IN THE SUPREME COURT OF FLORIDA

AUTO OWNERS INSURANCE CO.,

Petitioner,

v.

MICHAEL TOMPKINS,

Respondent.

_____/

SUPREME COURT CASE NO. 82,991
DISTRICT COURT CASE NO. 93-00881

RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION

On Notice to Invoke the Discretionary Jurisdiction
of the Supreme Court to Review the Decision
of the Second District Court of Appeal

GOLDBERG, GOLDSTEIN & BUCKLEY
Attorneys for Respondent
P.O. Box 2366
Ft. Myers, FL 33902
813-334-1146

Jay Cooper, Esquire
Florida Bar No. 599832

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STATEMENT OF THE CASE

Respondent, MICHAEL TOMPKINS, brought a personal injury action against his insurance carrier, Petitioner AUTO OWNERS INSURANCE COMPANY, for underinsured motorist benefits/damages arising out of an automobile accident that occurred on June 24, 1989. During the trial in the Circuit Court of Lee County, Florida, TOMPKINS presented evidence of economic losses that resulted from the accident to include past lost wages and future loss of earning capacity as well as past medical expenses and medical expenses to be incurred in the future. TOMPKINS' treating orthopedic surgeon testified in the trial court proceedings that TOMPKINS would have future problems with his back and neck that would require office visits and physical therapy in the ensuing years of TOMPKINS' life. Petitioner's chosen examining physician testified that TOMPKINS had not sustained a permanent injury and would require no future care. The case was submitted to the jury on the issues of negligence, comparative negligence, permanent injury and past and future damages.

At the charge conference prior to closing arguments, TOMPKINS' counsel maintained that TOMPKINS was entitled to have the verdict form questions on future economic damages precede the question that asked whether TOMPKINS had sustained a permanent injury. Petitioner's counsel maintained that TOMPKINS could recover no future economic damages in the absence of a permanent injury. The trial court agreed with Petitioner's counsel and over TOMPKINS' objection gave a jury instruction that indicated that TOMPKINS

could only recover future economic damages if he had sustained a permanent injury. Further, the trial judge utilized a verdict form over TOMPKINS' objection that had the "permanent injury" question before the questions allowing for the future economic damages. The jury returned an interrogatory verdict finding no permanent injury and thus, given the form of the verdict, TOMPKINS was precluded from recovering future economic damages. TOMPKINS appealed to the Second District Court of Appeal.

The Second District Court of Appeal reversed for a new trial solely on the issue of future economic damages. The Second District agreed with TOMPKINS' contention that the trial court erred in instructing the jury that future economic damages were recoverable only if the jury found that TOMPKINS had sustained a permanent injury. The Second District Court cited as controlling its own decision in Ketchum v. Dunn, 619 So.2d 1010 (2nd DCA 1993). Petitioner challenges the Second District's decision and asks this Court to exercise its discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The Second District's opinion in the instant case is consistent not only with its own decision in Ketchum v. Dunn, 619 So.2d 1010 (2nd DCA 1993) but is further in accordance with existing Florida law, statutory authority and standard jury instructions: Iowa National Mutual Insurance Co. v. Worthy, 447 So. 2d 998 (5th DCA 1984), Lasky v. State Farm Insurance Co., 296 So. 2d 9 (Fla. 1974), Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982), Bennett v. Florida Farm Bureau Casualty Insurance Co., 477 So. 2d 608 (5th DCA 1985), Smey v. Williams, 608 So. 2d 886 (5th DCA 1992), Cronin v. Kitler, 485 So. 2d 440 (2nd DCA) rev. den. 492 So. 2d 1333 (Fla. 1986), McClellan v. Industrial Fire and Casualty Insurance Co., 475 So. 2d 1015 (4th DCA 1985), Florida Statute 627.737, and Florida Standard Jury Instruction 6.1 on "Motor Vehicle No Fault Threshold". Despite Petitioner's protest to the contrary, the Second District's opinion in the instant case dovetails with well established precedent. Those cases cited by Petitioner as conflicting are scant on facts and legal reasoning and do not present a conflict that this Court need resolve. This Court should decline to exercise its discretionary jurisdiction.

