IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-650

ELEVENTH CIRCUIT COURT OF APPEALS CASE NO.:10-13183-D

MERLY NUÑEZ,

APPELLANT,

vs.

GEICO GENERAL INSURANCE COMPANY,

APPELLEE.

ON REVIEW OF A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT ON CERTIFIED QUESTION

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I. THIS COURT'S PRECEDENT HAS CONSISTENTLY REJECTED ATTEMPTS BY INSURERS TO PLACE CONDITIONS ON STATUTORILY-MANDATED COVERAGE NOT AUTHORIZED BY STATUTE

In its *Answer Brief,* GEICO cites to various cases in support of the proposition that Florida courts have consistently affirmed the rights of insurers to require an EUO as a condition precedent to recovery under an insurance policy. Indeed, this general proposition is accurate, but only to non-statutorily mandated coverage. GEICO assumes this Court will ignore its own precedent and overlook that almost all the cases it cites involve non-statutorily mandated coverages, which are not afforded the same safeguards as those that are statutorily-mandated, such as P.I.P. The remaining cases cited by GEICO were not decided by this Court and the issue certified here by the Eleventh Circuit was neither presented nor decided therein.

GEICO's statement that the legislature has already answered the certified question in the affirmative best illustrates why the Florida Constitution separated the powers of government, giving the courts, and not the politicians and the industry lobbyists, the power to interpret the law. Prior to the 2012 amendment to the P.I.P. statute, it did not contain any requirement that an insured attend an EUO as a condition precedent to recovery of their P.I.P. benefits.

GEICO cites to two non-statutorily-mandated coverage cases, *Southern Home Ins. Co. v. Putnal*, 49 So. 922 (Fla. 1909) and *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300 (Fla. 4th DCA 1995), *rev. den.*, 670 So.2d 938 (Fla. 1996), for the proposition that requiring EUOs as a condition precedent is an established practice which Florida courts have approved for years. This Court clearly distinguished the *Goldman* case in its EUO analysis in *Custer Med. Center v. United Auto Ins. Co.*, 62 So.3d 1086 (Fla. 2010), holding that "*Goldman* involved a homeowner's insurance policy and the insured's failure to attend an examination under oath pursuant to the contractual terms of the policy, which has no application in the statutorily required coverage context." *Custer* at 1091. This Court further stated that "[t]he Florida No-Fault statute is mandatory and does not recognize such a condition. It is therefore invalid and contrary to the statutory terms." *Id.*

GEICO also cites to *Shaw v. State Farm & Cas. Co.*, 37 So.3d 329 (Fla. 5th DCA 2010) and *Amica Mut. Ins. Co. v. Drummond*, 970 So.2d 456 (Fla. 2d DCA 2007), for the proposition that Florida Courts have recognized EUO's in the context of P.I.P. However, the EUO issue certified to this Court by the Eleventh Circuit was neither raised nor addressed in *Shaw* or *Drummond.* In *Shaw*, a medical provider sought a declaration regarding State Farm's EUO policy provision based on his status as an assignee. Shaw did not ask the court to

consider, nor did the court consider on its own, whether State Farm could require an EUO as a condition precedent in its P.I.P. policy. Therefore, the finding that the duty to appear at an EUO was an "insured duty," not binding on the assignee, does not imply that the court considered the EUO question certified here.

In *Drummond*, the court was asked to resolve a dispute regarding medical payment coverage (MPC) that, unlike P.I.P., is neither statutorily created nor required. Thus, the holding in *Drummond* that the insured's failure to submit to an EUO was a material breach of a condition precedent to Amica's duty to provide coverage under the policy, is of no consequence here. The holdings in *Shaw*, *Drummond* and in the other P.I.P cases cited by GEICO are limited to the issues raised and decided, and do not impact the certified question here.

