlement, United would have been obligated to voluntarily dismiss its Petition for Writ of Certiorari in the Third District, as the appeal would have become moot. Instead, the record demonstrates that the parties continued to litigate the appeal in the Third District, up to the issuance of the Mandate on October 15, 2008. Indeed, on May 23, 2007, United responded to an order, dated May 22, 2007, directing United Auto to supplement the record on appeal with the trial transcript. (R 148-324). The voluntary dismissal appended to United's Response Brief is not part of the record and was not part of any record below. Custer has moved to strike the appendix by way of separate motion.

Attendance at a Physical Examination Obtained by the Insurer is Neither a Condition Precedent to Filing Suit nor a Condition Precedent to Obtaining Personal Injury Protection Benefits

The parties do not dispute that the PIP statute allows the insurer to obtain a physical examination of the insured by request. *See* Fla.Stats. §627.736(7)(a). (Response at 11-12). The parties also do not dispute that the PIP statute provides a defense to the insurer in instances where the insured "unreasonably refuses" to attend such an examination. *See* Fla.Stats. §627.736(7)(b). (Response at 11-12). That defense relieves an insurer from liability for "*subsequent*" benefits in the event the insured "unreasonably refuses" to attend the examination. *Id.*

The issue in this case has always been a burden of proof issue, i.e., who has the burden of proving an insured's "unreasonable refusal to submit" to a physical examination. That is how this case was litigated and how this case was presented to both appellate courts below. The Third District side-stepped the issue before it, however, and issued an opinion that is contrary to the statute and to firmly established law by turning an affirmative defense, which must be proven by the defendant, into a condition precedent.

Attendance at a physical examination cannot be a condition precedent to filing suit - - notwithstanding United's attempt to make a condition precedent to filing suit by the terms of its policy - - because the Legislature did not make it a

condition to precedent to filing suit, as it did with the Demand Letter provision. *See*§627.736(10), Fla.Stats. (2008), formerly Fla.Stats. §627.736(11).

Nor is attendance at a physical examination a condition precedent to coverage, because the statute only relieves the insurer of its obligation to pay "subsequent benefits," following an "unreasonable refusal" to attend an examination.[5]

If coverage were conditioned upon an insured's attendance at a physical examination, §627.736(7)(b) would relieve the insurer of its obligation to pay all bills. *See U.S. Security Insurance Co. v. Cimino*, 754 So.2d 697 (Fla. 2000)(the combined effect of the statute and the policy require an insured to attend a "PIP examination in order to *continue* receiving" benefits.) Rather, §627.736(7)(b) provides a defense to the insurer, relieving it of liability for bills received *after* an insured "unreasonably refuses to submit" to an examination. At best, §627.736(7)(b) provides an insurer with a defense to plead affirmatively, which it then must prove.

The Statute Provides an Insurer With an Affirmative Defense Which the Insurer Must Prove

[5] *See U.S. Security Ins. Co. v. Silva*, 693 So.2d 593 (Fla. 3d DCA 1997)(defining "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.)

United does not disagree that the law requires it to prove its own affirmative defenses. (Response at 15). However, it argues that "the affirmative defense of unreasonable failure to attend an independent medical examination is established by proving notice and the failure to attend without explanation." (Response at 15). There is no support for United's argument.[6] The argument ignores the language of the statute, which requires the insurer to prove that an insured "unreasonably refused to submit" to a physical examination. Fla.Stats. §627.736(7)(b).

What the Third District and United overlook is that, if a mere failure to attend were all that is required to relieve the insurer of liability, the Legislature would have had no reason to amend the statute in 1976 to add the "unreasonably refuses to submit" language. Prior to 1976, all that the insurer had to demonstrate was the insured's failure to attend the requested examination. *See Griffin v. Stonewall Ins. Co.*, 346 So.2d 97 (Fla. 3d DCA 1977).

By sleight of hand, United attempts to shift the burden to Custer

[6] Even if that were true, United failed to prove the Mr. Masis did not attend either of the scheduled examinations. The only evidence that was introduced before the trial court directed a verdict was United's letters to Mr. Masis's counsel scheduling the examinations. (R 401-404). There was no evidence that Mr. Masis did not attend either examination. Neither Dr. Fleisher, the IME physician, nor Florida Medical Specialists, the entity that scheduled the examinations, testified that Mr. Masis did not appear on either scheduled date.

to prove that Mr. Masis reasonably refused to attend his scheduled examinations. (Response at 16). If the Legislature wanted to place the burden of "reasonable refusal" on the insured, it would have said so. Instead, the Legislature said:

> 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. c627.736(7)(b)(emphasis added).

