IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

MURAD KABANI,

Appellant,

v.

OCEAN HARBOR CASUALTY INSURANCE COMPANY,

Appellee.
_____/

CASE NO.: CVA1 08-45

On Appeal from the County Court
for Orange County,
Antoinette Plogstedt, Judge.

Lee M. Jacobson, Esquire,
for Appellant.

Eric R. Eide, Esquire
for Appellee.

Before Komanski, LeBlanc and Rodriguez, J., JJ.

PER CURIAM.

ORDER REVERSING SUMMARY JUDGMENT IN FAVOR OF APPELLEE, OCEAN HARBOR INSURANCE COMPANY

This is a PIP case.[1] The appellant, Murad Kabani ("Appellant" or "Kabani"), appeals the order of the county court granting the motion for summary judgment of the defendant, Ocean

[1] PIP is an acronym for personal injury protection. With limited exception, each motor vehicle owner or registrant required to be licensed in Florida is required to carry a minimum amount of personal injury protection, or PIP, insurance, for the benefit of the owner and other designees. *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005). This coverage includes benefits for accident-related medical expenses, disability, lost wages and death. § 627.736(1)(a),(b),(c), Fla. Stat. (2005).

Harbor Casualty Insurance Company ("Appellee" or "Ocean Harbor"). We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument, Fla. R. App. P. 9.320, and reverse.

FACTS

Because this is an appeal from a summary judgment we accept as true the version of the facts advanced by Kabani, the opponent of the motion, as gleaned from the pleadings, affidavits, and depositions, giving him the benefit of all inferences favorable to his claim.

After being injured in an auto accident, Kabani notified his PIP carrier, Ocean Harbor, of his claim. Ocean Harbor then requested that Kabani submit to an "independent" medical examination ("IME"), as it is permitted to do pursuant to section 627.736(7), Florida Statutes, as well as the applicable policy.

Ocean Harbor turned over the handling of Kabani's claim to a managing agent, JAJ Holding Company ("JAJ"). JAJ, in turn, engaged an IME vending company, Premier Medical Review ("Premier") to schedule IMEs.

On March 30, 1998, Premier scheduled the IME of Kabani to take place on April 20, 1998. The scheduling letter advised Kabani to give at least forty-eight hours advance notice if he was unable to attend this examination. Kabani did not appear for this appointment and Premier rescheduled it for May 11, 1998, at 11:00 a.m. On May 8, 2008, Kabani called Premier and requested that the May 11, 1998, IME be rescheduled and was told that someone would get back to him. Kabani did not show up for his May 11, 1998, IME. In a notice from JAJ dated July 20, 1998, Kabani was informed that his PIP benefits had been terminated effective April 20, 1998. The notice advised that the reason for this action was that Kabani's failure to appear for both the April and May IME appointments "must be considered an 'unreasonable refusal' to attend." (R.

1184.) Kabani was told that "[i]f you do, in fact, have a valid reason or excuse for your failure to attend, please advise us immediately in order that we may reconsider our position." (R. 1184.) JAJ stated that its "decision to discontinue these benefits is based upon policy terms and conditions, F.S. 627.736 and various case law." (R. 1184.)

Kabani brought this action in the county court seeking payment of the PIP benefits. Ocean Harbor moved for summary judgment contending that Kabani unreasonably refused to attend the IME which had been scheduled for May 8, 2008. The motion was opposed by Kabani. The trial court found that it was "undisputed that Murad Kabani called Premier Medical Review on May 8, 1998 to request that the May 11 IME be rescheduled." (R. 1514.) The court below also found that while there was a dispute as to what the representative at Premier told Kabani and that there was no evidence that Kabani ever gave the representative a reason for asking that the exam be rescheduled or explain his inability to attend it. (R. 1514.) Further, the motion judge recognized that Kabani's deposition testimony "alludes to reasons [for failing to attend] that were 'work-related' and his Interrogatory Answers make reference to the fact that the IME appointment was scheduled between work shifts and his uncertainty over the status of the IME appointment." (R. 1515.) However, the court below found these were not "clear" statements of reasons for the refusal to attend the IME nor did they contain "specific facts that explain how or why Mr. Kabani was unable to be present at the IME appointment" on the morning of May 11, 1998. (R. 1515.)

