O/a 9-8-89

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 74,208

GREAT OAKS CASUALTY INSURANCE COMPANY,

Petitioner,

v.

RAISHA KELLY,

Respondent.
_____/

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent, Raisha Kelly ("Kelly") was involved in an automobile accident on September 28, 1987 and, as a result thereof, incurred $16,701.00 in medical expenses. At the time of the accident Kelly was covered by the provisions of an insurance policy issued by Petitioner, Great Oaks Casualty Insurance Company ("Great Oaks") which provided personal injury protection ("PIP") benefits. The policy provided the statutorily mandated $10,000.00 PIP coverage and contained a $2,000.00 deductible.

Great Oaks tendered to Kelly the sum of $8,000.00 in full satisfaction of her claim. Because Kelly felt she was entitled to the full $10,000.00 in benefits provided by her policy, she filed a Complaint for Declaratory Relief, naming Great Oaks as the Respondent, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. In her Complaint, Kelly prayed for a declaration from the Court that she was entitled to PIP benefits in the full amount of $10,000.00, for a Final Judgment for the $2,000.00 difference from Great Oaks, and for attorney's fees and costs.

After Cross-Motions for Summary Judgment were filed, the Court ruled that Kelly was entitled to the relief sought in her Complaint and, after a short recitation of the pertinent case law, stated that,

> "It seems, therefore, that the formula is to determine the amount due without reference to the deductible provision. From the amount determined, subtract the amount of the deductible. The claimant receives the lesser of the difference or the limits of the policy; in this case $10,000.00."

After appealing the case to the Third District Court of Appeal, Great Oaks filed a Suggestion to that Court that the issue raised in this case be certified to this Court as a question of great public importance. The Third District issued its Order so certifying and on June 5, 1989 this Court issued its Order accepting jurisdiction.

SUMMARY OF ARGUMENT

Pursuant to §627.739, Fla. Stat. (1987), PIP insurers shall offer to insureds deductibles, in doubling amounts ranging from $250.00 to $2,000.00, with such amount to be deducted from the benefits otherwise due each person subject to the deduction. The interpretation of the term "benefits otherwise due" is the critical issue in this case. This Court has already ruled on the proper interpretation of this term and has done so consistently with the plain meaning of the term "deductible".

Furthermore, this Court has mandated a calculation for use in determining PIP benefits, and if this Court accepts the arguments urged by the Petitioner herein, equal protection would be denied to those persons whose medical bills exceeded $10,000.00, in that if the calculation is applied to cases with medical bills in excess of $10,000.00, it is Respondent's position which is correct in this case.

In addition, in 1982 a Bill was presented to the Florida Legislature which would have definitively changed the PIP statute to reflect the position taken by the Petitioner in this case. The Legislature did not enact that Bill, it never became law, and serves as further evidence of the appropriateness of Respondent's position in this case.

ISSUE

A $2,000.00 DEDUCTIBLE IN A POLICY OF PERSONAL INJURY PROTECTION INSURANCE (PIP) DOES NOT REDUCE FROM $10,000.00 TO $8,000.00 THE BENEFITS THAT ARE PAYABLE UNDER THE POLICY.

ARGUMENT

The controlling precedent in this case is the case of Govan v. International Bankers Insurance Company, 521 So.2d 1086 (Fla. 1988). In the Govan case this Court ruled in favor of the PIP carrier and mandated a formula by which benefits payable under PIP policies were to be determined. It is interesting to note that the Respondent in this case asks this Court not to follow its own precedent, wherein the ruling was in favor of the Respondent insurance company. This points up the simple fact that the Govan formula is an appropriate calculation used to determine benefits, and does not favor either the insured or the insurance company, but merely follows the law and provides an easily determinable and applied standard for calculating benefits.

Pursuant to the Govan formula, the total amount of medical bills incurred by the insured is to be multiplied by the percentage of coverage afforded by the PIP statute, or 80%. The resulting amount, or ''benefits otherwise due", is reduced by the amount of the deductible and the remainder is the amount payable to the insured. Of course, logically, if the remaining amount exceeds the limits of the policy, then the insurance company is responsbile for payment only up to its policy limits. The specific formula used in the Govan case is set out below:

Plaintiff's total medical bills	$5,887.45
Percentage payable pursuant to statute	x .80
Benefits due, but for deductible	$4,709.96
Less deductible	2,000.00
Benefits payable	$2,709.96

