In the Supreme Court of Florida

CASE NO.: SC12-157

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

ROBIN CURRAN,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

A. Pertinent facts and proceedings before suit and at the trial level

1. Events prior to suit being filed

This case arose from a relatively minor automobile accident in which Plaintiff/Respondent Robin Curran ("Plaintiff") was involved on June 20, 2006 with an underinsured motorist who banged into her from behind as they were starting to accelerate when their light turned green. (R1, p 101; R3, p 560).[1] The impact did not cause the Plaintiff's body to hit any part of her vehicle. (R1, p 174; R3, p 473). X-rays taken just after the accident proved negative. (R1, p 174; R3, p 478).

A year after the accident, on July 19, 2007, Plaintiff's lawyer sent a letter to Defendant/Petitioner State Farm ("State Farm"), the auto insurer who had issued Plaintiff an automobile insurance policy that included uninsured/underinsured motorist ("UM") coverage. (R1, pp 100-101, 131). The letter advised that the Plaintiff had developed complex regional pain syndrome type 1, also known as

[1] References to the original record on appeal prepared by the Clerk of the trial court appear herein by volume and page number, as follows: (R1, pp 14-18). A conformed copy of the Fifth District's *en banc* decision has been made an Appendix hereto as provided in Fla. R. App. P. 9.120(f). The *en banc* decision, and concurring and dissenting opinions, are referenced by Westlaw Citation (the decision is not published in the Southern Third Reporter) and by Appendix page number (A 4). Unless otherwise indicated, all emphasis in this brief has been supplied by undersigned counsel.

reflex sympathetic dystrophy ("RSD"); stated that Plaintiff's damages were in a range of $3.2 million to $3.5 million; and demanded payment of the policy limits of $100,000 in UM coverage within 30 days. (R1, pp 131, 180).

Given the complex medical diagnosis and the demand for $100,000, State Farm wrote to Plaintiff's counsel on August 17, 2007 and requested that the Plaintiff submit to a medical examination, as provided in the parties' insurance contract. (R2, p 342). The policy states:

> Any person making claim...under the no-fault, medical payments, uninsured motor vehicle and death, dismemberment, and loss of sight coverages shall...be examined by physicians chosen and paid by us as often as we may reasonably require.

(R2, p 320).

Plaintiff's counsel responded by having State Farm served with a § 624.155, Fla. Stat. Civil Remedy Notice of Insurer Violation, dated 8/21/07. (R1, p 180). Plaintiff's counsel also sent State Farm a letter that same date, noting State Farm's request for a medical examination and stating:

> Mrs. Curran will agree to undergo this examination conditioned upon your execution of a Stipulation that this will be the only CME [compulsory medical examination] she will be required to undergo and that you will waive any further examinations once this matter is in litigation.

(R2, p 343).

The August 21, 2007 Civil Remedy Notice and letter from Plaintiff's counsel advising that Plaintiff would only submit to a medical examination if State Farm

would waive all future examinations turned out to be just the opening salvo in what was described in Judge Monaco's concurring opinion below as an "entire letter and e-mail dance orchestrated by plaintiff's counsel [that] had as its rather transparent motive the goal of putting the insurance carrier in a position where it could not offer up the policy limits prior to suit, unless it did so without having a medical consultation that it had confidence in." *State Farm Mutual Auto. Ins. Co. v. Curran*, __ So. 3d __ , 2011 WL 6003288, *13-14 (Fla. 5th DCA 2011)(A 27).[2]

State Farm responded to the August 21, 2007 letter immediately, advising counsel that an examination had been scheduled for Plaintiff with neurologist Dr. Joseph Uricchio in Winter Park, Florida on September 5, 2007, for which Plaintiff's travel expenses would be reimbursed. (R2, p 345). The Plaintiff's own doctor had referred her to Dr. Uricchio at one point. (R3, p 493). Counsel for Plaintiff nonetheless responded on August 28, 2007 by (a) objecting to Dr. Uricchio; (b) taking "issue" with State Farm "unilaterally setting" Plaintiff for the examination; and (c) demanding, under threat of immediate litigation, that State Farm execute by August 30, 2007 the previously forwarded stipulation to forego all further examinations of the Plaintiff. (R2, p 346).

[2] Judge Monaco went on to say: "This was about as thinly disguised a bad faith trap as is imaginable." 2011 WL 6003288, *13-14. (A 27).

At this point, State Farm brought in its attorney, who wrote to counsel for Plaintiff on August 30, 2007, and pointed out that State Farm had an obligation to determine the legitimacy of the RSD claim within the 60 day time limit triggered by Plaintiff's filing of the § 624.155 civil remedy notice. (R2, p 347). After noting that both attorneys knew Dr. Uricchio was "very qualified to address any RSD issue," counsel for State Farm advised that arrangements could be made if there were any problems with transportation, and that Dr. Uricchio would be conducting the examination on September 5, 2007. (R2, pp 347-348).

On August 31, 2007, counsel for Plaintiff advised for the first time that Plaintiff was now *unavailable* on September 5, 2007. (R2, p 349). State Farm responded, through counsel, that it would try to see if Dr. Uricchio had another date available. (R2, p 351). After the parties came to an agreement on Dr. Uricchio and a September 12, 2007 date for the examination, counsel for Plaintiff wrote another letter on September 5, 2007, this time adding eleven more conditions to Plaintiff's attending the scheduled medical examination: (1) that no representative or attorney for State Farm be present; (2) that State Farm provide in advance a list of all examination procedures Dr. Uricchio intended to perform; (3) that the Plaintiff not be required to complete any questionnaires or answer questions about the retention of a lawyer or legal liability; (4) that the Plaintiff not be subjected to x-rays or any other testing of either an invasive *or non-invasive* nature; (5) that the

Plaintiff be permitted to have a videographer and/or court reporter present; (6) that the Plaintiff not be required to bring any material to the examination; (7) that the Plaintiff be permitted to have her attorney present; (8) that Dr. Uricchio provide a detailed written report within 25 days of the examination; (9) that no further medical examinations be required of Plaintiff should the matter proceed to litigation; (10) that Dr. Uricchio be ordered to provide answers to interrogatories should the matter proceed to litigation; and (11) that "State Farm be responsible for notifying the examining doctor of the terms of this objection and any order entered pursuant thereto." (R2, pp 354-356).

In a same-day reply, State Farm responded that the medical examination was being performed under the terms and conditions of the policy pursuant to which Plaintiff was seeking benefits, and that it would be performed "in a manner consistent with routine medical examinations ... and in compliance with all applicable law." (R2, p 357). As a courtesy, State Farm agreed to the presence of the videographer, court reporter, and Plaintiff's counsel, and to the absence of any representative or attorney for State Farm. (R2, p 357). Counsel for Plaintiff, writing again on September 5, 2007, accused State Farm of acting unreasonably and of failing to cooperate in good faith, concluding with a contention that the Plaintiff was left with no choice but to file a lawsuit. (R2, p 358).

In another same-day reply, counsel for State Farm advised Plaintiff's counsel that it was obvious that he had advised the Plaintiff not to comply with the terms and conditions of the policy, and that he trusted counsel had made his client "aware of the choices you have now made on her behalf and how that will affect her rights and benefits under the subject policy." (R2, p 359). He stated that the examination was still going forward on September 12, 2007, and advised that if Plaintiff "chose to comply with the policy, she can attend the examination." (R2, p 357).

2. Plaintiff's filing of suit without complying with the policy's medical examination condition

On September 10, 2007, Plaintiff filed the instant lawsuit against State Farm. (R1, pp 100-104). In a letter of that date enclosing a copy of the complaint, counsel for Plaintiff told State Farm to cancel the September 12, 2007 medical examination, and advised that State Farm should henceforth "utilize the appropriate means for requesting" medical examinations under the Florida Rules of Civil Procedure. (R2, p 362).

