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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,003

JIMMY R. VELEZ,

Appellant,

vs.

CRITERION INSURANCE COMPANY, ETC.,

Appellee.

_____/

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

INITIAL BRIEF ON THE MERITS ON BEHALF OF APPELLANT, JIMMY R. VELEZ

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QUESTION PRESENTED

IS AN INSURER OBLIGATED TO PAY PIP BENEFITS TO ITS INSURED UNDER A MOTOR VEHICLE INSURANCE POLICY WHEN THE INSURED WAS STRUCK BY AN AUTOMOBILE WHILE OCCUPYING A TWO-WHEELED MODE OF TRANSPORTATION WITH PEDALS AND A 1.5 BRAKE HORSEPOWER MOTOR?

STATEMENT OF CASE AND FACTS

The Plaintiff/Appellant, JIMMY R. VELEZ, was seriously injured in a motor vehicle accident which occurred on April 28, 1982, in Pinellas County, Florida. At said time and place, Mr. Velez was operating a Puch MKII moped with a maximum rating of 1.5 brake horsepower, and was struck by an automobile. Mr. Velez owned an insured automobile at the time of his accident, and properly applied for Personal Injury Protection (PIP) benefits from his own insurer, Criterion. (R. 1-9)

Criterion began paying PIP benefits, but discontinued said payments upon its assertion that the occupant of a vehicle, such as Mr. Velez was riding at the time of his accident, is not entitled to PIP benefits. Mr. Velez brought suit for PIP benefits, and a final summary judgment was entered in favor of Criterion. (R. 14, 15)

Mr. Velez appealed the Trial Court's decision to the Second District Court of Appeal. That Court rendered its opinion on January 27, 1984, affirming the summary judgment granted by the Trial Court. The Second District thereafter denied Appellant's motion for rehearing and Appellant petitioned this Honorable Court to invoke its discretionary jurisdiction. On June 21, 1984, the Florida Supreme Court entered its order accepting jurisdiction and dispensing with oral argument.

ARGUMENT AND CITATION OF AUTHORITY

PIP BENEFITS ARE PAYABLE TO A PERSON WHO IS STRUCK BY A MOTOR VEHICLE WHILE RIDING UPON A TWO-WHEELED MODE OF TRANSPORTATION WITH PEDALS AND A 1.5 BRAKE HORSEPOWER MOTOR.

Florida Statute 627.736(4)(d) provides that the insurer of the owner of a motor vehicle shall pay PIP 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 if the injury is caused by physical contact with a motor vehicle. (Emphasis supplied.)

Hence, if Mr. Velez was not an occupant of a "self-propelled vehicle" at the time of his accident, PIP benefits are payable to him. The only question, therefore, is whether Mr. Velez' mode of transportation is considered a "self-propelled vehicle" under Chapter 627 of the Florida Statutes.

A.

THE PLAIN MEANING OF THE TERM "SELF-PROPELLED" DOES NOT ENCOMPASS THE APPELLANT'S MODE OF TRANSPORTATION.

Mr. Velez' moped may be operated by pedaling, or it can be operated with the assistance of its engine. It is significant to note, however, that its engine cannot be started un-

less the operator first propels the moped by pedaling. Therefore, since Mr. Velez' moped cannot be propelled without being pedaled, it is clearly not "self-propelled" within the plain meaning of that term.

Mr. Velez' mode of transportation is also not "self-propelled" according to the dictionary definition of that term. As the Appellee pointed out in its brief to the Second District, Webster's Seventh Collegiate Dictionary (1971) defines "self-propelled" as "containing within itself the means for its own propulsion." Since Appellant's moped cannot be propelled without being pedaled, the means for its propulsion are not contained within itself. Appellant's moped is, therefore, not "self-propelled" within either the plain meaning or the dictionary definition of that term.

B.

A MOPED WHICH CAN BE PEDALED BUT WHICH ALSO HAS A MOTOR WITH A MAXIMUM RATING OF ONE AND ONE-HALF BRAKE HORSEPOWER IS CONSIDERED BY THE LEGISLATURE TO BE A BICYCLE AND NOT A VEHICLE AND, THEREFORE, CANNOT BE A "SELF-PROPELLED VEHICLE" FOR PURPOSES OF THE AUTOMOBILE REPARATIONS REFORM ACT.