If the Legislature wanted to place the burden of proving a reasonable refusal to submit to an examination on the insured, it would have used language to indicate that intention - - but it did not. Given the statute's language, to place the burden on the insured is to effectively require the insured to prove his or her own "unreasonable refusal" in order to absolve the insurer of liability for further benefits, which simply makes no sense. Nothing in the statute requires the insured to prove his or her "reasonable refusal" to submit to an examination.

Moreover, if the Legislature wanted a simple failure to attend an examination to relieve the insurer of liability for subsequent benefits, it would not have used the

word "refused," which denotes the element of willful intent on the part of the insured. United's position ignores the statute's language.

To support its argument that the burden somehow shifts to the insured to demonstrate a "reasonable refusal," United relies on this Court's decision in *U.S. Security Insurance Co. v. Cimino*, 754 So.2d 697 (Fla. 2000), but misstates the Court's holding.[7]

United misstates the Court's holding in *Cimino*. This Court did not hold that "the statute envisions scenarios where the insured 'reasonably refused to submit' to the examination and only after the insured provides a reasonable reason does the burden shift to the insurer to establish that the failure to appear was unreasonable." (Response at 19-20). *Cimino* did not deal with shifting burdens of proof. There is nothing in this Court's opinion to suggest that "[i]t is only after an insured presents evidence that his refusal was reasonable does the burden shift to the insurer to establish that the reason was unreasonable." (Response at 20). Moreover, that was *not* the Third District's holding below. (Response at 20). The Third District side-stepped the issue of the burden of proof in its entirety by holding that "an insured's submission to an IME is a condition precedent to coverage." (Opinion at

[7] United's argument is completely contrary to its earlier concession that it maintains the burden of proving its own affirmative defenses. (Response at 15).

4). Instead, the Third District decided that United's requests for a physical examination *after Mr. Masis had already been discharged from treatment* were "not patently unreasonable," and Masis's failure to the IME requests entitled United to a directed verdict. (Opinion at 5).

Rather than supporting United's position and the Third District's conclusion, *Cimino* supports Custer's position. In *Cimino,* U.S. Security's insured sought a declaratory judgment, after U.S. Security warned Cimino that she had to attend a physical examination without her attorney, who wanted to videotape the examination, or her failure to attend or comply with the required conditions would result in the termination of her benefits.

The Court examined the obligations imposed on the insured and the insurer under Fla.Stats. §627.736(7), concluding that the Legislature's use of the term "unreasonably refuses" envisions scenarios where an insured reasonably refuses to attend an examination. That analysis precludes a directed verdict before the insurer introduces *any* evidence to demonstrate why it is relieved of any obligation to pay subsequent benefits for an insured's "unreasonable refusal" to attend an examination. In other words, a jury determines whether the reason for the insured's missed IME was an "unreasonable refusal" or a "reasonable refusal." The fact remains that the Legislature provided insurers with a defense to liability for

subsequent benefits, and the burden remains on the insurer to prove the defense. This Court did not shift that burden of proof in *Cimino*.

Likewise, *Universal Medical Center of South Florida v. Fortune Insurance Company*, 761 So.2d 386 (Fla. 3d DCA 2000), does not support United's position or the Third District's decision. In fact, the Third District's opinion ignores its own precedent in *Universal Medical*. There, the Third District reversed a final judgment in favor of Fortune Insurance Company, because the trial court - - sitting as the fact finder at a bench trial - - found that the insured unreasonably refused to attend a physical examination in the absence of any record evidence to prove an unreasonable refusal. The Third District found, that "[t]here is no competent substantial evidence that the insured *unreasonably refused* to attend his first scheduled IME." *Universal Medical, supra* at 387 (emphasis in original).

Contrary to United's suggestion otherwise, the Third District in *Universal Medical* did not shift the burden to the insured to demonstrate a "reasonable refusal." Rather, the opinion demonstrates that the Court found that there was "no competent substantial evidence that the insured *unreasonably refused* to attend his first scheduled IME." *Universal Medical, supra* at 387.

Finally, United's reliance on the Third District's citation to *Griffin v. Stonewall Ins. Co*, 346 So.2d 97 (Fla. 3d DCA 1977) in the *Universal Medical*

decision is misplaced. (Response at 17). The Third District's citation to *Griffin, supra,* as a case in which an insured refused to be examined without reason or excuse which could not support a decision requiring an insured to prove a "reasonable refusal," because *Griffin* was decided before the Legislature amended §627.736(7)(a) to include the "unreasonably refuses to submit" language, when all the insurer had to prove was an insured's failure to appear.