On September 13, 2007, counsel for State Farm advised that Plaintiff's failure to appear for the scheduled September 12, 2007 examination constituted a breach of the policy terms, and declined to accept service of the complaint on State Farm's behalf. (R2, p 363).[3]

[3] On September 18, 2007, State Farm sent the Plaintiff a reservation of rights letter, noting the Plaintiff's refusal to comply with her contractual obligation to

3. State Farm's answer, affirmative defenses, and motion for summary judgment

State Farm answered the Complaint on September 27, 2007, and asserted its affirmative defenses, including that there was no coverage for the Plaintiff's bodily injury claim due to her breach of the policy terms and conditions by failing to appear for her scheduled medical examination and by filing suit without allowing State Farm to review the results of a medical examination. (R1, p 115).[4]

One month after filing its answer and affirmative defenses, State Farm moved for summary judgment on the issue of coverage. (R1, pp 130-185). In the motion, State Farm argued that the Plaintiff had breached the parties' insurance contract by refusing to submit to a medical examination, and that State Farm was therefore entitled to decline coverage as a matter of law. (R1, p 134). The motion cited *inter*

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submit to a medical examination in connection with the bodily injury claim she was making under her insurance contract with State Farm. (R2, pp 366-367).

[4] State Farm also raised an affirmative defense of comparative negligence in response to the Plaintiff's negligence claim against the underinsured motorist. (R1, p 115). State Farm had alternative appellate arguments seeking a new trial, including an argument that summary judgment was incorrectly entered for the Plaintiff on the issue of comparative negligence and an argument based on claimed impropriety in jury selection. State Farm's alternative appellate points for new trial are not addressed herein as they were expressly not addressed by the Fifth District, 2011 WL 6003288, and do not relate to its certified question. State Farm does not, however, abandon its arguments for a new trial if it is not determined that Plaintiff forfeited her right to coverage by willfully failing to comply with the policy conditions. If coverage was not forfeited, State Farm submits that the case should be remanded to the Fifth District to address State Farm's alternative appellate arguments.

alia, *De Ferrari v. Govt. Employees Ins. Co.*, 613 So. 2d 101 (Fla. 3d DCA 1993), which held that submission to a reasonably requested medical examination is a condition precedent to coverage under the insured's policy, and that an insured's refusal to submit to a medical examination is a material breach of the policy that entitles an insurer to summary judgment on the insured's claim for policy benefits. (R1, p 133).

4. Denial of summary judgment, trial, and entry of judgment

In April 2008, after a hearing on the motions, the trial court entered summary judgment in favor of Plaintiff on coverage. (R3, p 422). Although the trial court expressed doubts that Plaintiff could insist that the contractually-required submission to a medical examination would preclude any further medical examinations in the event of litigation, the court decided that the other demands of the Plaintiff were not unreasonable. (R3, pp 420-421). Reasoning that there "appeared to be no meeting of the minds of any of the terms and conditions that were requested by the Plaintiff," the trial court held that *as a matter of law* the Plaintiff did not breach the policy conditions by not appearing for the scheduled medical examination. (R3, p 421).

Upon denial of State Farm's summary judgment motion, the case proceeded to trial and the jury awarded a total of $4,650,589 in damages. (R5, pp 941-942). State Farm filed motions for judgment notwithstanding the verdict and for new

trial (R7, pp 1019-1027), which were denied by the trial court. (R 6, p 1093). For purposes of entry of judgment, the verdict amount was reduced to the policy limits of $100,000 and final judgment was entered in that amount on April 9, 2009. (R7, pp 1239-1240).

A notice of appeal from the final judgment was timely filed on April 27, 2009, thus initiating the appellate review proceedings in the Florida Fifth District Court of Appeal. (R7, pp 1294-1296).

B. Proceedings in the Fifth District Court of Appeal

1. The panel decision

On appeal, State Farm argued in material part that the trial court had erred in denying summary judgment for State Farm based on the Plaintiff's breach of the policy conditions. Plaintiff's only argument was that she had not breached the policy because the conditions she sought to impose were reasonable.[5]

After briefing and oral argument, the panel decision was issued on January 28, 2011. *State Farm Mut. Auto. Ins. Co. v. Curran*, 2011 WL 248541 (Fla. 5th DCA 2011). The panel decision reversed for entry of judgment in favor of State

[5] This Court's order accepting jurisdiction directed the Clerk of the Fifth District to include the briefing at the Fifth District level in the record, but that was scheduled to occur after this Initial Brief is to be filed under the Court's scheduling. When filed, the briefs will support the above two statements in text about the parties' positions on appeal, which are also affirmatively discussed in the majority, concurring, and dissenting opinions of the Fifth District judges. 2011 WL 6003288. (A 1-77).

Farm, stating in pertinent portions:

> State Farm contends that the benefits are not owed to Curran because she breached a condition precedent in the policy requiring her to attend a compulsory medical examination (CME). [fn omitted].***
>
> State Farm is correct that compliance with this policy provision is a condition precedent to suit and recovery of policy benefits. *See De Ferrari v. Gov't Emps. Ins. Co.*, 613 So. 2d 101, 102 (Fla. 3d DCA) (affirming summary judgment in favor of insurance company in a suit to recover UM benefits; concluding that the insured failed to comply with a condition precedent in the policy requiring that "[t]he injured person will submit to examination by doctors chosen by us, at our expenses, as we may reasonably require" and that the insurance company did not have to show that it was prejudiced by the noncompliance), *review denied*, 620 So. 2d 760 (Fla. 1993); *see also Kazouris v. Gov't Emps. Ins. Co.*, 706 So. 2d 960, 960 (Fla. 5th DCA 1998) (specifically adopting the analysis in *De Ferrari* to resolve the issue "whether the insurer can insist on an independent medical examination when the insured makes a claim under uninsured motorist coverage."); *Goldman v. State Farm Gen. Fire Ins. Co.*, 660 So. 2d 300 (Fla. 4th DCA 1995), *review denied*, 670 So. 2d 938 (Fla. 1996); *Stringer v. Fireman's Fund Ins. Co.*, 622 So. 2d 145, 146 (Fla. 3d DCA 1993). We note, parenthetically, that Curran does not argue otherwise in her brief.
>
> We have thoroughly reviewed the record in this case and conclude that Curran refused to attend a scheduled CME and filed suit to recover the UM benefits under the policy without compliance with this condition precedent. Her refusal constitutes a breach of the policy that prohibits her recovery. Accordingly, we reverse the judgment in her favor and remand this case to the trial court to enter judgment in favor of State Farm.
>
> REVERSED and REMANDED.

(A 79-80).[6]

[6] The original panel decision has been included in the Appendix hereto as the decision was withdrawn from the Westlaw reporter upon issuance of the *en banc* opinion.

2. Plaintiff's motion for rehearing and rehearing *en banc*

Plaintiff filed a motion for rehearing and rehearing *en banc*, which re-argued the position Plaintiff had taken on appeal. (Plaintiff's Motion for Rehearing and Rehearing *En Banc*).[7] Specifically, Plaintiff argued that she had not breached the policy provision requiring a medical examination because all of the conditions that Plaintiff's counsel had sought to impose on her attendance at the examination were reasonable; that it was State Farm that had acted unreasonably in not accepting the conditions; and that accordingly she did not have to attend the examination before filing suit. (Plaintiff's Motion for Rehearing and Rehearing *En Banc*). In the motion for rehearing, Plaintiff for the first time mentioned the subject of prejudice, with the passing remark (made without record citation, not surprisingly because the subject was not raised or addressed by the Plaintiff at any point in the trial court - R *passim*) that: "Under the circumstances of this case, State Farm suffered no prejudice." (*Id.* at p 12).

3. The Fifth District's rehearing *en banc* and substitute opinion, certifying a question as one of great public importance

The Fifth District thereafter granted rehearing *en banc*, withdrew the panel opinion, and substituted a new majority opinion with three concurring opinions, and two dissenting opinions. *State Farm Mutual Auto. Ins. Co. v. Curran*, 2011

[7] The Plaintiff's Motion for Rehearing and Rehearing *En Banc* will be included in the record currently being prepared by the Clerk of the Fifth District.

