O/A 10-6-87

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

WAYNE GOVAN, individually and on behalf of other similarly situated individuals,

Petitioner,

Case No.: 70,106

vs.

INTERNATIONAL BANKERS INSURANCE COMPANY,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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INDEX

TABLE OF CITATIONS

Other Authorities

ARGUMENT

POINT I

Respondent's chief argument -- that the statute is crystal clear and susceptible of only one interpretation -- overlooks the record evidence that three different trial court judges have agreed with Petitioner's argument as to the correct interpretation of the statute. This fact alone strongly suggests the statute is ambiguous and susceptible of more than a single interpretation.

Respondent's argument leaves unexplained the relation between the Medical Payments Statute, (627.736(4)(f)), which has as its express stated purpose the covering of any medical PIP claim which is otherwise covered by PIP but not payable due to the 20% co-insurance provision, and the PIP deductible statute. Respondent's argument leaves a gap, beyond the amount of the deductible, where neither med pay nor PIP applies (i.e., medical bills totalling between $2,000.00-$2,500.00).

If it is conceded the statute is ambiguous, it should be construed in the manner most favorable to the insured. Palma v. State Farm, 489 So.2d 147 (Fla. 4th DCA 1986). Any administrative problems created by apportioning PIP benefits between lost wages and medical bills are solved by the Holloway v. State Farm, 370 So.2d 452, (Fla. 4th DCA 1979) case holding that the method

of calculating PIP benefits should be done in the manner most advantageous to the insured (see Amicus Brief of AFTL, page 7). The Holloway case also answers the argument raised by Atlas Mutual Insurance Company v. Wolfort, 506 So.2d 99 (Fla. 4th DCA 1987), concerning the impracticality of an alternative interpretation where both medical and lost wages are sought.

Petitioner also suggests the proposed 1987 House Bill, attached as Appendix A to the Amicus Brief of Florida Automobile Underwriter's Association be stricken. The fact that a certain bill was proposed, but not passed, is not evidence of anything and argument based on a proposed bill is nothing but speculation. The legislature may well have decided the proposed bill is nothing more than a restatement of the existing statutory intent and rejected the bill for that reason.

Respondent's argument that the testimony of the three current and former Department of Insurance employees (Respondent's Brief, page 7) is persuasive is incorrect. First, as Petitioner argued below, their testimony is inadmissable, as the issue is purely and unequivocally a matter of statutory construction, and it is not the function of an expert witness to draw legal conclusions. "If the witness' conclusion tells the trier of fact how to decide the case and does not assist it in determining what has occurred, then it is inadmissable.", Town of Palm Beach v. Palm Beach County, 460 So.2d 879 (Fla. 1984). An

expert may not attempt to define a statutory term when its definition is a matter of law on which the Court should instruct the jury. Consolidated Mutual Insurance Company v. Rany, 238 So.2d 431 (Fla. 3rd DCA 1970). Also, Respondent does not claim the Department of Insurance has taken a formal position or promulgated a regulation construing this portion of the No Fault Act. Respondent cites with approval cases holding the administrative construction of a statute by the agency charged with its administration is entitled to great weight, but fails to cite any adminstrative construction of this statute ever promulgated by the Department of Insurance. If the Department of Insurance has administratively interpreted the statute, the appropriate Florida Administrative Code Rule should be cited, and there is no reference anywhere in the record to any rule or order of the Department of Insurance which could amount to an agency interpretation of the statute.

Respondent has only presented the opinion testimony of three individuals, who happen to be either current or former employees of the Department of Insurance.

POINT II

Respondent argues that because the trial court orally granted the individual Petitioner's summary judgment motion on August 22, 1984, and because the complaint for class action was not filed until the next day, August 23, 1984, that there was no longer any controversy on which Petitioner could bring a class action. This argument overlooks the fact that Petitioner filed a motion for class certification on August 17, 1984, prior to the summary judgment on the individual claim.

Respondent's reliance on Syna v. Shell Oil Company, 241 So.2d 458 (Fla. 3rd DCA 1970) and Sheppard v. Williams, 193 So.2d 191 (Fla. 3rd DCA 1966) is also inappropriate. Both Syna and Sheppard were decided in 1970 and 1966 respectively, prior to the several Federal Court cases cited by Petitioner, and prior to the U.S. Supreme Court case of United States Parole Commission v. Geraghty, 100 S.Ct. 1202 (1980). In light of the Geraghty decision as well as Susman v. Lincoln American Corp., 587 F.2d 866 (CA 7 Ill. 1978) and Steinberg v. Fusari, 364 F.Supp. 922 (D.C. Conn. 1973); 419 U.S. 379, 42 L.Ed.2d 521 (1975) it is doubtful that the reasoning of Syna and Sheppard is still viable. Further, in Syna, the appellate court was affirming the trial court's ruling. In Govan, the trial court ruled in favor of the class action and the appellate court reversed. It is submitted

the question of the propriety of the class action was a discretionary call for the trial court to make in view of the evidence before it at trial. The trial court's order granting the class action claim specifically addressed Respondent's mootness argument, and rejected it, based on the reasoning expressed in Candy H v. Redemption Ranch, Inc., 563 F.Supp. 505 (Fla. 4th DCA 1/15/87). The trial court's order granting the class representation claim, (at R 102-105) was supported by competent, substantial evidence, and should not have been set aside by the Fourth District Court of Appeals.

Respondent's argument on the class action issue also ignores the equitable aspect of this case. If Petitioner prevails on the statutory interpretation of the issue, there is no good reason why the trial court's determination as to the propriety of the class action should not be upheld. The only result from ruling in favor of Petitioner on the interpretation issue, and affirming the Fourth District's decision on the class issue, would be that prior PIP claimants would not receive the benefits this Court determines is properly due them under their PIP policies. Where the issue is susceptible of an arithmetical determination in each individual case, justice would not be served by a ruling in favor of Petitioner on the statutory interpretation issue, and a ruling against Petitioner on the class action issue.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Larry Klein, Esquire, Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401; Richard Kupfer, Esquire, P.O. Box 3466, West Palm Beach, FL 33402; Michael Richmond, Esquire, Nova Law Center, 3100 S.W. 9th Avenue, Fort Lauderdale, FL 33315; Jack W. Shaw, Jr., 1500 American Heritage Life Building, Jacksonville, FL 32202; Shelley Leinicke, Esquire, P.O. Box 14460, Fort Lauderdale, FL 33302; Marjorie Gadarian Graham, Esquire, P.O. Drawer E, West Palm Beach, FL 33402; Don Dowdell, Esquire, 2124 Deerfield Drive, Tallahassee, FL 32308 and Brian J. Deffenbaugh, Esquire, FL Department of Insurance, Larson Building, Suite 413-B, Tallahassee, FL 32301, this 6th day of August, 1987.

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