GEICO further contends that the legislature has never acted to prohibit EUOs in the P.I.P. context and therefore, it must be presumed that it is in agreement with their use. In support of this proposition GEICO cites to *Regional MRI of Orlando, Inc. v. Nationwide Mut. Fire Ins. Co.*, 884 So.2d 1102 (Fla. 5th DCA 2004) and *Martinez v. Fortune Ins. Co.*, 684 So.2d 201 (Fla. 4th DCA 1996), *rev. den.*, 695 So.2d 699 (Fla. 1997). However, neither of these cases support GEICO's argument. *Regional MRI* involved an action brought by a medical provider, as an insured's assignee, to recover P.I.P. benefits for an MRI scan interpreted by an independent contractor. The issue before the court was whether a

medical provider can recover for medical services rendered when the medical services were provided through an independent contractor. The Court concluded that it was not unlawful for the medical provider to hire independent contractors to perform the professional component and "globally bill" for both the technical and professional component of the services. In *Martinez,* the court held that section 627.736(4)(b) required payment of P.I.P. benefits within thirty (30) days of receipt of the written notice of the claim. The Court considered that, since section 4(b) had not been amended during any of the other 25 amendments after 4(b) was interpreted by the court more than 20 years before, such implicit adoption by the legislature of the court's prior interpretation of 4(b) was persuasive evidence of what the legislature had intended.

Neither the reasoning in the *Regional MRI* case nor the *Martinez* case is applicable to the issue before this Court. In both cases, the courts attempted to decipher legislative intent to interpret the application of statutory provisions actually contained in the P.I.P. statute. Here, there is no EUO requirement in the P.I.P. statute to interpret. A non-existing statutory condition cannot be added to the P.I.P. statute by GEICO's self-serving argument that some presumed legislative intent exists today. The legislature's prior silence regarding a non-existing statutory provision does not imply anything at all and cannot be used to alter the statute.

Besides running afoul of all rules of statutory construction, such concept would lead to uncertainty in the law and expose the general public to arbitrary application of the P.I.P. statute. The primary guide to statutory interpretation is to determine the purpose of the legislature. *Tyson v. Lanier*, 156 So.2d 833 (Fla.1963). Uncertainty should be resolved by an interpretation that best accords with the public benefits. *Sunshine State News Company v. State*, 121 So.2d 705 (Fla.App.1960). It is not the function of the judicial branch to supply omissions of the legislature. *Brooks v. Anastasia Mosquito Control District*, 148 So.2d 64 (Fla.App.1963).

II. A PROVISION, REQUIRING AN INSURED TO ATTEND AN EUO AS A CONDITION PRECEDENT TO P.I.P. BENEFITS, DIRECTLY CONFLICTS WITH § 627.736(4).

An EUO provision requiring an insured to attend an EUO as a condition precedent to P.I.P. benefits is also invalid because it conflicts with § 627.736(4). This provision of the PIP statute, which governs when benefits are due, states in relevant part:

> "**BENEFITS WHEN DUE** -- Benefits due from an insurer under ss. 627.730-627.7405 shall be primary, except that benefits received under any workers' compensation law shall be credited against the benefits provided by subsection (1) and *shall be due and payable as loss accrues, upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under ss. 627.730-627.7405*." (emphasis added).

Section 627.736(4) is unambiguous and clearly provides that benefits are due upon the insurer's receipt of the insured's bills. The ordinary meaning of the term "payable" under § 627.736(4) means a "*debt [that is] payable at once ….*" *Rollins et. al., v. Pizzarelli, et. al.,* 761 So.2d 294 (Fla. 2000) *quoting Black's Law Dictionary* 1128 (6th Ed. 1990) (emphasis added)(alteration in original).

An EUO provision, requiring an insured to attend an examination under oath as a condition precedent to benefits, is irreconcilable with § 627.736(4). The provision would re-write § 627.736(4) to say that benefits are due and payable when the insured appears for an EUO. In light of this conflict, the EUO provision must be construed as if it were consistent with the PIP statute. Section 627.418(1), *Fla. Stat.* (2011) states:

> "Any insurance policy, rider, or endorsement otherwise valid which contains any condition or provision not in compliance with the requirements of this code shall not be rendered invalid, … but *shall* be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code." (emphasis added).