WL 6003288 (Fla. 5th DCA 2011). The majority expressly - and in detail - agreed with the panel that the Plaintiff had breached the parties' insurance contract:

> Curran concedes that, under the terms of the policy, she was required to attend a medical examination. She contends that she did not breach this duty because she never refused to attend the examination but only conditioned her attendance upon reasonable conditions. The trial court accepted this argument. We conclude that the trial court incorrectly focused on the reasonableness of Curran's proposed conditions, rather than the reasonableness of State Farm's actions. The trial court relied upon *U.S. Security Insurance Co. v. Cimino*, 754 So. 2d 697 (Fla. 2000). That case, however, addressed a personal injury protection ("PIP") claim. There, both the insurance contract and PIP statute limited the imposition of the penalty for failure to attend a CME to situations where the insured "unreasonably refuses to submit" to a CME. Thus, the appropriate focus in that case, as in all PIP cases, was on the reasonableness of the insured's actions. Here, by contrast, no such language appears in the contract or in any statute.
>
> ***Even under the analysis of the trial court, however, because Curran did not act reasonably in insisting that State Farm abandon a contractual right as a precondition to an examination, we conclude that Curran breached the contract. Under the terms of the policy, Curran was obligated to attend a CME upon request.*** Implicit in the policy was the condition that the request be reasonable in time, location and manner.
>
> State Farm's requests were all patently reasonable. Initially, State Farm simply asked to coordinate a date and time for a CME. ***Instead of offering a date, Curran insisted on a "condition" that State Farm waive any further examinations. This proposed condition unreasonably sought a waiver of a contractual right.*** The contract expressly permits future examinations under reasonable circumstances. Thereafter, State Farm was well within its right to unilaterally schedule the examination, especially given the time constraints it had under the pending Civil Remedies Notice and the impending threat of a claim for bad faith. Even then, State Farm offered to adjust the date if needed to accommodate Curran. Again, instead of offering alternative dates, Curran responded by objecting to the examining doctor, without specificity, and in contravention of the contract provision giving State Farm the right to

choose the doctor. Curran also continued to insist that State Farm waive its right to require future examinations. To ameliorate the location of the CME, State Farm promptly offered to provide transportation to the examination. Nevertheless, not until September 5, 2007, the date of the scheduled CME, did Curran finally propose an alternative date for an examination.

This time, in addition to insisting that State Farm waive its right to future examinations, Curran included a laundry list of additional "conditions" that State Farm would have to agree to before Curran would submit to the CME. Among the additional conditions were Curran's receipt, prior to the examination, of a "detailed list of any and all examination procedures and processes that Dr. Uricchio intends to perform at this examination," and the presence of Curran's counsel and a court reporter at the examination. State Farm did not object to the presence of counsel or a court reporter at the examination. It advised that the CME would be conducted in accordance with routine medical examinations, and rescheduled the examination to the date proposed by Curran. Instead of attending the rescheduled examination, Curran filed suit.

Under these undisputed facts, we have no reticence in concluding that Curran breached the contract. The contract conferred upon State Farm the right to schedule an examination with a physician chosen by State Farm. It also gave State Farm the right to conduct more than one such examination, if reasonably necessary. It was not necessary that State Farm agree to any proposed condition proffered by Curran (even if reasonable from the standpoint of the insured), only that State Farm act reasonably. ***Here, State Farm's requests were at all times reasonable. Operating within an accelerated time frame, State Farm made every reasonable effort to set a date and time convenient for Curran.*** It offered transportation, acquiesced in Curran's request that counsel and a reporter be permitted to attend and agreed that counsel for State Farm would not attend. [fn omitted]. ***Conversely, Curran was uncooperative in scheduling the examination, insisted on at least one unreasonable condition and set up a moving target with evolving demands. Although proffering conditions might not be a breach of the contract, an insured has no contractual right to unilaterally change the contract terms under the guise of proffered conditions.***

2011 WL 6003288, *7-8. (A 11-14).

After this detailed explanation of the Plaintiff's willful breach, the majority then diverged from the panel decision with an analysis that departs from all prior Florida case law on the subject of compliance with policy conditions precedent, rounding its way to the conclusions that (a) policy conditions precedent should really just be treated like cooperation clauses or notice provisions such that a prejudice analysis should be engrafted onto any consideration of the consequences of an insured's willful breach of a condition precedent; (b) that such an approach is justified by the majority's conclusion that the State Farm policy had no contractual language specifying the consequences of the breach (despite the fact that the policy contained the customary provision that "There is no right of action against us ... until all the terms of this policy have been met[.]" (R2, p 315); (c) the burden of proving prejudice should fall on the insurer; and, even though the subject was coming up in the case for the first time in the majority's opinion (as pointed out in Judge Sawaya's dissent - 2011 WL 6003288, *19, 37); (d) that State Farm *had not in fact* been prejudiced by the Plaintiff's breach and therefore State Farm should pay the judgment, plus Plaintiff's attorney's fees, with the right to raise Plaintiff's breach of contract as a defense to the inevitably forthcoming bad faith suit:

> Our conclusion that a breach occurred does not end our labor, however. While the policy provides that no right of action against the insurer exists until all policy terms have been met, nothing in the language of the policy imposes a forfeiture of benefits in the event of a breach of the duty to

> submit to a CME. The CME requirement is grouped with other duties (conditions subsequent) a claimant has when an accident occurs and a claim is asserted. Those other duties include, for example, the duty to notify police within 24 hours, report the claim within 30 days, allow an inspection of the vehicle, give an examination under oath and deliver suit papers to the insurer "at once." In the absence of policy language imposing a penalty or forfeiture in the event of non-compliance with these provisions, we think the remedy must be proportionate to the harm that results from the breach, just as it is in other contractual disputes. Had the alleged breach here involved the failure to report the accident to the police within 24 hours or to deliver the suit papers "at once," in the absence of resulting prejudice, we would glibly dismiss the breach as inconsequential. The same prejudice analysis should apply here.
>
> We think this conclusion is amply grounded in the decision of our high court in *Bankers Insurance Co. v. Macias*, 475 So.2d 1216, 1218 (Fla. 1985). There, our high court concluded that neither the failure to timely report a claim, nor the breach of the duty to cooperate, gives rise to the automatic forfeiture of insurance benefits, absent prejudice to the insurer. The instant case is analogous in that the contractual provision here is of the same ilk as the claim notice provision discussed in *Macias*.

2011 WL 6003288, *7-8. (A 14-15).

> ***Having concluded that prejudice was an issue and that the burden was on State Farm to plead and prove that Curran's breach of the duty to submit to a CME defeats coverage, we conclude that State Farm failed to meet its burden and, as the issue was framed and presented to the trial judge, he properly determined that no forfeiture of coverage had occurred.*** State Farm made no assertion of prejudice in its pleadings or arguments, instead placing total reliance on *De Ferrari* and *Goldman*.
>
> Even had State Farm argued prejudice, the record refutes any such allegation, at least to the extent that it would affect entitlement to the UM contract benefits. Immediately upon filing suit (seven days after the scheduled examination), Curran offered to submit to a medical examination pursuant to Florida Rule of Civil Procedure 1.360 (also well before the expiration of the time period under the Civil Remedies Notice). [fn omitted]. State Farm declined Curran's offer, electing instead to defer an examination until after the court first decided "if your client's

> failure to cooperate and failure to comply with all policy terms, conditions, limits, provisions and applicable Florida law affects coverage under the provisions which you now seek benefits." After the lower court ruled, the record reflects that Curran submitted to a CME with Dr. Uricchio. State Farm elected not to call Dr. Uricchio as a trial witness. There is no indication that the validity of the CME was affected by the short lapse of time attributable to Curran or that the rule 1.360 examination was materially different from the CME State Farm would have performed under the contract. The effect of Curran's breach was clearly inconsequential as it pertained to the merits of her claim for UM benefits. *See Tiedtke* [*v. Fidelity & Cas. Co. of New York*], 222 So. 2d [206] at 209 [(Fla. 1969)] (unnecessary to remand case for determination of prejudice where record amply establishes no prejudice to insurer).[8]

2011 WL 6003288, *12. (A 23).

The *en banc* majority thus affirmed the final judgments against State Farm, concluding with:

> We acknowledge conflict with *De Ferrari* and *Goldman*. We also certify the following question to the supreme court as one involving great public importance:
>
> When an insured breaches a CME provision in an uninsured motorist contract, (in the absence of contractual language specifying the consequences of the breach) does the insured forfeit benefits under the contract without regard to prejudice, or does the prejudice analysis described in *Bankers Insurance Co. v. Macias,* 475 So. 2d 1216, 1218

[8] State Farm submits that the Fifth District majority's citation of *Tiedtke* was a particularly unfair justification for its conclusion that no remand for a determination of prejudice is necessary here. Tiedtke could not be more factually different from this case. In *Tiedtke*, the reasons for the conclusion that no remand was needed were: (a) that "a review of the trial transcripts clearly demonstrates to us that the issue was raised, and, furthermore, was explored in depth by counsel for both parties", 222 So. 2d at 209; and (b) that the late notice given to the insurer of the auto accident was not self-evidently no prejudicial where notice was given in time for the insurer to take on the defense and obtain all necessary evidence before trial.