In its order granting summary judgment to Ocean Harbor, the court below concluded that PIP benefit claimants "have a duty to provide some explanation in response to their failure to attend an IME appointment (in order to prevent the failure to attend to be 'unreasonable'), then an insured driver has a corresponding duty to give the insurance company some explanation

when requesting that an IME appointment, which has already been set, be cancelled and rescheduled." (R. 1515.)[2] The county court also concluded that "if an insured driver refuses or fails to give the insurance company any reason for rescheduling an IME appointment, then the insured driver has no legal basis to reasonably believe that the IME appointment has been rescheduled or to otherwise fail to attend the IME." (R. 1517.) This, the court concluded, "is analogous to a party laying a predicate or foundation." (R. 1517.)

In granting the motion for summary judgment, the motion judge ruled that "Mr. Kabani has not established any evidence in the record showing that he gave Premier Medical Review any reason or explanation for changing or moving the May 11 IME appointment." (R. 1518.) The court granted summary judgment, it explained, because Ocean Harbor had "met its initial burden in support of its Motion for Summary Judgment" (R. 1518-1519) and that "Mr. Kabani has failed to rebut this or establish any material disputed fact to show" that he had given a reason in advance of the IME for rescheduling the exam. (R. 1519.) This "refusal" to appear at the IME was violative, the motion judge held, of Part IV(b)(3) of the policy which requires a person seeking benefits to submit to IMEs and relieves Ocean Harbor of responsibility for "subsequent personal injury protection benefits" in the event of an "unreasonable refusal to submit." (R. 1273.)

For support of its conclusion, he trial court relied upon the cases of *United Automobile Insurance Co. v. Custer Medical Center*, 990 So. 2d 633 (Fla. 3d DCA 2008)*; U.S. Security Insurance Co. v. Silva*, 693 So. 2d 593 (Fla. 3d DCA 1997); *Allstate v. Graham*, 541 So. 2d 160 (Fla. 2d DCA 1989); *Tindall v. Allstate Insurance Co.*, 472 So. 2d 1291 (Fla. 2d DCA 1985) and *Griffin v. Stonewall Insurance Co.*, 346 So. 2d 97 (Fla. 3d DCA 1977).

[2] The court below recited this position as that of Ocean Harbor and concluded that it is

At the time it granted Ocean Harbor's summary judgment motion, the trial court also considered and denied a motion for summary judgment by Kabani in which he argued that the request for an IME was ineffectual because it was made by JAJ and not Ocean Harbor and therefore did not meet the statutory requirement that a request for a PIP IME be made by "insurer." *See* § 627.736(7), Fla. Stat. (1998).

ARGUMENTS

Stripped to their essentials, the parties' arguments are straightforward.

Kabani contends that there are issues of fact which made a summary judgment in Ocean Harbor's favor improper. He points to his deposition testimony that he had no objection to going to a doctor. Further, Kabani notes the trial court's finding that there was a disputed issue of fact as to what Premier told him in response to his request that the May 11, 1998, IME be rescheduled.

Ocean Harbor does not dispute that there are factual issues surrounding Kabani's rescheduling of the IME. Indeed, it conceded at oral argument below that it could not get summary judgment under section 627.726(7). "If [Ocean Harbor's summary judgment motion] were simply based upon the statutory issue of whether there's an unreasonable refusal to appear, then I think my motion for summary judgment would be denied. There's a factual dispute as to whether or not he had a reasonable basis." (R. 1420.) It argues that, despite these factual issues, its motion for summary judgment involved only a single, narrow legal issue about which the operative facts were uncontroverted, viz. whether at the time Kabani called to cancel his IME, his failure to give a reason for doing so rendered his later absence an "unreasonable refusal" to attend that IME.

"well taken" and supported by caselaw. (R. 1517.)

Inasmuch as counsel for Ocean Harbor drafted the order appealed from, it is not surprising that the conclusions in it are identical to the positions advanced by Ocean Harbor, notably that an insured must have a legitimate reason for asking to reschedule an IME and must communicate it to the carrier in advance. The failure to do so and subsequent nonattendance at the exam will be deemed an "unreasonable refusal" to attend, as a matter of law, according to Ocean Harbor and the court below.

STANDARD OF REVIEW

Summary judgment is properly granted when there are no issues of material facts, and the moving party is entitled to judgment as a matter of law. *Anderson v. Maddox*, 65 So. 2d 299, 300 (Fla. 1953). We review a trial court's grant of summary judgment *de novo*. *Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006).

DISCUSSION

The most recent case relied upon by Ocean Harbor and the court below is *United Automobile Insurance Company v. Custer Medical Center*, 990 So. 2d 633 (Fla. 3d DCA 2008). After the county court's decision here, the district court of appeal decision in *Custer* was quashed by the Florida Supreme Court. *See Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086 (Fla. 2011). Upon consideration of this more recent decision, we must reverse.