When a policy provision conflicts with the insurance code, such provisions are invalidated by the courts. See e.g., *Allstate Ins. Co., v. Kaklamanos,* 843 So.2d 885 (Fla. 2003); *Flores v. Allstate Ins. Co.*, 819 So.2d 740, 745 (Fla. 2002); *Salas v. Liberty Mut. Fire Ins. Co*., 272 So.2d 1, 5 (Fla. 1972); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So.2d 229, 232-34 (Fla. 1971); *Diaz-Hernandez v. State Farm*

Fire & Cas. Co., 19 So.3d 996, 1000 (Fla. 3d DCA 2009); *Vasques v. Mercury Cas. Co*., 947 So.2d 1265, 1269 (Fla. 5d DCA 2007).

III. THE APPLICABLE P.I.P STATUTE IS CLEAR AND UNAMBIGUOUS, LEAVING NO ROOM FOR INTERPRETATION

GEICO argues that the addition of an EUO requirement by the legislature in 2012 somehow confirms and codifies the propriety of an EUO as a condition precedent to the recovery of P.I.P benefits in the pre-2012 versions of the statute. GEICO further contends that where a statutory amendment is enacted soon after controversies as to the interpretation of the original act arose, the amendment is viewed as a legislative interpretation of the original law and not as a substantive change. GEICO'S arguments are misplaced for several reasons.

First, nowhere in the applicable P.I.P statute is there any provision permitting an insurance company to demand an EUO as a condition to recovery of P.I.P benefits. In order to interpret a provision or its application, there must be a provision there to interpret. Further, it is the court, and not the legislature, that is vested with the power to interpret law. Certainly, the legislature can add a provision or condition to the P.I.P. statute. However, it is the role of the courts to interpret a statutory provision if its language or its application is unclear. However, neither the courts nor the legislature can retroactively impose a silent non-existing statutory condition to a statute that has existed for over 40 years

simply because today, the insurance industry would like to have it. Hence, the 2012 amendment cannot possibly "clarify" a provision that was never part of the statute in the first place, even less retroactively insert an invisible one, irrespective of their intent in 2012. It is settled law in Florida that where the language of a statute is clear and unambiguous, there is no room for interpretation. *See State v. Dugan,* 685 So.2d 1210, 1212 (Fla. 1996) ("When interpreting a statute, courts must determine legislative intent from the plain meaning of the statute.").

In interpreting a statute, Florida law also applies the plain meaning rule. "It is an established principle that where the language of a statute is clear and unambiguous and conveys clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So.2d 217 (Fla.1984); *See also State v. Dugan*, 685 So.2d 1210, 1212 (Fla. 1996) ("When interpreting a statute, courts must determine legislative intent from the plain meaning of the statute."). "As with the interpretation of any statute, the starting point of analysis is the actual language of the statute." *Cont'l Cas. Co. v. Ryan Inc. E.,* 974 So.2d 368, 374 (Fla. 2008); *Freeman v. First Union National Bank*, 865 So.2d 1272, 1276 (Fla. 2004), citing *Joshua v. City of Gainesville,* 768 So.2d 432, 435 (Fla. 2000). "When a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory

construction to ascertain intent." *Lee Cnty. Electric Coop., Inc. v. Jacobs*, 820 So.2d 297, 303 (Fla.2002). Courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)(emphasis added).

In the instant case, there isn't even an ambiguous EUO statutory provision to interpret. GEICO's desire "[t]o read the statute…to add words to the statutory text in the belief that some textually unspoken 'legislative intent' so required," is contrary to Florida law. *See Scarfo v. Ginsberg*, 817 So.2d 919, 921 (Fla. 4th DCA 2002). To infer that a condition is impliedly permitted is contrary to proper statutory interpretation.

Further, this Court declared, in construing Florida's No-Fault Law, that "[w]here the wording of the [No-Fault] Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language...." *Allstate Ins. Co. v. Holy Cross Hospital, Inc.*, 961 So.2d 328, 334 (Fla. 2007). Since the applicable P.I.P. statute unambiguously does not include an EUO provision, there is no room left for interpretation. GEICO's contention that the amendment was enacted to "clarify" the applicable P.I.P. statute is simply self-serving rhetoric.