> (Fla. 1985), apply? If prejudice must be considered, who bears the burden of pleading and proving that issue?

2011 WL 6003288, *12. (A 24).

State Farm timely filed its Notice to Invoke Discretionary Jurisdiction. On February 29, 2012, this Court issued an order accepting jurisdiction and directing the parties to proceed with briefing on the merits. State Farm submits this Initial Brief accordingly.

STATEMENT OF THE ISSUES

Whether this Court should uphold the established rule that an insured's willful failure to comply with a policy condition requiring an examination prior to the filing of any lawsuit is a material breach that precludes recovery under the policy.

Whether, if a new rule is to be adopted that places a burden on the insurer to show that it has been prejudiced by an insured's material breach of a policy condition requiring the insured to submit to an examination before filing suit, there should not at least be a remand to the trial court for State Farm to be given an opportunity to meet its newly-imposed burden.

SUMMARY OF ARGUMENT

The now vacated Fifth District panel decision correctly held that there was no coverage for the Plaintiff's claim for UM benefits under her insurance contract with State Farm because the Plaintiff breached the contract and failed to perform a condition precedent to any right to sue on the policy. The Plaintiff's long list of

conditions to which she would require State Farm to agree before she would fulfill her policy obligation to submit to a medical examination were not part of the contract. The Plaintiff had no right to restrict the medical examination by Dr. Uricchio with the unprecedented - and completely medically unsound - requirements that he conduct *no tests at all* and that Plaintiff not be required to fill out any medical questionnaires. Plaintiff also had no right to insist that State Farm waive its entitlement to any possible future medical examinations, including examinations to which it would be entitled under Fla. R. Civ. P. 1.360 should the matter proceed into litigation. These conditions were not part of the insurance contract, and improperly deprived State Farm of its contractual right to a medical examination before any personal injury lawsuit was instituted.

Under long established - and heretofore uniform - Florida law, Plaintiff's attendance at the medical examination was a condition precedent to coverage for her injuries and to bringing the instant action. Under that law, Plaintiff's willful refusal to comply with the policy's medical examination condition precedent was a material breach of the policy which precluded her from recovering policy benefits, just as the original Fifth District panel decision properly held.

The Fifth District's majority decision, issued in *en banc* proceedings, is radically at odds with the existing Florida law - and to no good purpose. The Fifth District's majority decision holds that policy conditions requiring insureds to

submit to examinations before filing suit will now be considered conditions subsequent, rather than conditions precedent to recovery of policy benefits. And, the Fifth District's majority decision holds, insureds breach those provisions at will and still recover not only policy benefits but whatever additional extra-contractual damages they can recover in a bad faith suit unless the insurer comes forward and meets the burden - newly imposed by the Fifth District majority - of showing that it was substantially prejudiced by the insured's willful refusal to submit to the medical examination.

Recognizing that its radical departure might be on shaky grounds, not least because it conflicts with all existing Florida law on the subject, the Fifth District majority acknowledged conflict with two of the leading cases - *Goldman v. State Farm Gen. Fire Ins. Co.*, 660 So. 2d 300 (Fla. 4th DCA 1995), *rev. denied,* 670 So. 2d 938 (Fla. 1996) and *De Ferrari v. Gov't Empls. Ins. Co.*, 613 So. 2d 101 (Fla. 3d DCA), *rev. denied,* 620 So. 2d 760 (Fla. 1993) - and certified two questions to this Court as being of great public importance:

> When an insured breaches a CME [compulsory medical examination] provision in an uninsured motorist contract, (in the absence of contractual language specifying the consequences of the breach) does the insured forfeit benefits under the contract without regard to prejudice, or does the prejudice analysis described in *Bankers Insurance Co. v. Macias,* 475 So. 2d 1216, 1218 (Fla. 1985), apply ? If prejudice must be considered, who bears the burden of pleading and proving that issue ?

2011 WL 6003288, *12 (A 24).

Petitioner respectfully submits that this Court should disapprove the Fifth District majority opinion and adhere to the established law on the effect of an insured's willful refusal to comply with a policy condition requiring a medical examination prior to suit. The entirely beneficial purpose of such policy conditions is to allow insurers to evaluate a bodily injury claim and determine if it should be paid *without litigation*. Depriving insurer's of their contractual right to evaluate and pay claims without litigation is *inherently* prejudicial such that no additional prejudice requirements can - or should - be engrafted on to the law as to these policy conditions precedent to suit.

Nothing is being asked of insureds under the existing law except that they comply with their contract terms. The insureds are completely the master of their own fates, and they alone should be held responsible for their decisions to willfully refuse compliance with their contract obligations - for whatever the motivations that might prompt a contemplated refusal. A decision from this Court approving the continuation of the existing law's bright line rule on this point will bring an abrupt - and appropriate - halt to suits like this, which seek to test whether insureds can refuse to comply with policy conditions and still recover their policy benefits - and more. Attorney's fees and 'bad faith' recoveries can potentially be extracted from every insurer dragged into litigation - but *not* from those who have been allowed to use their policy conditions to evaluate and pay claims *before suit*.

ARGUMENT

A. The Court should continue to uphold the established rule that an insured's willful failure to comply with a policy condition requiring an examination prior to suit is a material breach that precludes recovery under the policy

1. The rule and the reasoning behind it, which merit this Court's adherence

The established - and heretofore uniform - law of Florida, including from the Fifth District, has held that an insured's refusal to comply with a policy condition requiring the insured to submit to an examination is a material breach that precludes recovery under the policy. *See, e.g., Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922, 932 (Fla. 1909); *Edwards v. State Farm Florida Ins. Co.*, 64 So. 3d 730 (Fla. 3d DCA 2011); *Amica Mut. Ins. Co. v. Drummond*, 970 So. 2d 456 (Fla. 2d DCA 2007); *Starling v. Allstate Floridian Ins. Co.*, 956 So. 2d 511, 513 (Fla. 5th DCA 2007); *Kazouris v. Government Employees Ins. Co.*, 706 So. 2d 960 (Fla. 5th DCA 1998); *Fassi v. Amer. Fire & Cas. Co.*, 700 So. 2d 51 (Fla. 5th DCA 1997); *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300 (Fla. 4th DCA 1995), *rev. denied* 670 So. 2d 938 (Fla. 1996); *Stringer v. Fireman's Fund Ins. Co.*, 622 So. 2d 145 (Fla. 3d DCA), *review denied*, 630 So. 2d 1101 (Fla. 1993); *De Ferrari v. Government Employees Ins. Co.*, 613 So. 2d 101 (Fla. 3d DCA 1993), *rev. denied*, 620 So. 2d 760 (Fla. 1993).

