O/a 9-8-89
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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 73,488

FILED
SID J. WHI
AUG 11 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

INTERNATIONAL BANKERS INSURANCE COMPANY,

Petitioner,

vs.

SUSAN ARNONE,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

ISSUE

DID THE FOURTH DISTRICT ERR IN HOLDING THAT THE $10,000 POLICY LIMITS WERE AVAILABLE FOR PIP COVERAGE, WHERE THE STATUTE PROVIDES THAT THE DEDUCTIBLE ($2,000) IS "TO BE DEDUCTED FROM THE BENEFITS OTHERWISE DUE"?

The insured has made a two-pronged argument, however neither prong is responsive to our argument.

The first argument advanced by the insured is that there is some inconsistency between the position taken by the Department of Insurance in its amicus brief in this case, with the position taken by the Department of Insurance in its amicus brief in Govan. The insured argues on pages 2 and 3 that in Govan the Department of Insurance stated it had not made "an official determination by administrative rule or declaratory statement" as to the proper interpretation of the statute. This is not inconsistent with the Department's position in the present case that it has approved policy language providing that the PIP limits are reduced by the deductible amount. The insured fails to understand the distinction between having a written rule and approving the manner in which policies are written. Even if the positions of the Department of Insurance had the appearance of inconsistency, such inconsistency would be meaningless because of the difference in issues in Govan and in the present case. The issue in Govan was which comes first, the statutory percentage reduction, or the deductible elected by

the insured. There was no issue in Govan as to whether the insured could recover the full policy limits, or only the policy limits less the deductible.

Other than attacking the alleged inconsistency by the Department of Insurance, the only other argument advanced by the insured is that somehow Govan requires that the insured prevail in this case. Since Govan involved a different issue, Govan is clearly not controlling. Moreover, in Govan this court did approve language of the Fourth District to the effect that "benefits otherwise due" meant benefits payable "under the policy" before application of the deductible. Govan v. International Bankers Insurance Company, 521 So.2d 1086, 1088 (Fla. 1988); International Bankers Insurance Company v. Govan, 502 So.2d 913, 914 (Fla. 4th DCA 1986).

The insured has avoided discussing the plain language of Section 627.739(2), Florida Statutes (1985), which says that the deductible is to be deducted from "the benefits otherwise due." The meaning of this statutory language is really the only issue in this case, and there can be only one logical meaning to these words. Assuming there is no deductible, what are the "benefits otherwise due"? Section 627.736(1), entitled "Required Benefits" provides for benefits "to a limit of $10,000." If a policy contained no deductible, the "benefits otherwise due" could under no circumstances exceed $10,000. If, as the statute clearly

provides, the deductible is to be deducted from the "benefits otherwise due" the full policy limits are not recoverable where there is a deductible. In the present case the policy limits were $10,000 and the deductible $2,000. The maximum recoverable is clearly only $8,000. The only way the insured could prevail is if "benefits otherwise due" would be more than the policy limits, which cannot be.

We stated in our main brief that there was a dearth of authority specifying how a deductible is applied because it was obviously either controlled by statute or the policy. We have discovered a treatise, however, C.A. Williams, Jr. & R. Heins, Risk Management and Insurance (5th ed.), in which it is stated on pages **230** and **231:**

> Deductibles make it possible for the insured to bear all or certain types of losses up to a specified amount, while the insurer assumes part or all of the losses in excess of this amount up to the policy limits.
>
> * * *
>
> Deductible Clause. A provision in an insurance contract that requires an insured to bear part of the potential losses covered under the contract, typically the first **$100** or some other amount per occurrence. (Emphasis added)

The amount covered "under the contract" could be no greater than the policy limits. If the insured in the present case was entitled to recover the full **$10,000,** the insured would not be bearing any of the losses covered under the contract of insurance.

The insured would have paid a lower premium for a deductible, but would not have had a deductible.

An analogous situation was presented in Zmudczynski V. League General Insurance Company, **297 N.W.2d 696** (Mich. **1980),** in which statutory no-fault benefits for lost wages had a limit of **$1,285** a month. The statute provided for a deductible related to other health and accident coverage of the insured, which was applicable because plaintiff was receiving **$205** a week from other sources. Plaintiff's losses were substantially more than **$1,285** a month, and plaintiff contended he was entitled to the full **$1,285** a month payment even after the deductible was applied. The court rejected that argument, stating on page **697:**

> Plaintiff contends that the defendant's computation was in error. He alleges that his wages were substantially more than **$1,285.00** per month at the time of the accident. He concludes that his wage loss is the base figure from which the other benefits should be deducted. He argues that the **$1,285.00** per month maximum is the maximum amount payable after deductions rather than before.
>
> The trial court held that defendant's method of computing coordinated benefits under the policy and the statute was correct. The judge ruled that "benefits payable", as used in the statute, plainly means the maximum amount payable by the insurer, in this case **$1,285.00.** Therefore, it is from that figure that the deductibles must be subtracted, rather than from the plaintiff's actual wage loss.
>
> Plaintiff argues that the method of computation adopted by the defendant and approved by the trial court results in a windfall to the defendant. We disagree. At the hearing on the motion for summary judgment, it was agreed that plaintiff pays a lesser premium for coordinated benefits coverage. It is only fair that his benefits be reduced accordingly.

Applying the method used in Zmudczynski to the present facts results in a maximum liability for the insurer of $8,000, not the policy limits of $10,000.

The insured briefly discusses legislative history. Legislative history is irrelevant where the wording of a statute is clear. Rinker Materials Corporation v. City of North Miami, 286 So.2d 552 (Fla. 1973) and Volunteer State Life Insurance Company v. Larson, 2 So.2d 386 (Fla. 1941). In the event this court is interested in legislative history, we respectfully refer this court to the briefs in the consolidated case of Great Oaks Casualty Insurance Company v. Kelly, Case no. 74,208. In order to avoid repetition, we have omitted any discussion of legislative history because it is fully discussed in the briefs in Great Oaks.

CONCLUSION

The opinion of the Fourth District should be reversed.

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