By applying the same formula to the instant case, it becomes clear that the trial court was correct in its ruling that Kelly is entitled to the full $10,000.00 limit of her policy. Specifically:

Plaintiff's total medical bills	$16,701.00
Percentage payable pursuant to statute	x .80
Benefits due, but for deductible	**$13,360.80**
Less deductible	2,000.00
Benefits payable	$11,360.80
Maximum benefits payable pursuant to policy limits	$10,000.00

I its discussion of Govan contained at pag s 13 and 14 of its brief filed in this case, the Petitioner curiously fails to apply the facts of the instant case to the Govan formula. Perhaps the Petitioner is suggesting that because of the mathematical results obtained, the Govan formula is only to be applied in cases in which the medical bills incurred by the insured do not exceed **$10,000.00.** For it is when said expenses do exceed $10,000.00 that Petitioner's interpretation of Govan falls apart. Nowhere in Govan does this Court limit its holding to cases in which the medical bills incurred are less than $10,000.00. Equal protection demands that the rights of all persons must rest upon the same rule under similar circumstances. Insurance Company of Texas v. Rainey, 86 So.2d 447 (Fla. 1956). Furthermore, under equal protection clauses, governmental acts that

classify persons arbitrarily may be invalid if they result in treating similar people in a dissimilar manner. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901 (1984). Pursuant to the position taken by the Petitioner in this case, an insured with medical bills under $10,000.00 will have his benefits calculated under the Govan formula, yet an insured with medical bills over $10,000.00 will simply have an automatic $2,000.00 taken from the maximum limits applicable to his policy.

It is important in this case to consider the plain meaning of the term "deductible" or "deductible clause". The Petitioner in its brief states at page 2 that "the outcome of this case turns on a question of legislative intent." It is respectfully suggested to this Court that an exhaustive analysis of legislative intent is not necessary when the plain meaning of a term is clear and the term is not ambiguous nor subject to various methods of interpretation. First, the term "benefits otherwise due" has already been interpreted by this Court in the Govan case. At page 1088 of the Govan decision, this Court, interpreting §627.739(2), stated that "[t]he plain reading of this statute requires a construction that subtracts the deductible from the eighty percent of the medical expenses." Second, the term "deductible" is susceptible to only one plain meaning, and that is that a deductible is a threshold to recovery. Plainly stated, in any type of insurance, be it PIP, Uninsured Motorist, Liability, or Homeowner's, a deductible is the amount which the insured must pay out of his own pocket before the insurance company will be required to pay

the first dollar toward its maximum policy limits. Indeed, Black's Law Dictionary, as a second definition of "deductible" states as follows:

"The portion of an insured loss to be borne by the insured before he is entitled to recovery from the insurer." The dictionary then refers the reader to the definition of the term "deductible clause", which is defined as a "clause in insurance policy providing that insured will absorb first part of loss (e.g. first $100) with insurer paying the excess."

Furthermore, the Supreme Court of New Jersey in the case of American Nurses Association, etc. v. Passaic General Hospital, etc., 484 A.2d 670 (N.J. 1984) stated as follows:

> "Though a deductible is frequently referred to as self-insurance, its functional purpose is simply to alter the point at which an insurance company's obligation to pay will ripen."

Id. at 673.

Clearly, the use of deductibles as a reduction in coverage is contrary not only to the Govan decision, and the plain language of Florida Statute §627.739, but is also a derogation of the commonly accepted interpretation of the term deductible.

It is also interesting to note that when the no-fault statute became effective in January of 1972, the law stated that the amount of the deductible was to be deducted from the "amounts otherwise due" each person subject to the deduction. The statute, when amended in 1977, changed the wording to "benefits otherwise due". (Emphasis supplied). This would seem to bring the provisions of §627.739(2) closer into alignment with the required benefits of 5627.736,

precluding the interpretation that the statute allowing deductible permits a coverage reduction.

In its brief, Respondent relies upon the cases of Industrial Fire & Casualty Insurance Co. v. Cowan, 364 So.2d 810 (Fla. 3rd DCA 1978) and Thibodeau v. Allstate Insurance Co., 391 So.2d 805 (Fla. 5th DCA 1980), as standing for the proposition that Florida's PIP statutue has always been interpreted by Appellate Courts to allow for the reduction of PIP benefits by the amount of the deductible. However, in the Govan case this Court specifically disapproved Thibodeau and Industrial Fire to the extent they conflicted with Govan.