The term "self-propelled vehicle" is not defined in the Florida Statutes. Chapter 627 does, however, specifically

refer to Chapter 316 for a categorization of mopeds. In Section 627.32(1), the legislature excluded mopeds, as defined in Section 316.003(2), from its definition of "motor vehicle". (Emphasis supplied.) Significantly, Section 316.003(2) does not define the term "moped" at all. Rather, it is a definition of the term "bicycle" and includes mopeds with a maximum horsepower rating of one and one-half brake horsepower. Therefore, for purposes of Chapter 627, the legislature has clearly categorized mopeds with a maximum rating of one and one-half brake horsepower as bicycles, and mopeds with more than one and one-half brake horsepower as motor vehicles.

Since Mr. Velez' moped had a maximum rating of one and one-half brake horsepower, the legislature considers it to be a "bicycle" for purposes of Chapter 627. It cannot be disputed that a bicycle is not self-propelled, and it follows, therefore, that Mr. Velez' moped is not self-propelled.

The term "vehicle" is not defined in Chapter 627, but is defined in Section 316.003(64), which makes specific reference to Section 316.003(2), the same section referred to in Section 627.32(1). Section 316.003(64) defines a "vehicle" as any device in, upon or by which any person or property is or may be transported or drawn upon a highway, except bicycles or mopeds as defined in subsection (2). (Emphasis supplied.) The legislature, therefore,

does not even consider a moped to be a vehicle!

Since a 1.5 brake horsepower moped is considered a bicycle for purposes of Chapter 627, it is not self-propelled. Further, since bicycles and mopeds are not even vehicles, Mr. Velez' mode of transportation cannot be considered a "self-propelled vehicle". Hence, Mr. Velez was not an occupant of a "self-propelled vehicle" at the time of his accident, and PIP benefits are payable to him.

Aside from the instant case, State Farm Mutual Automobile Insurance Company v. Link, 416 So.2d 875 (Fla. 5th DCA 1982), is the only Florida decision which has directly considered the precise question presented herein. Although Link applied the 1980 Florida Automobile Reparations Reform Act, none of the applicable provisions were altered in the 1981 Act.

In Link, the Appellee was struck by an automobile while riding a moped rated at a maximum 1.5 brake horsepower. State Farm declined to pay PIP benefits upon its assertion that Link was an occupant of a self-propelled vehicle, and the Trial Court agreed, thereby prompting State Farm's appeal.

The Fifth District Court of Appeal noted that, had the legislature intended to limit recovery under PIP solely to pedestrians, it could have simply stated so. 416 So.2d at 878. The Court, therefore, looked to the definitional sections of Chapter 627 to determine whether Link's moped was a "self-propelled vehicle".

After first recognizing that Chapter 627 contained no definition of the term "self-propelled vehicle", the Court declared that it was proper to look to the definitions of Chapter 316 for two reasons. First, in Section 627.732(1), the legislature specifically referred to Chapter 316 for its definition of "moped". Therefore, when the legislature drew Chapter 627 (1981), it was cognizant of the fact that mopeds with a maximum rating of 1.5 horsepower were considered by Chapter 316 to be bicycles, but did nothing to dispel such notion for purposes of Chapter 627. Second, both Chapter 316 and Chapter 627 concern the use and misuse of various modes of transportation. Indeed, the courts often look to Chapter 316 in construing rights and liabilities under the no-fault act. See, e.g., Ward v. Florida Farm Bureau Casualty Insurance, 375 So.2d 898 (Fla. 1st DCA 1979), Sherman v. Reserve Ins. Co., 350 So.2d 349 (Fla. 4th DCA 1977), State Farm Mutual Auto. Ins. Co. v. O'Kelley, 349 So.2d 717 (Fla. 1st DCA 1977).

The Fifth District found that Link's 1.5 brake horsepower moped was a "bicycle" under the definition set forth in Section 316.003(2). The Court further decided that a moped is not a vehicle because both mopeds and bicycles are excluded from the definition of "vehicle" provided by Section 316.003(64). Therefore, Link, like the Appellant, was not an occupant of a "self-propelled" vehicle at the time he was struck by an automobile, and PIP benefits are payable to him.

The Link decision is based upon sound judicial reasoning which can be applied directly to the case at bar because the pertinent facts herein are identical to those in Link. The judgment of the courts below should, therefore, be reversed to compel Appellee Criterion to pay PIP benefits to the Appellant, as well as attorney's fees and costs.

C.

IF THE LEGISLATURE HAD INTENDED TO DENY PIP BENEFITS TO OCCUPANTS OF ALL MOTORIZED MODES OF TRANSPORTATION EXCEPT MOTOR VEHICLES, IT WOULD HAVE DONE SO.

