DIA 10-6-87

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 70,106

WAYNE GOVAN, etc.,

Petitioner,

vs.

FOURTH DCA CASE NO. 85-2661

INTERNATIONAL BANKERS INSURANCE COMPANY,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

The parties will be referred to as the plaintiff or insureds and the defendant or insurer.

The following symbol will be used:

R - Record.

STATEMENT OF THE CASE AND FACTS

Insurer agrees with insured's statement of the case and facts.

SUMMARY OF ARGUMENT

Section 627.739(2), Florida Statutes (1983), provided:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, $1,000, and $2,000, such amount to be deducted from the benefits otherwise due each person subject to the deduction. (Emphasis added).

Insured selected a $2,000 deductible in his policy.

Section 627.736(1)(a) provides that the medical benefits under PIP are 80% of the medical expenses. The "benefits otherwise due" are therefore 80% of the medical expenses, or $4,709.96 in the present case. Subtracting the deductible elected by the insured of $2,000 leaves benefits payable of $2,709.96.

The insured contends the calculations should be done vice versa by first subtracting the $2,000 deductible from the total medical expenses and then taking 80% of that number. That method would result in an additional $400 of benefits, but would be contrary to Section 627.739(2). The opinion of the Fourth District is correct and should be affirmed.

ARGUMENT

POINT I

WHETHER THE 4TH DCA ERRED IN CONSTRUING FLA. STAT. 627.739(2) (1983) TO REQUIRE THAT ANY PIP DEDUCTIBLE BE SUBTRACTED FROM 80% OF MEDICAL BILLS INCURRED, RATHER THAN FROM 100% OF THE TOTAL MEDICAL BILLS INCURRED.

Conspicuous by its absence from plaintiff's brief is the wording of the statute and the insurance policy provision construed by the Fourth District. The statutory language is clear, and the insured apparently recognizes this, making no mention of it in his brief in an attempt to avoid the obvious. All this court really needs to do in order to determine the merits of this appeal is read Section 627.739(2), Florida Statutes (1983), which provided:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, $1,000, and $2,000, such amount to be deducted from the benefits otherwise due each person subject to the deduction. (Emphasis added).

The insurance policy in the present case had a $2,000 deductible, providing:

> LIMIT OF LIABILITY: APPLICATION OF DEDUCTIBLE: OTHER INSURANCE
>
> "The amount of any deductible stated in the schedule of declaration shall be deducted from the total amount of all sums otherwise payable by the company ... and if the total amount of such losses and expense exceed such deductible, then the total limit of benefits the company is obligated to pay shall be the difference between such deductible amount and the applicable limit of the company's liability." (Emphasis added) (R 135-153, Pg. 10 of Insurance Policy).

Section 627.736(1)(a) provided:

> (1) REQUIRED BENEFITS. - Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to the provisions of subsection (2) and paragraph (4)(d), to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows:
>
> (a) Medical benefits. - Eighty percent of all reasonable expenses for necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services. Such benefits shall also include necessary remedial treatment and services recognized and permitted under the laws of the state for an injured person who relies upon spiritual means through prayer alone for

> healing, in accordance with his religious beliefs. (Emphasis added)

The interpretation of the Fourth District is the only possible proper interpretation of this statute. Section 627.736(1)(a) provides that the PIP medical benefits due are 80 percent of the medical expenses. Section 627.739(2) provides that the insurer will offer deductibles from $250 to $2000 "such amount to be deducted from the benefits otherwise due". The only logical construction is to subtract the deductible from 80% of the medical expenses.

Plaintiff prefers that the deductible be subtracted from the total amount of the medical bills, and then 80 percent applied to that number, because plaintiff will receive $400 more than he would have received if the statutory language were followed. Plaintiff's construction is directly contrary to the provisions of the statute, which provides that the deductible is to be deducted from the "benefits otherwise due" (80 percent of medical bills), not from the total medical bills.

In the two cases relied on by plaintiff for conflict the opinions did not even mention the issue involved in the present case, which is which comes first, the 80% or the $2,000 deductible. The reasoning applied by the Fourth

District in the present case, if applied to the facts in those cases, would not change the result in those cases. There is thus no conflict.