Almost twenty years ago, the Fourth District's *Goldman* decision collected

authorities from Florida and from around the country in a comprehensive review of the law on the issue:

> An insured's refusal to comply with a demand for an examination under oath is a willful and material breach of an insurance contract which precludes the insured from recovery under the policy. *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922, 932 (Fla. 1909) (insured's refusal to comply with policy condition that insured submit to an examination under oath "will preclude the insured from recovering upon the policy, where it provides that no suit can be maintained until after a compliance with such condition"); *Stringer v. Fireman's Fund Ins. Co.*, 622 So. 2d 145 (Fla. 3d DCA), *review denied*, 630 So. 2d 1101 (Fla. 1993) (the failure to submit to an examination under oath is a material breach of the insurance policy which will relieve the insurer of the obligation to pay under contract).
>
> Other jurisdictions have similarly interpreted the examination under oath requirement of an insurance policy, holding that failure to submit to examination under oath is a material breach of the policy terms and a condition precedent to an insured's right to recover and/or bring suit under the policy. *See, e.g., Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944 (11th Cir.), *cert. denied*, 498 U.S. 899, 111 S.Ct. 255, 112 L.Ed. 2d 213 (1990) (policy provision requiring the insured to take an examination under oath was a condition precedent to suit and that noncompliance constituted a material breach justifying the entry of summary judgment); *Fineberg v. State Farm Fire & Cas. Co.*, 113 N.C. App. 545, 438 S.E. 2d 754, review denied, 336 N.C. 315, 445 S.E. 2d 395 (1994) (failure to comply with insurance policy condition of submission to examination under oath bars recovery under policy as well as the right to bring suit under policy); *Watson v. National Sur. Corp.*, 468 N.W. 2d 448 (Iowa 1991); *see also* 5A J. Appleman & J. Appleman, Insurance Law & Practice § 3549, at 549-50 (1970) (citing jurisdictions which hold that failure to submit to an examination under oath constitutes material breach and is a defense to an action on the policy); 13A G. Couch, Couch on Insurance 2d § 49A:361, at 759 (M. Rhodes rev. ed. 1982); 44 Am. Jur. 2d Insurance § 1364, at 290-91, § 1366 at 294 (1982); Christopher Vaeth, Annotation, Requirement Under Property Insurance Policy That Insured Submit To Examination Under Oath As To Loss, 16 A.L.R. 5th 412 (1993).

> In analogous cases, where the terms of the insurance policy require that the insured submit to other types of examinations, such as independent medical examinations, Florida courts have held that the insured's willful refusal to submit to such examinations constitutes a material breach which bars recovery. *See Griffin v. Stonewall Ins. Co.*, 346 So. 2d 97 (Fla. 3d DCA 1977); *DeFerrari v. Government Employees Ins. Co*., 613 So. 2d 101 (Fla. 3d DCA), *review denied*, 620 So. 2d 760 (Fla. 1993); *Allstate Ins. Co. v. Graham,* 541 So. 2d 160 (Fla. 2d DCA 1989); *Tindall v. Allstate Ins. Co.*, 472 So. 2d 1291 (Fla. 2d DCA 1985), *review denied*, 484 So. 2d 10 (Fla. 1986).

660 So. 2d at 303.

The *Goldman* Court then provided an equally in depth analysis of the specific issue of whether conditions requiring examinations under oath or medical examinations are conditions precedent, the breach of which will preclude recovery of policy benefits without a showing of prejudice, or whether they are conditions subsequent, like cooperation clauses, the breach of which will not void coverage absent a showing of prejudice:

> The determinative issue in this case is whether the policy provision requiring the insured to submit to a sworn examination outside the presence of the other insured is a condition precedent to filing suit. [FN5] A substantial line of cases supports the rule that an insurer need not show prejudice when the insured breaches a condition precedent to suit. See *United States Fidelity & Guar. Co. v. Wigginton*, 964 F.2d 487 (5th Cir.1992) (fire policy was rendered void by insured's failure to submit to examination under oath, regardless of whether insurer was prejudiced where an examination clause was a condition precedent); *Bolivar County Bd. of Supervisors v. Forum Ins. Co.*, 779 F.2d 1081 (5th Cir. 1986) (no showing of prejudice necessary when provision is condition precedent); *Reliance Ins. Co. v. County Line Place, Inc.*, 692 F. Supp. 694 (S.D. Miss. 1988) (no showing of prejudice necessary when notice provision is condition precedent); *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla.

1985) (in cases involving the breach of a condition precedent, the burden is on the insured to show a lack of prejudice); *DeFerrari*, 613 So. 2d at 101 (Fla. 3d DCA 1993) (prejudice is not at issue when an insured refuses to submit to an examination because the examination is a condition precedent to coverage); *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 177 S.E. 2d 819 (1970) (insured's noncompliance with condition precedent precluded recovery notwithstanding lack of showing of prejudice by insurer).

> [FN5] "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, § 567. 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).

On the other hand, if the provision is a cooperation clause, [FN6] the burden would be on the insurer to demonstrate substantial prejudice before a breach would preclude recovery under the policy. *See Macias*, 475 So. 2d at 1216 (Fla. 1985) (failure to cooperate is a condition subsequent and it is proper to place the burden of showing prejudice on the insurer); *Bontempo v. State Farm Mut. Auto. Ins. Co.*, 604 So. 2d 28 (Fla. 4th DCA 1992); *Ramos v. Northwestern Mut. Ins. Co.*, 336 So. 2d 71 (Fla. 1976) (an insurer may not avoid liability under its policy by merely showing the violation of a clause requiring "assistance and cooperation" of the insured without a further showing of how this violation prejudiced the insurer); *American Fire & Cas. Co. v. Collura*, 163 So. 2d 784 (Fla. 2d DCA), *cert. denied*, 171 So. 2d 389 (Fla. 1964); *American Fire & Cas. Co. v. Vliet*, 148 Fla. 568, 4 So. 2d 862 (Fla. 1941); *United States Fidelity & Guar. v. Snite*, 106 Fla. 702, 143 So. 615 (Fla. 1932).

We note that the issue before us has not been decided in any of the

cooperation clause cases cited above. In *Leasing Service Corp. v. American Motorists Ins. Co.*, 496 So. 2d 847 (Fla. 4th DCA 1986), review denied, 508 So. 2d 13 (Fla. 1987), a case involving the breach of an examination under oath provision of an insurance contract, there are general statements to the effect that an insurer may not avoid liability under its policy by merely showing the violation of a clause requiring "assistance and cooperation" of the insured without a further showing of how this violation prejudiced the insurer. The court, however, did not address the precise questions of whether compliance with the examination under oath provision was a condition precedent to suit or whether the insured's refusal to submit to the examination under oath constituted a material breach of the insurance contract. "It is axiomatic that no decision is authority on any question not raised and considered." *See State ex rel. Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4, 6 (Fla. 1930); *State ex rel. Christian v. Austin*, 302 So. 2d 811, 818 (Fla. 1st DCA 1974), *quashed in part, cause remanded*, 310 So. 2d 289 (Fla. 1975); *Mattis, Stare Decisis* Among and Within Florida's District Courts of Appeal, 18 U. Miami L. Rev. 148 (1990).

> [FN6] Most liability insurance policies contain a so-called "cooperation clause" providing that the insured shall cooperate with the insurer, shall attend hearings and trials upon the insurer's request, and shall assist in effecting settlements, in securing and giving evidence, in obtaining the attendance of witnesses, and in the conduct of suits. The purpose of such a cooperation clause is to prevent fraud and collusion in proceedings to determine liability once notice has been given. *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985).

We conclude that the policy provisions requiring appellants to submit to examinations under oath are conditions precedent to suit rather than cooperation clauses. [cites omitted].

660 So. 2d at 304-305. As also set out succinctly enough in the current Couch on Insurance:

> While the effect of a breach has historically depended on whether the requirement is a condition precedent to recovery or to suit, or an element

> of the insured's duty to cooperate, discussed below, an insured's failure to comply with a policy condition breaches the policy. Generally, in the absence of a reasonable excuse, ***when an insured fails to comply with the insurance policy provisions requiring an examination under oath and the production of documents, the breach generally results in forfeiture of coverage, thereby relieving the insurer of its liability to pay, and provides the insurer an absolute defense to an action on the policy.***

13 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d,* § 196:23 (1999) (footnotes omitted).

The established Florida law was followed by the U.S. Eleventh Circuit Court of Appeal in the recent decision of *Kinman v. State Farm Mutual Automobile Ins. Co.*, 2010 WL 4411211 (11th Cir. 2010). The *Kinman* Court rejected an insured's contention that the identical policy provision to that involved here, requiring submission to a medical examination, was merely a cooperation clause that could result in a forfeiture of coverage only if State Farm demonstrated prejudice: "[T]he policy provision at issue is a condition precedent to suit and... [the insured's] noncompliance precludes an action on the policy regardless of a showing of prejudice by the insurer." 2010 WL 4411211, *9.