By excluding mopeds, as defined in Section 316.003(2), from its definition of "motor vehicle" in Chapter 627, the legislature acknowledged that mopeds with a maximum rating of 1.5 brake horsepower are considered bicycles for purposes of the Automobile Reparation Reform Act. Apparently, the legislature thought that such language was clear enough to express its intent to treat mopeds with a maximum of 1.5 brake horsepower as bicycles and, therefore, non-self-propelled vehicles under the provisions of Chapter 627. The Second District Court of Appeal, however, has found another way to construe the legislature's intent and has characterized the analysis set forth herein and by Judge Upchurch in the Link decision, supra, as a "strained statutory construction." 445 So.2d at 1050.

The fact of the matter is that if the legislature had intended to deny PIP benefits to occupants of all mopeds, regardless of horsepower, it could easily have done so. In Senate Bill No. 708, the Oregon legislature amended its No-Fault Act to clearly exclude all mopeds. Said bill provides in pertinent part as follows:

> (2) Personal injury protection benefits apply to a person's injury or death resulting:
> (a) In the case of the person insured under the policy and members of that person's family residing in the same household, from the use or maintenance of any motor vehicle, except the following vehicles:
> (A) A motor vehicle, including a motorcycle or moped, which is owned by any of such persons and which is not covered by a motor vehicle liability insurance policy that provides personal injury protection benefits with respect to the use and maintenance of that vehicle;
> (B) A motorcycle or moped which is not owned by any of such persons, but this exclusion applies only when the injury or death results from such person's operating or riding upon the motorcycle or moped;...

The Florida legislature could easily have adopted a statute similar to Oregon's Senate Bill No. 708, but it chose not to do so. The only logical conclusion which can be derived from such inaction by the legislature is that it did not intend to deny PIP benefits to occupants of all mopeds, but only to occupants of mopeds with engines in excess of 1.5 brake horsepower.

D.

IT IS LOGICAL TO DENY PIP BENEFITS TO OCCUPANTS OF MOPEDS WITH ENGINES IN EXCESS OF 1.5 BRAKE HORSEPOWER WHILE GRANTING PIP BENEFITS TO OCCUPANTS OF MOPEDS WITH A MAXIMUM RATING OF 1.5 BRAKE HORSEPOWER.

Because mopeds with large, powerful motors are more like motorcycles than bicycles, it is logical to deny PIP benefits to occupants of same. Likewise, it is logical to grant PIP benefits to occupants of mopeds with small, low-horsepower motors, because such mopeds are more like bicycles than motorcycles. It is just such a distinction that has been used by the courts and legislatures of other no-fault states to determine whether PIP benefits are payable in situations similar to the case at bar.

In Myers v. Government Employees Ins. Co., 302 S.E.2d 331 (S.C. 1983), the Supreme Court of South Carolina was faced with the question of whether the occupant of a Honda Express, which is powered by a 50 cc, two-horsepower motor without pedal assist, was entitled to PIP benefits from the insurer of his automobile. The Court found that PIP benefits were payable because South Carolina law considers vehicles with engines not in excess of five horsepower to be motor-driven cycles, and not motorcycles. Similarly, New York law distinguishes covered from non-covered mopeds on the basis of maximum performance speed. See Levy v. Motor Vehicle Accident Indemnification Corp., 81 AD2d 816 (S.Ct. N.Y. County 1981). It would, therefore, be logical to construe

the Florida no-fault act in such a way as to distinguish covered from non-covered vehicles on the basis of horsepower as suggested hereinabove. Further, such a distinction may also be applied to bicycles with helper motors, an increasingly popular mode of transportation. Hence, if the helper motor is rated in excess of 1.5 brake horsepower, the occupant of such a bicycle would not be entitled to PIP benefits from his automobile insurer.

As can be seen from the argument set forth hereinabove, the legislature's treatment of mopeds powered by engines not in excess of 1.5 brake horsepower as bicycles is both a logical and a practical method of distinguishing covered from non-covered modes of transportation. The decisions of the Courts below should, therefore, be reversed, and Link, supra, should be adopted as the controlling law with regard to the question presented herein.

CONCLUSION

The Florida legislature intended to treat mopeds with engines not in excess of 1.5 brake horsepower as bicycles for purposes of the Florida Automobile Reparations Reform Act. Such modes of transportation are, therefore, not "self-propelled vehicles" within the meaning of said Act. The Appellant was, therefore, not an occupant of a self-propelled vehicle at the time of his accident, and PIP benefits, as well as attorney's fees and Court

costs are due and payable to him. Hence, the Appellant respectfully prays that the decisions of the Honorable Courts below be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 11th day of July, 1984, to: MARK E. HUNGATE, ESQUIRE, Attorney at Law, Post Office Box 210, St. Petersburg, Florida, 33731, attorney for Appellee.

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