In Thibodeau v. Allstate Insurance Company, 391 So.2d 805 (Fla. 5th DCA 1980), the medical expenses were in excess of $8,000. The policy only provided $5,000 in coverage for PIP benefits with a $4,000 deductible. Since the coverage was only $5,000, the "benefits otherwise due" were $5,000. After reducing that by the deductible of $4,000 plaintiff was owed $1,000. The Fourth District mistakenly said that its holding appears to conflict with Thibodeau because in Thibodeau the court appeared to hold that "benefits otherwise due" refers to the no-fault benefit limits. That statement is incorrect. What the Fourth District failed to understand was that "benefits otherwise due" in Thibodeau was $5,000 (the policy limits) because the medical expenses were in excess of $8,000. Applying 80% to the $8,000 expenses would still result in medical expenses in excess of $5,000. In the present case the policy limits were $10,000, more than the actual medical expenses.

That same distinction, as well as another, exists in Industrial Fire & Casualty Insurance Company v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978). In that case the policy

limits were $5,000 and the medical expenses and lost wages were approximately $40,000. As in Thibodeau, the court stated the benefits "otherwise due" were $5,000, there was a deductible of $1,000, and plaintiff was entitled to $4,000. There is another more important distinction in Cowan because in that case the accident occurred on February 24, 1977, and the court was applying the 1975 version of 627.736(1) which did not have the 80% provision. The 1975 statute provided for payment of 100% of medical expenses.

In the present case the Fourth District held that "benefits otherwise due" are determined by applying the 80% provision of the statute and then subtracting the deductible contained in the policy. In Thibodeau and Cowan, relied on for conflict, the courts did not even discuss this issue. Simple arithmetic shows that using the Fourth District's method in the present case results in the same amounts due reached by the Fifth District and the Third District.

In Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960), this court stated on page 782:

> In making a judicial effort to ascertain the legislative intent implicit in a statute, the courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used ... .

In Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), this court stated on page 820:

> ... The administrative construction of a statute by the agency charged with its administration is entitled to great weight. We will not overturn an agency's interpretation unless clearly erroneous. State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 828 (Fla. 1973).

See also Woodley v. Department of Health and Rehabilitative Services, District 3, Lake County AFDC, 505 So.2d 676 (Fla. 1st DCA 1987). In the present case three different employees of the Florida Department of Insurance testified that during their employment the Department of Insurance construed the statutes in the same manner as the Fourth District has done in the present case. (R 163-164, 179-189; 317-319, 321-322; 353, 360, 377-378).

The language of the statutes could not be more clear. The Fourth District correctly interpreted them and its opinion should be approved.

POINT II

WHETHER THE LOWER COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF ALL CLASS MEMBERS NAMED IN PLAINTIFF'S CLASS ACTION CLAIM, THEREBY IMPLICITLY DETERMINING THAT PLAINTIFF'S CLASS ACTION WAS MAINTAINABLE UNDER FLA.R.CIV.P. 1.220 AND THAT PLAINTIFF WAS A PROPER REPRESENTATIVE OF THE CLASS.

This case was originally filed as a single claim by the insured. It was not until after the lower court announced at a summary judgment hearing that it was interpreting the statute in favor of the insured that counsel for the insured attempted to make this into a class action. The Fourth District properly held that once the lower court had determined the merits, there was no longer any controversy on which a class action could be instituted.

If this court affirms the Fourth District on the substantive issue on this appeal, the class action question is moot. If this court reverses the Fourth District on the substantive issue, there is no reason for this court to reverse the Fourth District in regard to the class action, because that aspect of the Fourth District's opinion does not create conflict. At the end of the opinion the Fourth District simply stated:

> We also reverse that portion of the final order which allowed this action to proceed as a class action. It appears that the appellee did not file a motion for class certification

> until after he had obtained a favorable ruling on the merits.

The chronology was as follows. On August 22, 1984 there was a summary judgment hearing in which the trial court orally announced it was ruling in favor of plaintiff (R 120-134). On August 23, 1984, the day following the oral pronouncement of the ruling, the plaintiff filed the complaint for a class action (R 25-27). On January 16, 1985, the lower court ordered that plaintiff could proceed as a class action (R 102-105).

Once the lower court orally announced it was ruling in favor of plaintiff, there was no longer any controversy on which plaintiff could then bring a class action. In similar circumstances it has been held that a class action has been barred. Syna v. Shell Oil Company, 241 So.2d 458 (Fla. 3d DCA 1970); Sheppard v. Williams, 193 So.2d 191 (Fla. 3d DCA 1966).

The Fourth District did not err in determining that the class action was moot.

CONCLUSION

A close examination of the cases cited for conflict demonstrates that there is no conflict. Moreover the Fourth District's interpretation of the statutory language is the

only proper interpretation possible, and the opinion of the Fourth District should be approved.

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By _____
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CERTIFICATE OF SERVICE

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