The reason that the rule requires no *showing* of prejudice when an insured willfully fails or refuses to comply with a policy condition requiring a medical examination or an examination under oath prior to suit is not that the law is *indifferent* to whether the insurer has been prejudiced, but rather that prejudice must follow as the night the day. It is *inherently* prejudicial for an insured to force

an insurer into litigation before the insured has complied with the policy conditions that enable an insurer to investigate and evaluate a claim.[9] Judge Sawaya's well-reasoned and comprehensive dissent in this case articulated this very point:

> The CME provision and the no-action provision are included in the policy to give insurance companies like State Farm the right to properly investigate the claim to weed out any false and meritless claims and to pay legitimate claims prior to incurring the expense, time, and effort of a lawsuit. Not only are these valuable rights that help eliminate frivolous and fraudulent claims, they help reduce or eliminate the costs of litigation. These rights are factored into the costs of the insurance and the premiums charged by the insurance company, resulting in reduced costs of insurance and a general savings to the public.
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> * * * *
>
> ***A further showing of prejudice is not required because prejudice to the insurer is established by the fact of the willful breach***: the insurer loses its right to properly investigate and evaluate the claim and settle that claim prior to suit to avoid the expense, time, and effort of litigation.

2011 WL 6003288, *17-18, 26 (Sawaya, J., dissenting). (A 37-37, 54).

[9] As touched upon by the *Goldman* decision's discussion cited in text, the contrast made in the case law is generally with breach of cooperation clauses, which arise mainly in the context of ***liability*** policies. In that context, a showing of prejudice makes sense because cooperation clauses are broad and cover a spectrum of actions that an insured may need to take - identifying witnesses, not confessing fault until the insurer has the chance to investigate, not getting into cahoots with a claimant, appearing for deposition and trial, etc., etc. - such that some failures to cooperate may simply not be prejudicial to the insurer. If the insured should have provided the names of witnesses, for example, but the insurer already got them from the police report, there is no point in allowing the insurer to void coverage for that breach. Conditions precedent in first party coverage, though, like UM and property policies, are the very provisions that enable insurers to handle and dispose of claims *without litigation*, such that skipping over them and going directly into litigation is prejudicial *per se*.

The inherently prejudicial effects of an insured's actions in taking a claim into litigation before allowing the insurer to investigate and evaluate are exacerbated in Florida by the attorney's fee statute applicable to insurers (and, notably, *not* to insureds). § 627.428, Fla. Stat. The statute has been interpreted in Florida case law as requiring the insurer to pay an insured's attorney's fees in virtually all litigation between them if *anything* is paid to the insured after litigation is commenced. If allowed to investigate, the insurer may well have concluded that some amount was owing on the claim and paid it. But, when the insured is allowed to deprive the insurer of its contractual conditions for evaluating and paying claims before litigation, the very act of paying after litigation has been commenced then also obligates the insurer to pay the litigation expenses ***for both sides*** on top of the amount owing on the claim - exactly what the Fifth District's majority opinion has decreed will take place here. As Judge Sawaya's dissent noted:

> The final result of the majority's ruling is that the only party that willfully and materially breached the policy walks away with the policy limits of $100,000 and a chance to litigate a bad faith claim, her lawyer walks away with his fees fully paid, and the party that foots the bill for their wrongful conduct is State Farm, who is the only party that tried to fulfill its commitments and exercise its rights under the policy. This is the sort of unjust outcome that the decisions in *Goldman* and *De Ferrari* attempt to prevent by holding wrongdoers who willfully and materially breach insurance contracts accountable for their conduct.

2011 WL 6003288, *34 (Sawaya, J. dissenting). (A 75).

The insurance policy has contemplated and contractually committed the

parties to an orderly process for handling claims. An insured should notify an insurer of a claim, and then comply with the policy conditions that were designed to get the necessary information into the insurer's hands. Once that is accomplished, the insurer is in a position to pay. If the insurer pays the claim, the matter has been handled as efficiently as possible, without burdening either the parties or the court system with unnecessary litigation. If the insurer does not pay the claim after the policy conditions have been met, or underpays in the insured's estimation, the parties *then* have litigation available.[10] Each step becomes available in proper order.

The Fifth District's majority opinion ignores this proper ordering of claims handling set by the policy conditions, and instead takes the law a step backwards by encouraging insureds to disregard their policy's conditions precedent to suit. As Judge Sawaya's dissent pointed out: "Any litigant has the right to seek an IME under the rule *after suit is filed.* By allowing insureds to skirt their contract obligations by going directly into a lawsuit and then offering up an IME actually *encourages* unnecessary lawsuits, and is "an open invitation to aberrant insureds to violate CME provisions and the rights of insurers that bargained for them and adjusted their premiums in reliance on them." *Id. at* 2011 WL 6003288, *29-30 (Sawaya, J. dissenting). (A 63).

[10] First party property insurance policies also often make appraisal an available alternative if the parties are unable to agree on an amount of loss.

Petitioner respectfully submits that the existing law properly enforces the parties' contract obligations, and protects the orderly process that the policy terms commit the parties to following. The existing law is plain and fair. Insureds are not entitled to policy benefits if they file suit before complying with policy conditions that would have allowed the insurer to evaluate and pay the claim without a lawsuit.

This straightforward rule has proved workable for decades. Insureds are perfectly able to comply with these types of policy conditions, as to which there has been not the slightest suggestion of unreasonableness, and they should be required to do so.[11] Leaving the Fifth District majority's decision to stand portends an unseemly future for Florida first party insurance litigation, as Judge Sawaya aptly described:

> Litigation is not a game of tricks and traps where clever litigants and their lawyers break contractual promises to achieve an unjust victory against an opponent intent on complying with its contractual promises. That sort of gamesmanship is anathema to all involved in the legal system who seek the truth by means of rules promulgated to achieve justice through fairness. When aberrant litigants and their lawyers get away with the spoils of that type of victory, it cheapens the currency of those rules, gives encouragement to others to do the same, and lends

[11] As recognized throughout the majority, concurring, and dissenting opinions of the Fifth District Judges, the desire to pursue attorney's fees and the much bigger prize of the bad faith suit has its own pull that can work to defeat the policy conditions' intent to get insurance benefits paid *without* litigation wherever possible. So, although attendance at a medical examination is easy enough, it is sometimes avoided precisely so that the claim will ***not*** be paid before suit.

> credence to the cynics who say that such practice is endemic to the legal system. Here, the majority acknowledges the bad faith action Curran has created for herself and so the majority makes it a point to say that its decision does not mean that Curran's wrongful conduct "cannot be considered in the context of any subsequent action for bad faith." Despite the majority's acknowledgment of the inevitable bad faith action that will soon follow and the majority's recognition that what Curran did was wrong, rather than condemn her conduct, the majority declares it inconsequential, orders that State Farm pay her attorney's fees and awards her full recovery under the policy.

2011 WL 6003288, * 38. (A 74-75).

All of this litigation, including these layers of appellate review, could have been avoided. All that the insured had to do was comply with her insurance contract. Period.

If this Court requires compliance, there will be few if any more wasteful gambles like this testing whether laxness on the part of Florida's courts will allow insureds to circumvent their contract obligations in design of getting greater, extra-contractual gains from their insurers.

2. The Fifth District majority opinion's misinterpretation of the Court's *Custer* and *Macias* decisions to alter the established law as to the consequences of breach of a policy condition requiring a medical examination prior to suit

In conflict with the existing law, the Fifth District majority opinion concludes that policy conditions requiring medical examinations prior to suit are conditions subsequent, and that there is a burden of proof on an insurer to come forward with proof that it has been substantially prejudiced by an insured's breach of such a

condition or else the breach will have no consequences for the insured. The Fifth District majority suggests, incorrectly, that these conclusions are somehow required by this Court's decisions in *Custer Medical Ctr. v. United Auto Ins. Co.*, 62 So. 3d 1086 (Fla. 2010) and *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985).