Moreover, if there was an ambiguity with such a provision in the statute, it cannot be interpreted in the manner which GEICO suggests. "The policy of the courts of Florida when construing provisions of the Florida No-Fault Act has always been to construe the act liberally in favor of the insured." *Palma v. State Farm Fire & Cas. Ins. Co*., 489 So.2d 147, 149 (Fla. 4th DCA1986). A liberal construction in favor of the insured would not be one which would void coverage.

IV. THE ISSUE PRESENTED BY THE CERTIFIED QUESTION WAS SQUARELY ADDRESSED IN *CUSTER*

GEICO argues that this Court's decision in *Custer* should not be read to prohibit EUOs since they were not the focus of the appeal.. In the alternative, it argues that this Court's EUO analysis in *Custer* was limited to EUOs outside the presence of counsel. Certainly, this Court is best suited to address the context in which it decided the issue in *Custer*.

NUNEZ submits, nonetheless, that GEICO's position is without merit. Discussion of EUOs, and case-law involving same, were raised in the underlying appeals and were addressed in the briefs submitted by the parties. GEICO'S argument that *Custer* is somehow limited to EUO's outside the presence of counsel is not supported by this Court's analysis in *Custer* or by the case-law cited therein supporting same. Moreover, such a reading is illogical since the P.I.P statute did not contain any EUO condition, whether with or without the presence of counsel.

Nowhere does the opinion focus on the presence of counsel as more than a mere fact therein or infer a different result otherwise. The language prohibiting such policy requirement is applicable to any EUO under P.I.P. This position is further supported by the expressed rejection in *Custer* of the *Goldman* case, where presence of counsel was also not an issue. *See Custer* at 1091.

V. THE P.I.P. STATUTE NEED ONLY STATE THE PERMISSIBLE CONDITIONS, NOT ALL POTENTIALLY IMPERMISSIBLE ONES

GEICO suggests that the rule of statutory construction which provides that "where a statute mentions one thing, it necessarily implies the exclusion of another," be ignored here. However, this is exactly the type of circumstance where this rule applies. Where a statute sets forth and defines the permissible conditions precedent to payment of a statutory benefit, such as P.I.P. it must be construed to exclude any other condition not mentioned in the statute.

GEICO relies on *U.S. Sec. Ins. Co. v. Cahuasqui*, 760 So.2d 1101 (Fla. 3d DCA 2000), *Rev. dism'd,* 796 So.2d 532 (Fla. 2001) for the proposition that conditions not included in the statute are not necessarily prohibited. However, the *Cahuasqui* decision has no application in this case. In *Cahuasaqui,* this Court held that the offer of judgment statute was applicable to P.I.P. actions, even if section 627.428 only permitted an award of fees in favor of a prevailing insured. *Id.* The harmonization of the two existing fee statutes has no bearing on whether an EUO,

that is non-existent in the P.I.P. statute, can be made a condition precedent to P.I.P. benefits.

VI. THE FRAUD ARGUMENTS RAISED DO NOT CHANGE THE PROPER APPLICATION OF LEGAL PRECEDENT AND STATUTORY CONSTRUCTION

By repeatedly alluding to P.I.P. fraud, and the legislature's desire to combat it, GEICO essentially urges this Court to disregard its own precedent related to: (1) EUOs as a condition precedent to P.I.P. benefits; (2) insurer created conditions to other statutorily-imposed coverage; and (3) well established principles of statutory construction and interpretation. No doubt P.I.P. fraud is a problem that has plagued the system for more than a decade. The fact the Florida Legislature adopted the Statewide Grand Jury Report on Insurance Fraud in 2001, and has since amended the PIP statute and other insurance statutes multiple times to include provisions to combat fraud, actually supports NUÑEZ's position.[1] At no time, prior to the 2012 amendment, has the Florida Legislature included an EUO requirement in the PIP statute. Perhaps the Florida Legislature was also cognizant of the potential for the abuse of such a provision by insurers as GEICO did here.

GEICO's claim that, unless an insured's refusal to attend a timely requested EUO is held to support of the denial of P.I.P. benefits, the legislative objective of

[1] For example, section 627.736(12), titled "Civil action for insurance fraud" was added in 2001; section 627.736(4)(h), titled "Benefits; when due" was added in 2003; and section 627.736(14), titled "Fraud advisory notice" was added in 2006.

preventing fraud will be profoundly disserved, is untrue. Section 627.736(6)(c), Fla. Stat., permits insurers to obtain significantly more discovery from even more sources to investigate actual circumstances of fraud, than a mere insured's EUO.

