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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,003



JIMMY R. VELEZ,

Petitioner,

vs.

CRITERION INSURANCE COMPANY,
a foreign corporation,

Respondent.

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ON PETITION FOR CERTIORARI FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA
APPEAL NO. 83-972

# ANSWER BRIEF ON THE MERITS ON BEHALF OF RESPONDENT, CRITERION INSURANCE COMPANY, a foreign corporation

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## TABLE OF CONTENTS

## TABLE OF CASES & AUTHORITIES



CASES

## STATEMENT OF THE CASE AND THE FACTS

The most accurate and simple statement of the case and of the facts is the decision rendered by the Second District itself. Thus, for its statement, Respondent[1] simply adopts by reference the opinion of the Second District.

The Second DCA's decision was simply and logically that a 1.5 horsepower moped is a self-propelled vehicle,[2] (A-1 to 4), therefore, the insured, as an occupant of his moped when injured, was not entitled to recover PIP from the policy insuring his motor vehicle which was not involved in the accident.[3]

The Second District's opinion was issued January 27, 1984. (A-1). Petitioner served a motion for rehearing on February 6, 1984 which was denied by order of the Second DCA dated February 28, 1984. Petitioner's notice to invoke discretionary jurisdiction was filed in this Court on March 8, 1984 and jurisdiction was accepted by order dated June 21, 1984. Petitioner's merits brief was served July 11, 1984 and this answer brief was served August 3, 1984.

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[1]Petitioner was the Plaintiff in the trial court and Appellant before the Second District, Jimmy R. Velez. Respondent, Criterion Insurance Company, was Defendant and Appellee respectively.

[2]The Second DCA's opinion is attached as an appendix to Petitioner's Brief. Reference to pages of the appendix is indicated by (A- ).

[3]The moped was not listed as an insured vehicle under the Criterion policy.

## ARGUMENT

### A MOPED RIDER IS AN "OCCUPANT OF A SELF-PROPELLED VEHICLE" AND IS INELIGIBLE FOR PIP BENEFITS UNDER HIS AUTO POLICY.

Under the Florida Automobile Reparations Act, the insurer (Criterion) of the owner of a motor vehicle (Petitioner owned a described 1976 AMC) must only pay PIP benefits for accidental bodily injury sustained in the state by the owner (Petitioner) if he is (1) occupying a motor vehicle or (2) while not an occupant of a self propelled vefhicle, if the injury is caused by physical contact with a motor vehicle. sec.627.736(4)(d) Fla.Stat.(1981). Here, there is no doubt the required physical contact is present and there is no contention that the moped is a "motor vehicle". See sec.627.732(1) Fla.Stat.(1981).

Therefore, Petitioner may only recover PIP benefits if the court finds that as a matter of law that a moped is not a self-propelled vehicle, thus resulting in a conclusion that Appellant was not an occupant of a self-propelled vehicle so that PIP is payable.

To give validity to Petitioner's position, this Court must accept two unacceptable propositions: (1) ignore the plain and obvious meaning of "self-propelled vehicle" and (2) incorporate the definitions of Chapter 316 into Chapter 627, Florida Statutes.

Petitioner's argument commences with several flawed premises. First, there is no evidence in this record to support the proposition that this Puch moped could not be started without pedaling. There simply is no testimony either way. Even if the contention were true, Petitioner was not pedaling this moped when injured. Therefore, Respondent takes the position that this vehicle's self-propulsion capacity must be evaluated solely from its use at the time of the accident.

Second, Petitioner asserts that a moped does not contain within itself the means for its own propulsion, perhaps believing that the engine simply decorates the area between the wheels and beneath the seat. If one accepts his contention that a moped can't be propelled without pedaling, perhaps his premise might more accurately be stated that a moped does not contain within itself all of the means required for its own propulsion when started.[4]

Again, however, at the time of this accident, there can be no doubt that the moped was propelling itself solely by use of its 1.5 horsepower engine.

Third, in paragraph B at pp.3-4, Petitioner states that "Chapter 627 specifically refers to Chapter 316 for a categorization of mopeds". Respondents contend that such a statement is grossly inaccurate.

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[4] Given this premise, Petitioner also would probably agree that a golf-cart is not self-propelled because it requires periodic battery charging by human hands. Or the turn of a key in an automobile?

The only possible basis for Petitioner's adoption of this position is that one (1) section of the "No-Fault" law refers to mopeds as defined in sec.316.003(2), Fla.Stat.(1981). See sec.627.732(1), Fla.Stat.(1981), which in paraphrase states that a motor vehicle is defined as any four-wheeled self-propelled vehicle except mopeds. Thus, the words "except mopeds as defined in sec.316.003(2)" are pure surplusage since they have only two-wheels.