In *Custer*, an insured twice failed to attend a PIP IME and sued the carrier after it cut off benefits. Significantly, both failures to appear were "without explanation." *United Auto. Ins. Co. v. Custer Med. Ctr.*, 990 So. 2d 633 (Fla. 3d DCA 2008). After the plaintiff rested its case and without the insurer presenting any evidence of it own, the trial court granted a motion for a directed verdict on the carrier's affirmative defense that the failure to appear was unreasonable as a matter of law under section 627.736 (7). An appellate panel of the circuit court reversed

holding that the failures to appear were not unreasonable as a matter of law and that unreasonableness must be proven by the PIP carrier. The circuit court appellate panel explained that "the simple showing of a failure to appear [does not] shift the burden of proof to the Plaintiff to prove why the insured failed to appear... ." *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d at 1091 (*quoting Custer Med. Ctr. v. United Auto. Ins. Co.*, No. 04-520 at 2-3 (Fla. 11th Cir. Ct. Feb. 14, 2006)). The district court of appeal granted the insurer's petition for certiorari and quashed the opinion of the circuit court appellate panel because the plaintiff had not offered anything to raise any fact question on the question of whether the plaintiff had met its burden of proving a condition precedent of PIP coverage, i.e. submission to a reasonably requested IME. *United Auto. Ins. Co. v. Custer Med. Ctr.*, 990 So. 2d 633, 635 (Fla. 3d DCA 2008).

The Florida Supreme Court reviewed the case next and determined that the PIP carrier bore the burden of proving that a failure to appear at IME was unreasonable as it is an affirmative defense. The *Custer* Court, explained that:

> [T]he circuit court was correct that [the insurer] clearly had the burden of pleading and proving its affirmative defense; therefore, it was required to present evidence to *the fact-finder* that [the insured] unreasonably failed to attend a medical examination without explanation after having received proper notice. Initially, a failure to attend a medical examination is not automatically considered a "refusal" under the statute.

Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d at 1097.

Thus, even though in *Custer* the insured's failures to show up for an IME were both unexplained, the insurer was a not entitled to judgment as a matter of law. The impropriety of granting summary judgment in favor of Ocean Harbor is even more pronounced here. Ocean Harbor frankly concedes that there are issues of material fact but contended, and the court below agreed, that the outcome of its motion centered on the "narrow legal issue" of Kabani's duty to

explain, at the time he canceled the IME, why he was doing so. *Custer* makes clear that Kabani has no such duty. We are left, then, with Ocean Harbor's concession of the existence of factual issues and for this reason summary judgment was improper.[3]

In closing, we offer these observations as guidance to the court and the parties on remand.

Ocean Harbor claims that its approach, which we reject, did not constitute a burden shifting. The court accepted this and ruled that Ocean Harbor demonstrated "that Kabani has not established any evidence in the record that he gave any reason or explanation for changing or moving the May 11 IME appointment." (R. 1518.) Also, the lower court held that Ocean Harbor had shown that Kabani had "failed to rebut" that he did not give a "reason or explanation" for cancelling the IME scheduled for May 11, 1998. (R. 1519.) We have reversed because the Florida Supreme Court decision in *Custer* compels us to reject the position that the law requires a PIP claimant to provide a reason for cancelling an IME in advance of the scheduled exam and that the failure to do so constitutes an "unreasonable refusal" to attend. We also note that the *Custer* Court made plain that the insured does not bear the burden to prove the reasonableness of his of her failure to attend and does not bear the burden to show that the failure

[3] The court below granted summary judgment based on Ocean Harbor's "affirmative defense that [Kabani] unreasonably refused to attend an IME without sufficient cause in violation of Part IV(b)(3) of the insurance policy." (1519). That the lower court's ruling was based upon this policy provision rather than section 627.736 (7), as was *Custer*, is of no moment. That policy language simply tracks the statutory provision and Ocean Harbor relied upon the court of appeal decision in *Custer*, and other cases decided under section 627.736 (7) . The crux of this case is whether Kabani unreasonably refused to attend an IME. The definition of the term "unreasonable refusal" in the policy must be consistent with its statutory meaning. Counsel for Ocean Harbor made only a most oblique reference to the policy's cooperation clause at oral argument below and then drafted an order, signed by the county court judge, that summary judgment was based upon the policy's cooperation clause. Ocean Harbor cites no case distinguishing the duty to cooperate in a policy from the statutory duty here. In the context of

to attend was not a refusal. As the trial court correctly observed, Ocean Harbor's contention that Kabani unreasonably refused to attend an IME is an affirmative defense. It is not, as Ocean Harbor argued, akin to a "predicate or foundation" which Kabani must lay. (Appellee Reply Br. 30; *see also* R. 1517.) To prevail on this affirmative defense, Ocean Harbor bears the burden to prove that Kabani refused to attend the May 11, 1998 exam, not merely that he failed to attend. If it proves that, Ocean Harbor must then prove that such refusal was unreasonable.