This Court in its Govan decision specifically approved of the Fourth District Court of Appeal's decision in International Bankers Insurance Company v. Govan, 502 So.2d 913 (Fla. 4th DCA 1986) in which the Fourth District Court of Appeal clearly and unequivocally stated that the term "benefits otherwise due" is not the same as "policy limits". That Court noted:

> "We acknowledge that our holding appears to conflict with the opinions of two of our sister courts. See Thibodeau v. Allstate Insurance Co., 391 So.2d 805 (Fla. 5th DCA 1980); Industrial Fire & Casualty Insurance Co. v. Cowan, 364 So.2d 810 (Fla. 3rd DCA 1978). Those cases appear to hold that "benefits otherwise due" refers to the no-fault benefits limits, such as the $10,000.00 limit involved herein. If that were true, the "deductible" would not be a deductible at all in the manner that the word is normally used, i.e., as an amount to be deducted from the claim, but rather would simply be a means of providing for lower policy limits. We do not believe the legislature would have authorized lower policy limits in such indirect and unusual fashion, especially since section 627.736 (1) (a) specifically mandates coverage in the amount of at least $10,000.00. We are not aware of any statutory provision authorizing lesser limits. The International Bankers no-fault policy at issue in this case does contain a provision which, consistent with the holdings of

> Cowan and Thibodeau, reduces the policy limit by $2,000.00. We are concerned with this provision in that it appears to utilize the $2,000.00 deductible a second time, after it has already been used in the traditional manner discussed above as a threshold to recovery. [Footnote omitted1 .

Govan, 502 So.2d at, 914. (Emphasis supplied.)

The passage cited above, in addition to providing further evidence that the plain meaning of the term deductible is a threshold to recovery, gives further illumination by stating that a deductible is an amount to be deducted from the claim, and not from the policy limits. If a deductible was deducted from the policy limits it would not be a deductible, it would literally change the policy limits. Considering the fact that the $10,000.00 policy limit is statutorily mandated, and nowhere does the statute state that the limits are really $8,000.00 and not $10,000.00, the position urged by the Petitioner in this case is clearly incorrect.

In its brief, the Petitioner goes into an extensive review of the construction allegedly placed upon the statute by the Department of Insurance ("DOI"). The brief cites to the depositions of three DOI employees, David Goding, Opal W. Bennett, and Kenneth James Ritzenthaler. Petitioner asks this Court to place a great amount of credence upon the fact that "the DOI has always approved rates based on its interpretation of §627.739 that the total available PIP benefits may be reduced by the amount of the deductible, and insurers in this State have always relied on that interpretation." (Petitioner's brief at page 21.) The Petitioner fails to note, however, that agency determination with regard to a statute's interpretation and applicability, while normally to be accorded deference, is to be disregarded in

the event of a clear error or conflict with the intent of a statute. Sans Souci v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 421 So.2d 623 (Fla. 1st DCA 1982) appeal after remand 448 So.2d 1116 (Fla. 1st DCA 1984). It is clear that the interpretation placed upon §627.739 by the Department of Insurance is in derogation of the plain meaning of the word deductible, in conflict with this Court's decision in Govan, and amounts to an unauthorized attempt to utilize a policy deductible twice. The DOI, consistent with the position taken by the Petitioner herein, automatically reduces medical bills down to $10,000.00, and reduces them again by an additional $2,000.00 down to $8,000.00. This is clearly a violation of both equal protection rights and is contrary to the requirements of the statute whereby policy limits of $10,000.00 are mandated. The construction placed upon the statute by the DOI is clearly erroneous and should be disregarded by this Court for the reasons stated above.

Finally, in its brief, the Petitioner asserts that the legislature is presumed to be aware of judicial decisions when re-enacting a statute and that in 1982, when §627.739 (2) was re-enacted, it was not amended by the legislature even though the legislature knew of the interpretation being placed on the term deductible by the Courts, as evidenced by the Cowan and Thibodeau decisions. Petitioner therefore contends that the legislature agreed with Cowan and Thibodeau because the statute was not changed. The Petitioner fails to take into consideration the following points. First, because §627.736 clearly requires coverage up to $10,000.00, the legislature would have no need

to change the statute to comport with two incorrect decisions. Furthermore, as stated by this Court in Delaney v. State, 190 So.2d 578 (Fla. 1966), when re-enacting a statute the legislative body is presumed to be aware of constructions placed upon that statute by the highest court of the state and in the absence of clear expression to the contrary, is presumed to have adopted these constructions. As the decisions in Cowan and Thibodeau were not decisions of the highest Court of the state, the legislature is not presumed to have adopted the constructions placed by those lower courts.