The decision in *Custer Medical Ctr. v. United Auto Ins. Co.*, 62 So. 3d 1086 (Fla. 2010) involved a PIP claim governed by the PIP statutes, which have their own special requirements that are not applicable other than to PIP claims, as the Fifth District majority at least acknowledged. More importantly, the discussion in *Custer* treated the obligation to undergo a medical examination for insurance benefits as *a condition precedent* to entitlement to subsequent benefits - not a condition subsequent, as the Fifth District majority opinion erroneously concluded.[12] As Judge Sawaya's dissent pointed out:

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[12] The Court in *Custer* was addressing an incorrect statement in the Third District's *Custer* decision that compliance with the CME requirement was a condition precedent *to the existence of the insurance policy*, as to which this Court's comments were:

> Attendance at a medical examination may be a condition precedent to the payment of subsequent PIP benefits or, perhaps more accurately, an "unreasonable " failure to attend a requested medical examination may be a condition subsequent that divests the insured's right to receive further subsequent PIP benefits. *See U.S. Sec. Ins. Co. v. Cimino*, 754 So. 2d 697, 699, 701–02 (Fla. 2000) (indicating that attendance at a PIP medical examination is a condition precedent to the receipt of subsequent PIP benefits and that section 627.736 contemplates "a situation ... where the

> In [*Custer*], the court was concerned with a PIP statute found in section 627.736(4)(b) that states PIP payments for bills submitted become overdue after 30 days. The requested examination in *Custer* was not scheduled until long after this period had expired and the bills were overdue. The PIP statute further provides that refusal to attend an examination eliminates the insurer's liability "for subsequent ... benefits." § 627.736(7)(b), Fla. Stat. (2001). The court simply held that an examination refusal eliminates the payment of subsequent benefits, not benefits that are overdue prior to the scheduled examination. Uninsured motorist payments are not due until a court renders a judgment saying they are due and, therefore, the request for examination is made long before trial and the rendering of the judgment. ***Hence, under Custer, compliance with a CME provision in a policy is a condition precedent to recovery of uninsured motorist benefits and a condition precedent to recovery of subsequent PIP benefits.***

2011 WL 6003288, *31. (A 60).

The Fifth District's majority opinion is also incorrect in using this Court's decision in *Bankers Insurance Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985) to reach

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> insured 'reasonably refuses to submit' " to a medical examination). The plain text of section 627.736(7)(b), Florida Statutes (2001), supports the analysis presented in *Cimino*: "If a person unreasonably refuses to submit to an examination, the [PIP] carrier is no longer liable for subsequent [PIP] benefits." § 627.736(7)(b), Fla. Stat. (2001) (emphasis supplied). Accordingly, when parties to an auto insurance policy dispute attendance at a medical examination, neither the insurer nor the insured is contesting the policy's existence, as the Third District incorrectly stated in its decision below. [cites omitted]. To the contrary, these parties are simply in a dispute with regard to the insured's continued right to receive subsequent PIP benefits under an existing insurance policy.

62 So. 3d at 1097-1098. The Fifth District majority incorrectly translated this discussion into its conclusion that *Custer* held that a CME provision is a condition subsequent.

the conclusion that a prejudice analysis is required here, and that State Farm had the burden of proving below that it was substantially prejudiced by Plaintiff's willful breach of her contract obligation to attend a medical examination before filing suit. *Macias* stands for neither proposition.

Macias actually involved the failure of an insured to timely file a notice of accident in a PIP case. The issue in the case was "whether a presumption of prejudice to an insurer arises where an insured fails to give timely notice of an accident to the insurer." 475 So. 2d at 1217. The *Macias* decision stated: "The notice requirement entitles the insurer to conduct a timely and adequate investigation of all circumstances surrounding the accident." *Id.* The Court held that "*[t]he burden should be on the insured to show lack of prejudice* where the insurer has been deprived of the opportunity to investigate the facts and to examine the insured. This rule should apply to claims under a PIP policy just as well as to claims under other policies." 475 So. 2d at 1218.

Macias thus placed a burden on the *PIP claimant* to show that the claimant's failure to provide timely notice *did not result in prejudice* to the insurer. *Macias* does not directly address anything other than an insured's burden where the insured has not timely notified the insurer of a claim. *Macias* did not address an insured's willful failure to attend a medical examination required by a UM policy, and certainly did not hold that the *insurer* in such a case would have the burden of

proving that it *had* been prejudiced by the insured's breach of the policy condition, as the Fifth District majority opinion indicated.

Petitioner respectfully submits that the Third District's *De Ferrari* decision was correct in concluding that *Macias* did not create new prejudice requirements for cases involving an insured's refusal to submit to a medical examination, and that neither should it be so construed:

> We conclude that prejudice is not at issue when an insurer's reasonable request for an I.M.E. is refused by an insured. The *Macias* case in no way created a new duty to establish prejudice, where none previously existed. Here, the insured failed to meet a condition precedent to coverage and accordingly [the insurer's] motion for summary judgment was properly granted.

De Ferrari, supra, 613 So. 2d at 103. Again, the prejudice to the insurer is *inherent* in these cases where an insured refuses to submit to a medical examination before filing suit, and thus no *showing* of prejudice has been required by Florida law to date - and neither should such a showing be required in the future.

> A further showing of prejudice is not required because prejudice to the insurer is established by the fact of the willful breach: the insurer loses its right to properly investigate and evaluate the claim and settle that claim prior to suit to avoid the expense, time, and effort of litigation. As Judge Monaco states in his concurring opinion, prejudice has been established by Curran's breach of the CME and no-action requirements and State Farm was harmed because it "was denied the opportunity to offer its policy limits in advance of suit, and thus avoid a potential bad-faith claim, it put ... the defendant through a completely unnecessary trial" and established a "bad-faith suit is undoubtedly on the horizon." One must ask, what more prejudice and harm must an insured inflict on an insurer before she loses her right to recover under the policy?

2011 WL 6003288, *28 (Sawaya, J. dissenting). (A 54).

This case is a perfect example of the how an insurer is *ipso facto* prejudiced by an insured's refusal to submit to a medical examination. The accident here was relatively minor, and the Plaintiff was not reported to have any injuries to speak of right after the accident. Plaintiff later claimed that she had developed RSD. RSD is a difficult diagnosis because there are few, if any, objective symptoms. But, a genuine case of RSD - if causally related to an accident - can result in seriously life-altering conditions and substantial damages, as reflected, for example, in the $4.6 million jury verdict here. Hence, State Farm's need for a medical examination by a doctor in whom State Farm had confidence, particularly with a policy limits demand and a civil remedy notice outstanding. If the RSD physician selected by State Farm (to whom Plaintiff herself had already been referred for treatment, ironically) had been permitted to confirm the diagnosis, the injury was clearly worth the $100,000 policy limits. Instead, State Farm has been required to go through litigation, a trial, an appeal to the Fifth District with a panel decision and a year thereafter a contrary *en banc* decision, and proceedings before this Court - with the $4.6 million 'bad faith' suit looming ever since the jury verdict was returned. All that the Plaintiff had to do to forestall that massive overburdening of State Farm and the court system was go to her medical examination. As promised in her contract.

Petitioner respectfully submits that *Macias* did not require the Fifth District majority's holding that an insurer has the burden of proving prejudice from an insured's willful refusal to submit to a medical examination before filing suit before the insured will be precluded from recovery of policy benefits. This Court should allow the existing law to stand under which an insured's willful refusal to submit to medical examinations constitutes a material breach which bars recovery without any requirement that the insurer make a 'showing' of prejudice. *De Ferrari*, *supra.* If any prejudice showing is engrafted onto the existing law, which it should not be, the burden should be on the willfully breaching insured to show that the willful breach caused *no* prejudice to the insurer.

3. The Fifth District majority opinion incorrectly characterizes the policy as not specifying the consequences of a breach of the medical examination provision

The Fifth District majority opinion indicates that the policy did not specify the consequences of breaching the policy terms. This is simply inaccurate. The policy's no action clause specifies exactly the consequence of an insured's breach of policy conditions: the insured's suit for policy benefits will not lie. The policy provides: "There is no right of action against us ... until all the terms of this policy have been met[.]" (R2, p 315).