IME Notice Must Be Given by an "Insurer"

Kabani moved for summary judgment on the grounds that the IME notices sent by Premier did not meet the requirement of section 627.736(7), Florida Statutes, that such notices be given by an "insurer." The decision to schedule the IME was made by JAJ, a managing agent and communicated by Premier, a "vendor."

The parties agree that the relevant statutory language provides that:

> (7) Mental and physical examination of injured person; reports.--
> (a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon the request of *an insurer*, submit to mental or physical examination by a physician or physicians.

§627.736(7)(a), Fla. Stat. (1998) (emphasis added).

In turn, the term "insurer" "includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity." § 624.03, Fla. Stat. (1998). Finally, the statutory definition of the term "person" in the context of this case "includes an individual, insurer, company, association, organization, Lloyds, society, reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation, agent,

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this case, the same result obtains whether based upon the policy language or the statutory

general agent, broker, service representative, adjuster, and every legal entity." § 624.04, Fla. Stat. (1998). Kabani argued that neither JAJ nor Premier fit the definition of insurer. Ocean Harbor rejoined that "JAJ, as the managing agent for Ocean Harbor, falls within the statutory definition of "person" as that term is used in the definition of "insurer." (Ans. Br. 10.) Kabani then responded that it is not any "person" who may request an IME. This can only be done by one "engaged as an indemnitor, surety, or contractor in the business of entering into contracts of insurance." (Reply Br. 3.) Kabani is correct but our review of the record leaves some question as to what exactly JAJ did and did not do in its business at the time it requested the IME. As this matter is being remanded, Kabani may, if he so chooses, renew his motion for summary judgment. JAJ meets the statutory definition of an "insurer" who may request an IME only if it is "engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity." § 624.03, Fla. Stat. (1998).[4]

WHAT IS A "BENEFIT" WHICH MAY BE DENIED FOR UNREASONABLE FAILURE TO ATTEND IME?

Finally, we address a question which has arisen and may recur on remand. The parties disagree as to whether Ocean Harbor, if it prevails, is absolved of paying all medical *bills* subsequent to Kabani's unreasonable refusal to attend an IME or, as Kabani contends, may only deny payment for *treatment* subsequent to May 11, 1998.

We agree with Ocean Harbor and find persuasive its argument on this point based upon *U.S. Security Insurance Co. v. Silva*, 639 So. 2d 593 (Fla. 3d DCA), *rev. den*. 700 So. 2d 687 (Fla. 1997). When an insured unreasonably refuses to attend an IME, the carrier "is no longer

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language.

[4] Kabani also contends on appeal that the trial judge erred in permitting Ocean Harbor to amend its Answer to assert the affirmative defense of unreasonable refusal. We find no abuse of discretion in this regard and do not disturb that ruling.

liable for subsequent benefits." §627.736 (7)(b), Fla. Stat. (1998). This means that the insurer is not liable for subsequent payments. It does not mean that it does not have to pay for subsequent treatment. Put otherwise, the carrier does not have to pay for services rendered but not billed prior to the cutoff. *See U.S. Sec. Ins. Co. v. Silva*, 639 So. 2d 593, 596 (Fla. 3d DCA).

CONCLUSION

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Order granting the motion for summary judgment of defendant, Ocean Harbor Insurance Company, be and hereby is **REVERSED**; and

IT IS FURTHER ORDERED AND ADJUDGED that this matter be and hereby is remanded for further proceedings consistent with this Order.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this ____27th_____ day of ___April_____, 2012.

_/S/_____
WALTER KOMANSKI
Circuit Judge

_/S/_____
BOB LeBLANC
Circuit Judge

_/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this __27th___ day of __April_____, 2012, to the following:

1) Lee M. Jacobson, Esq. LAW OFFICE OF MICHAEL BREHNE, P.A., 620 North Wymore Road, Suite 270, Maitland, Florida 32751; and

2) John M. Crotty, Esq., GROWER, KETCHAM, RUTHERFORD, BRANSON, EIDE & TELAN, P.O. Box 538065, Orlando, Florida 32853-8065.

_/S/_____
Judicial Assistant