Why should any court incorporate the defintions in another chapter when it is totally unnecessary.[5] We know a moped is not a 'motor vehicle' because it doesn't have four-wheels. So what purpose is served by reference to the definition of "motor vehicle" when the term sought to be defined is "self-propelled", as appears in sec.627.736(4)(d)(1), Fla.Stat.(1981)? Even if reference to sec.627.732(1) is appropriate, it can be reasonably interpreted to read that a moped is a self-propelled vehicle which simply has been excluded as a motor vehicle, without resort to further interpretation. The section defines motor vehicle as any self-propelled vehicle except a moped. Certainly any linguist would advise that a thing must be a member of a defined group before it can be excluded or excepted.

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[5]This is particularly true (1) where chapters 316, 320 and 324 restrict their definitions to situations where the words and phrases "are used in this chapter"; and (2) where the section under construction, 627.736(4)(d)(1) contains no reference to another chapter.

As pointed out by the Second District, the definitions of sec.316 were not incorporated into sec.627.736(4)(d)(1), Fla.Stat.(1981) which provides that the insurer of the owner of a motor vehicle shall pay personal injury protection benefits for accidental bodily injury sustained in this state by the owner while occupying a motor vehicle or

> "... while not an occupant of a self-propelled vehicle..."

Before September 1, 1977, this latter phrase provided as follows:

> "...while not an occupant of a motor vehicle or motorcycle,..."

In comparing the pre- and post-1977 acts, it is clear that the old law was somewhat redundant but supplied a more expansive scope of PIP recovery[6], excluding payment only to owners injured while occupying a motorcycle. The 1977 amendment excluded PIP to owners injured while occupying any type of self-propelled vehicle (except a motor vehicle).

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[6]Indeed in State Farm Mut. Automobile Ins. Co. v. O'Kelley, 349 So.2d 717(Fla.1st DCA 1977), a moped occupant received PIP where the First DCA held simply that a moped was not a motorcycle. The court reasoned (back in 1977) that the propensity for accidental injury during operation of mopeds "can hardly be said to be that which we have traditionally associated with motorcycles. As observed by the 2nd DCA herein the Legislature's response was to amend the PIP statute, effective Sept. 1, 1977 to remove "motorcycle" inserting "self-propelled vehicle" and in Oct. 1982, deleting the reference to mopeds in sec.627.732(1), Fla.Stat.

The intent of the amendment is made more clear by recalling that "mopeds" first received special legislative attention in 1976 when sec.316.003(2), Fla.Stat. was amended to include mopeds within the definition of bicycles, apparently reflecting their increased use.[7]

Owners of these 1.5 horsepower vehicles are not required to purchase PIP yet the legislature apparently realized the increased risks presented by the specter of the light, self-propelled vehicles capable of 28-mph, ridden on public streets in collisions with substantial motor vehicles, by excluding their occupants from recovery of PIP under their auto policy. The premium charged simply is insufficient to cover the propensity for the obvious magnified risk of injury.[8] State Farm Mut. Auto. Ins. Co. v. Nicholson, 337 So.2d 860, 862(Fla.2d DCA 1976).

Respondent takes the position that the decision in State Farm Mut. Auto Ins. Co. v. Link, 416 So.2d 875(Fla.5th DCA 1982) represents strained and improper reasoning in its wholesale incorporation of Chapter 316 definitions to interpret 627.736(4)(d)(1)'s use of the undefined term 'self-propelled vehicle'.

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[7]Curiously, the legislature further amended sec.316.2065, Fla.Stat. in 1976 to provide in subsections (14) and (15) that no person under age 15 could operate a 1-1/2 horsepower moped and that they had to comply with federal motor vehicle light and safety standards. Respondent takes the position that this is further indicia that the Legislature did not intend to treat mopeds as bicycles in all respects.

[8]State of Florida, DOT Publication "Traffic Safety Trends and Forecasts", #HS805-998(Oct.1981) which showed the following death rates per vehicle: 1/1000 for motorcycles, 1/5000 for mopeds, 1/100,000 for bicycles.

Including this decision, the Second DCA has three times declined invitations to incorporate 316 definitions into chapter 627 and Respondent contends that the 2nd District's reasoning is more consonant with legislative intent.

In Allstate Ins. Co. v. Almgren. 376 So.2d 1184(Fla.2nd DCA 1979), the Second District rejected use of the sec.324 definition of Motor vehicle in construction of sec.627.727, Fla.Stat. terming them collateral definitions written for other purposes.