The no action clause was recognized long ago as setting the consequence for an insured's breach of a policy condition requiring submission to an examination

prior to suit. In *Southern Home Ins. Co. v. Putnal*, 49 So. 922 (Fla. 1909), this Court held that an insured's refusal to comply with the policy condition that insured submit to an examination under oath "will preclude the insured from recovering upon the policy, where it provides that no suit can be maintained until after a compliance with such condition." 49 So. at 932.

The Fifth District majority opinion's attempt to recast the no action clause as a provision that merely 'suspends' the insurer's obligations, 2011 WL 6003288, *18, effectively removes the clause from the policy altogether. There was a contractual agreement here that the insured would have no right to sue on the policy without first meeting the policy conditions. The Fifth District's majority opinion simply releases the insured from that contractual agreement and allows the insured to sue anyway.[13] Such result is contrary to Florida law, which does not allow courts to create coverage that does not exist according to the policy's terms. *See, e.g.*, *Telemundo Television Studios, LLC v. Aequicap Ins. Co.*, 38 So.3d 807 (Fla. 3d

[13] The majority opinion suggests in a footnote that any forfeiture provision would, in any event, be an "unenforceable penalty." 2011 WL 6003288, *36, n 5. This issue was never raised at any point by the Plaintiff, and the court's remark on the subject is without legal support. The case cited by the majority opinion - *Crosby Forrest Products, Inc. v. Byers*, 623 So. 2d 565 (Fla. 5th DCA 1993) - stands only for the unrelated proposition that a contractual monetary penalty clause will not be enforced if the sum specified is disproportionate to the damages. All of the Florida case law on this point, as cited in text, quite clearly holds that an insured's willful failure to comply with a policy condition requiring an examination before suit is a material breach that will preclude the insured from recovering under the policy.

DCA 2010)(courts have no power to create insurance coverage where none otherwise exists); *Gen. Sec. Ins. Co. v. Barrentine*, 829 So.2d 980, 981 (Fla. 1st DCA 2002)(an insured's "failure to comply with the requirements of the policy is fatal to his claim" because "[c]ourts have no power to create insurance coverage, if it does not otherwise exist by the terms of the policy").

4. The Fifth District majority opinion creates conflict with this Court's decisions requiring the conclusion of litigation over insurance contract claims before bad faith claims can accrue

The majority opinion contains a ruling, unprecedented in American jurisprudence, that State Farm may not raise its breach of contract defense in the contract action against it, but must instead wait and raise it as a defense in a subsequent bad faith action. Not only is this holding incomprehensible in depriving a party of the right to raise its contract defense in the contract action, but it conflicts with the law established by this Court that a bad faith claim does not accrue until the litigation over contract benefits has concluded. *See, e.g.*, *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1276 (Fla. 2000); *Imhof v. Nationwide Mut. Ins. Co.*, 643 So. 2d 617, 619 (Fla. 1994), *receded from on other grounds, State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 63 (Fla. 1995); *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991).

By saying that State Farm may raise the insured's breach of contract as a defense in the insured's bad faith suit, the majority opinion is completely confusing

the law. Breach of contract is State Farm's defense to the contract suit, and should have resulted in the ruling that the insured was not entitled to contract benefits at all, just as the original panel held in accordance with the heretofore uniform law of Florida. To say that an insurer may not raise its contract defense in the contract suit but must wait to raise it as a defense in a bad faith suit is to completely reverse the order in which the claims adjustment process should take place. The insurer should be able to keep an insured who does not comply with conditions precedent ***from suing at all,*** not have to litigate through *two* lawsuits before even being allowed to raise the insured's breach of contract. Instead, the Fifth District majority opinion encourages the insured to breach the contract because the insurer will then have no defense to the contract claim and be forced to face bad faith litigation.

B. If the Court decides that there is to be a burden of proof placed on insurers to show prejudice, State Farm should at least be afforded an opportunity to do so

The Fifth District majority opinion effectively "found" on appeal that State Farm did not suffer any prejudice from the Plaintiff's breach of her obligation to attend a medical examination before suit.[14] State Farm's briefing in the Fifth

[14] Inappropriately invoking the tipsy coachman rule, the Fifth District majority took it upon itself to conclude that, in its estimation, the record refuted any prejudice to State Farm, "at least to the extent" of State Farm having to pay the UM contract benefits. Respectfully, this is simply wrong in suggesting that there was nothing prejudicial about the filing of the lawsuit or about State Farm having to litigate rather than having an opportunity to evaluate and pay if appropriate. The attorney's fees and costs alone constitute prejudice. State Farm was forced to

District cited the existing case law holding that, as a matter of law, an insurer is relieved of its obligation to pay when an insured files suit without complying with a condition precedent, and that the insurer is not required to show prejudice. The Fifth District majority opinion used State Farm's reference to that law to reach the *non sequitur* conclusion that State Farm was not, in fact, prejudiced – which is an entirely different matter. As set out above, State Farm submits that it was prejudiced as a matter of course because it was deprived of its contractual right to examine the Plaintiff before suit to determine whether her condition warranted payment of the demanded policy limits.

In the appeal before the Fifth District, the Plaintiff's position was that she had *not* refused to submit to the medical examination because all of her proposed conditions were reasonable. Plaintiff did not argue that State Farm was not prejudiced in fact by her failure to attend the medical examination. Neither did Plaintiff argue that State Farm had to prove prejudice. So, without any input from State Farm – much less any evidence – the Fifth District majority decided that State Farm had the burden of proving prejudice, and that factually it had failed to

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expend fees and costs itself, and then was also ordered to pay fees and costs for the for the Plaintiff. The tipsy coachman rule had no application here at all. *See Robertson v. State*, 892 So. 2d 901, 908-09 (Fla. 2002) (affirmance based upon an alternate ground that was not at issue in the trial court was improper where it operated to deprive a party of the opportunity to present evidence and argument on the matter).

do so. Respectfully, if the majority opinion's newly-adopted principle that State Farm must prove prejudice from an insured's failure to comply with a condition precedent is to stand, at least there should be a remand for State Farm to be permitted to meet its newly-imposed burden.[15]

CONCLUSION

Based on the foregoing facts and authorities, Petitioner State Farm Mutual Automobile Insurance Company respectfully submits that the Court should reaffirm and approve the established law set by the decisions in *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922, 932 (Fla. 1909); *De Ferrari v. Gov't Emps. Ins. Co.*, 613 So. 2d 101, 102 (Fla. 3d DCA), *review denied*, 620 So. 2d 760 (Fla. 1993); *Kazouris v. Gov't Emps. Ins. Co.*, 706 So. 2d 960, 960 (Fla. 5th DCA 1998); *Goldman v. State Farm Gen. Fire Ins. Co.*, 660 So. 2d 300 (Fla. 4th DCA 1995), *review denied*, 670 So. 2d 938 (Fla. 1996); and *Stringer v. Fireman's Fund Ins. Co.*, 622 So. 2d 145, 146 (Fla. 3d DCA 1993). The conflicting majority opinion issued by the Fifth District herein should be disapproved, and the case

[15] And as set forth above, State Farm's additional appellate points should be ruled upon by the Fifth District such that if State Farm is not entitled to a judgment in its favor on coverage, appellate consideration is given to what State Farm believes to be its highly meritorious bases for obtaining a new trial, including the fact that the trial court entered ***summary judgment*** against it on its comparative negligence defense despite its record evidence of a sudden and unexpected stop by the Plaintiff when she pulled into the intersection after the light turned green. *See Eppler v. Tarmac America, Inc.*, 752 So. 2d 592 (Fla. 2000).

remanded to the Fifth District with directions that the straightforward panel decision be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Initial Brief of Petitioner was sent by U.S. mail this 26th day of March, 2012 to: O. John Alpizar, Esquire, 1528 Palm Bay Road, North East, Palm Bay, Florida 32905; and Marjorie Gadarian Graham, Esquire, 11211 Prosperity Farms Road, Suite D 129, Palm Beach Gardens, Florida 33410.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Initial Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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