In reality, GEICO's reliance on the fraud theme to justify the desired results is inconsistent. GEICO, and indeed many other insurers appearing as Amici directly or indirectly through other organizations, argue the need for the EUOs as if they would be the solution to remedy any P.I.P. fraud. However, at the same time, they argue that insurers have always been able to use EUOs with "longstanding judicial approval" and "since the beginning of the twentieth century." (GEICO's Answer Brief at 5).

If such is true, then why is there supposedly so much P.I.P. fraud?[2] Perhaps, an EUO in the context of P.I.P. is not such an effective tool to curb fraud, as GEICO and others insurers with stake here suggest. What an EUO (as a condition precedent) really means to many insurers is an opportunity create obstacles to having to pay otherwise valid claims. As GEICO did here with NUNEZ, many insurers request an EUO at an inconvenient date, time and location, and deny coverage if the insured does not attend, irrespective of whether the insurer has received all statutory requirement needed for payment and where there is no suspicion of fraud.

[2] GEICO has also failed to point to any evidence, report, or study showing that EUOs in P.I.P. have been effective in curbing fraud.

In the instant case, NUNEZ never refused to attend an EUO, but was ignored twice when she requested in writing that it be re-set for a convenient date, time, and location. Other insurers directly and/or indirectly filing Amici briefs in this case will also attached a "duces tecum" to their EUO request demanding the insured produce a *laundry list* of personal documents, including tax returns, phone records, etc. in order to intimidate insureds from attending. NUNEZ submits that this is another reason why the EUO cannot be allowed to be used as a condition precedent to coverage under P.I.P.

VII. GEICO'S 'CONSISTENT WITH" APPROACH TO STATUTORY CONSTRUCTION IS INCONSISTENT WITH FLORIDA LAW

GEICO repeatedly alludes to an EUO being "consistent with" the legislature's intent to curb fraud and that they are not specifically prohibited. However, there is no such "consistent with" rule of statutory construction. Further, while a statutorily-mandated coverage, such as P.I.P., must state the condition to payment, it does not have to list every conceivable requirement that would not be permissible. Using GEICO's logic, a polygraph of the insured would be "consistent with" curbing fraud and it is also not expressly prohibited by the statute. Many other conditions could be similarly interpreted to apply. The acceptance of GEICO's "consistent with" theory would lead to vague and uncertain P.I.P. statute.

The application on the non-recognized "consistent with" approach by GEICO would also be inconsistent, invalid and contrary to the P.I.P. statutes objective of providing "swift and automatic payments." *Chapman v. Dillon*, 415 So. 2d 12, 18 (Fla. 1982); *Gov't Employees Ins. Co. v. Gonzalez*, 512 So. 2d 269 (Fla. 3d DCA 1987)(regarding P.I.P. benefits, foundation of legislative scheme is to provide "swift and virtually automatic payment" so that injured person may get on with his/her life without undue financial interruption).

CONCLUSION

Based on the foregoing arguments and authorities, and those of any Amici filings in support of Appellant's position herein, NUNEZ requests that the certified question be answered in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed and emailed on this 7th day of August, 2012 to **Suzanne Youmans Labrit, Esq.**, SHUTTS & BOWEN, LLP., 4301 W. Boy Scout Blvd, Suite 300, Tampa, Florida 330; **Douglas G. Brehm, Esq.**, SHUTTS & BOWEN, LLP., 201 S. Biscayne Blvd Suite 1500, Miami, FL 33131; **Frank Zacherl, Esq.,** SHUTTS & BOWN, LLP, 201 S. Biscayne Blvd, Suite 1500, Miami, FL 33131 and **Marlene S. Reiss, Esq.,** MARLENE S. REISS, P.A., 9130 S. Dadeland Blvd, Suite 1612, Miami, FL 33156.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a) because the brief has been prepared in a proportionally spaced font using Microsoft Office Word in Times New Roman, 14-point font.

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