The Govan decision handed down by this Court in 1988 is the only judicial construction by the highest court of the state as to the interpretation to be afforded the term "benefits otherwise due". Consequently, there is no credence to be placed on the fact that the statute was not amended in 1982.

Finally, and perhaps most importantly, this Court in the Govan case, in a footnote found on page 1088, stated as follows:

> "We note the legislature, during the 1987 session, failed to enact a bill which would have amended the statute to make it consistent with the statutory interpretation presented here by the Petitioner." House Bill 1015.

This Bill, presented to the legislature during the 1987 session, reads in pertinent part:

> "(2) Insurers shall offer to each applicant and to each policyholder, upon the renewal of a existing policy, deductibles, in the amounts of $250.00, $500.00, $1,000.00, and $2,000.00. The amount of a deductible shall be an initial out-of-pocket expense to be met by the policyholder prior to the calculation of benefits described in §627.736(1). The amount of a deductible may be applied to reduce the $10,000.00 limit described in §627.736(1). However, the amount of a deductible shall not be applied to reduce the amount of any benefits received in accordance with §627.736(1)(c)."

The Florida Legislature failed to enact this Bill and therefore directly refused to adopt the interpretation of the term "benefits otherwise due" which is being urged upon this Court by the Petitioner. Petitioner's allegations regarding legislative history aside, this is perhaps the most cogent demonstration of what the actual intent of the legislature is with regard to the interpretation of the term "benefits otherwise due". There is absolutely no reason to believe that by enacting a deductible provision, specifically §627.739(2), the legislature in any way intended to abrogate its statutorily mandated $10,000.00 coverage limitation contained in §627.736.

Furthermore, in the case of International Bankers Insurance Company v. Arnone, 528 So.2d 917 (Fla. 4th DCA 1988), the Fourth District Court of Appeal stated that §627.739(2) does not mention the terms or the limits of the policy and the legislature did not intend to permit a reduction of coverage when it permitted the offering of a deductible. This is the only direct pronouncement by any Court as to what the intent of the legislature specifically was in this particular case. This is not a general discussion of what Petitioner believes the intent of the legislature must have been, but rather, is a statement by a Court of Appeal of this State as to what the legislative intent actually was.

The last point raised by Petitioner in its brief urges that "even if the Court deems that a change in the law governing PIP deductibles is truly necessary, in the public interest the change must solely be applied to policies written or renewed after the effective date of this Court's decision in this case." Petitioner's brief at page 23.

The Petitioner fails to state, however, that the general rule in Florida requires that appellate decisions be given retrospective and prospective effect. Parkway General Hospital, Inc. v. Stern, 400 So.2d 166 (Fla. 3rd DCA 1981).

The Petitioner in its brief argues that if the Court finds for the Respondent in this case, it will be "mandating in an ex post-facto manner the use of certain insurance policies in this state wherein the premium charged and collected was inadequate to cover the insured risk." Petitioner's brief at page 22. It goes on to state that such a ruling by this Court would subject insurers to exposure for additional losses which were never contemplated by the policy and not covered by a lawfully adequate premium. The question of whether the premium charged would be inadequate to cover the insured risk was not raised as an issue with the trial court and, as such, should not be considered by this Court. Rolling Oaks Homeowner's Association, Inc. v. Dade County, 492 So.2d 686 (Fla. 3rd DCA 1986) and Silber v. Cn'R Industries of Jacksonville, Inc., 526 So.%~974 (Fla. 1st DCA 1988). The adequacy of the premiums charged and the existence of a "manifest inequity for the insurer" and a "windfall advantage for the insured" are not supported by competent record evidence and should be disregarded by this Court.

CONCLUSION

For the aforementioned reasons, Respondent Raisha Kelly respectfully requests that this Court affirm the decision of the Eleventh Judicial Circuit in and for Dade County, Florida and hold that PIP insurance carriers are to provide the $10,000.00 statutorily mandated coverage and cannot reduce same by the amount of the deductible. This decision should be applied prospectively and retrospectively to all insureds in this state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 31st day of July, 1989, to: DOUGLAS H. STEIN, ESQ., BLACKWELL, WALKER, FASCELL & HOEHL, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131.

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