In State Farm Mut. Auto. Ins. Co. v. Nicholson, 337 So.2d 860(Fla.2nd DCA 1976), the Second DCA construed the 1976 version of this same 627.736(4)(d)(1) to determine that a 3-wheeled police vehicle was not a motorcycle by adopting the practical rule that courts will not distort words utilized in the normal course of the english language to impose liability upon an insurer. That decision rejected use of 316 definitions as "too restrictive".

Respondent's rejoinder to Petitioner's invitation to this Court to re-write sec.627.736(4)(d)(1), Fla.Stat. (1981) and the Criterion policy to permit PIP recovery by moped riders is to remind that the Legislature did just that in 1977 when it substituted the phrase "self-propelled" vehicle for "motor vehicle or motorcycle" to determine which claimants, who were not occupants of a motor vehicle, would be denied PIP recovery.

By using two different terms (motor vehicle and self-propelled vehicle), the Legislature did not decide the issue simply by excluding mopeds from the definition of motor vehicle. As Respondent earlier explained, the specific exclusion of mopeds

is redundant and unnecessary since only four (4) wheeled vehicles qualify as motor vehicles. The issue is only whether a moped is within the class denominated self-propelled vehicles. Amendment by omission of words presumes that the Legislature intended the revised statute have a different meaning than accorded it before the amendment. Capella v. City of Gainesville, 377 So.2d 658(Fla.1979). In substituting a general phrase for the specific words, the legislature obviously intended to exclude occupants of more types of vehicles than those customarily thought of, or defined as, motorcycles.

The Oregon statute referred to by Petitioner at p. 8 of his brief (sec.A) simply precludes an insured household resident from obtaining PIP for injuries (1) arising out of the use and maintenance of an owned but uninsured motor vehicle and (2) (in sec. B) arising out of riding a non-owned moped. Obviously, sec.A of the Oregon statute does not exclude PIP to all occupants of mopeds. It does require that PIP be paid to household moped-occupants only where a premium has been paid for PIP coverage on that moped or motor vehicle. The Florida "No-Fault" Act accomplishes the same thing in more general terms, by permitting insurers to exclude payment of PIP to the owners of uninsured vehicles and to persons insured who occupy owned but uninsured motor vehicles. Sec.627.736(2)(a), 627.736(4)(d)(3) and 627.736(4)(d)(a), Fla.Stat.(1981).

Sec.B of Oregon's statute only excludes recovery of PIP by a household resident when injured while the occupant of a non-owned moped. This exclusion might not pass constitutional muster since

if an Oregon insured bought PIP for his own moped, what rational basis could exist to justify a denial of benefits if he were injured while riding his neighbor's instead of his own? The answer is none.

The distinction made by Oregon is not special treatment of 1.5 horsepower engines, but rather is on the basis of preventing an insured from obtaining insurance coverage on a fleet of owned vehicles without paying a higher premium to reflect an increased risk.

The Florida Legislature has already made its substantive due process decision as to who is entitled to PIP - occupants of motor vehicles and persons not occupants of self-propelled vehicles. It determined that the coverage distinction is the vehicle's capability of self-propulsion, not maximum performance speed or horsepower rating. Such a standard as suggested by Petitioner would have no rational relationship to any valid legislative purpose since a 1.5 horsepower engine is capable of 28 mph.[9]

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[9] Deposition of Dave Schramer at pp.12, 13, vender of this Puch moped, dated January 11, 1983, also not in the record.

## CONCLUSION

To adopt the Link decision and the remainder of Petitioner's argument is tantamount to telling the Legislature that any provision of any statute may be selectively engrafted onto another by the judiciary, perhaps distorting beyond recognition one area to achieve a desired result in a second. Respondent takes the position that judicial integrity requires restraint and rejection of the Link rationale, in favor of the Second district's decision herein. The "ordinary meaning: of self propelled is just that - any vehicle capable of, or containing the means for, its own propulsion.[10]

Therefore, Respondent takes the position that a moped is a "self-propelled" vehicle and that this court should affirm the decision of the Second District and quash the decision of the Fifth DCA.

Respectfully submitted,

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[10] Webster's Seventh Collegiate Dictionary (1971) p.1050 and American Heritage Dictionary (1979), p.117.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to DANIEL C. KASARIS, ESQUIRE, P.O. Box 4192, St. Petersburg, Florida 33731 this 3rd day of August, 1984.

FOWLER, WHITE, GILLEN, BOGGS,
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