United argues that "[t]he fact that the directed verdict was done at the close of Custer's case and not at the close of United Auto's case does not change the result." (Response at 21). Of course it does - - it changes everything. Directing a verdict at the close of Custer's case relieved United of its obligation to prove that Mr. Custer "unreasonably refused to submit" to a physical examination.

United also argues that, where an insured fails to attend an examination without explanation, "it would make no sense whatsoever to place the burden on the insurer to establish that the reason was unreasonable." (Response at 22). To support its argument, United contends that once the insurer terminates benefits due to a missed IME, "the insurer assumes an adverse relationship with its insured." (Response at 22). The argument ignores the fact that the IME itself is adversarial in nature, creating an adversarial relationship between the insurer and the insured long before benefits are terminated on the basis of a missed examination. The

insurer places itself in a potentially adversarial position *as soon as* it schedules the examination, because at best it is questioning the necessity for continued PIP benefits and at worst it is seeking a basis on which to deny further benefits.[8]

United misstates Custer's position. Custer does not argue that silence on the part of the insured in response to a request for an examination renders the insurer liable for PIP benefits. (Response at 22). Rather, Custer's position is that the insurer must prove an insured's "unreasonable refusal to submit" to an examination

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[8] As this Court recognized in *Cimino*, *supra*:

> A PIP examination is a potential step in the direction of litigation. The insured is claiming an entitlement to continued benefits and the insurer is questioning the necessity for same. In order to continue receiving benefits the insured must comply with the requirements of the insurance contract and section 627.736. The insured is required to comply with a PIP examination in order to continue receive the contractual benefits. The insured and the insurer are certainly not in agreement at this point.

Cimino, supra at 701.

Coupled with the fact that the examination is obtained by the insurer, the cost of which is "borne entirely by the insurer," there can be no question that the IME itself is adversarial in nature. *See* Fla.Stats. §627.736(7)(a). Indeed, that was the rationale underlying this Court's holding in *Cimino*, that a request to have the insured's attorney attend and videotape a physical examination is not unreasonable as a matter of law. *See also McElroy v. Perry*, 753 So.2d 121 (Fla. 2d DCA 2000).

before the insurer is relieved of its liability to pay subsequent benefits. That position is consistent with the language of the statute and with existing decisions from this Court and the district courts of appeal, including the Third District's own decision in *Universal Medical, supra*.

Moreover, it was never Custer's intention "to have the case go to the jury so it could argue hypothetical reasons why Masis failed to appeal [sic]." (Response at 23). Instead, United either would or would not have produced evidence of Mr. Masis's "unreasonable refusal to submit" to the scheduled examination in its case-in-chief. If United presented such evidence, a jury would have determined whether the refusal - - if indeed there was a refusal - - was unreasonable or not. If United presented *no* evidence of an "unreasonable refusal," Custer would have been entitled to a directed verdict on United's affirmative defense. United's suggestion that Custer would have argued "hypothetical" reasons why Mr. Masis missed his IME is pure speculation - - and incorrect.

The burden never shifted to Custer to present evidence of the reasons for Mr. Masis's missed examinations. The Third District's imposition of a non-existent "condition precedent" that required Custer to prove a reasonable refusal re-frames the pleadings in this case and is contrary to the law.

Setting aside the collateral issue of the propriety of the Third District's

decision vis-a-vis *U.S. Security Ins. Co. v. Silva,* 693 So.2d 593 (Fla. 3d DCA 1997) to which United responds with a waiver argument,[9] (Petition at 46-48; Response 24-26), the Third District's opinion should be quashed and the circuit court's opinion reinstated, which requires a trial on the merits.

CONCLUSION

The Petitioner respectfully requests that the Court quash the Third District's opinion on grounds that the Third District did not have certiorari jurisdiction, and on grounds that a physical examination pursuant to Fla.Stats. §627.736(7) is *not* a condition precedent to filing suit or to coverage.

[9] United incorrectly argues that Custer did not argue *Silva*, *supra*, in the circuit appellate court or in the Third District. *Silva* was argued in both courts. (R 56-57, 113-114). Custer argued that *Silva* was not applicable unless and until the insurer provided proof that there was an "unreasonable refusal."Moreover, *Silva* was an issue in the trial court, raised by the trial judge himself who was reversed by the Third District in *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593 (Fla. 3d DCA 1997) on a certified question. (R 297, 301-302, 307-309, 320-322).

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 25th day of January, 2010.

CERTIFICATE OF COMPLIANCE

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

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