ARGUMENT

Legal analysis of the asserted conflict begins with Florida Statute 627.737 which provides that to the extent no fault benefits are available to an injured claimant, there can be no duplication of benefits in an action against the tort feasor. The statute further provides that as to non economic or intangible damages, a Plaintiff must meet the permanent injury threshold. As noted in Iowa National Mutual Insurance Co. v. Worthy, 447 So. 2d 998 (5th DCA 1984) the permanent injury threshold is applicable only when the Plaintiff seeks damages for pain, suffering, mental anguish and inconvenience resulting from bodily injury caused by the negligent operation of a motor vehicle. Worthy at page 1001.

Worthy notes that this Court has interpreted the no fault law in accordance with the position taken by TOMPKINS in this case. In Lasky v. State Farm Insurance Co., 296 So. 2d 9 (Fla. 1974) this Court stated: "Thus the insured party will receive such benefits as payment of his medical expenses and compensation for any loss of income and loss of earning capacity under the insurance policy he is required by law to maintain, up to the applicable policy limits, and may bring suit to recover such of these damages as are in excess of his applicable policy limits." Lasky as cited in Worthy at page 1001.

Following changes in the statutory no fault law, this Court in Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982) noted that, "Under the new provisions the injured party still recovers most of his out of pocket expenses from his own insurer and is allowed to bring suit

for the remainder." Chapman at page 18. In a reaffirmation of the viability of Lasky, the Court in Chapman noted that the "permanent injury" threshold is a classification only necessary to recover for pain and suffering. Chapman at pages 18, 19.

Other District Court decisions that both precede and post date the Lasky and Chapman decisions follow the Lasky/Chapman reasoning. In Bennett v. Florida Farm Bureau Casualty Insurance Co., 477 So. 2d 608 (5th DCA 1985) the District Court stated that, "A tort feasor is liable to the injured party for the percentage of medical expenses and lost wages not payable under PIP coverage and for any amount of these damages which exceed the statutory limits, without regard to the threshold requirements of Section 627.737(2), Florida Statutes." Bennett at page 608. The Fifth District Court of Appeal further clarified the existing law in Smey v. Williams, 608 So. 2d 886 (5th DCA 1992) when it stated: "An automobile accident victim may recover excess damages relating to medical expenses and loss of earnings as a result of bodily injury, sickness or disease whether or not those two items of damages accrued in the past (prior to trial) or will be suffered in the future (after trial)." Smey at page 887.

Since the trial of the instant case, Standard Jury Instruction 6.1 on the "Motor Vehicle No Fault Threshold" was published at 613 So. 2d 1316 (Fla. 1993). The new standard instruction cites the authorities listed above as well as Cronin v. Kitler, 485 So. 2d 440 (2nd DCA) rev. den., 492 So. 2d 1333 (Fla. 1986), and McClellan v. Industrial Fire and Casualty Insurance Co., 475 So. 2d 1015 (4th

DCA 1985). Ketchum v. Dunn, 619 So. 2d 1010 (2nd DCA 1993) is also consistent with the new standard instruction as is the instant case.

Petitioner maintains that conflict can be found with the Fourth District's decisions in Josephson v. Bowers, 595 So. 2d 1045 (4th DCA 1992) and Fazzolari v. City of West Palm Beach, 608 So. 2d 927, 929 (4th DCA 1992). Admittedly, both of these Fourth District Decisions appear to be out of sync with the same court's McClellan decision which cites Chapman and Worthy as precedent. Josephson v. Bowers offers no facts for its blanket dicta statement and cites to Hubbs v. McDonald, 517 So. 2d 68 (1st DCA 1987) for support. Hubbs v. McDonald is a decision that discusses what evidence is necessary to establish loss of future earning capacity. It is hardly precedent for Josephson v. Bowers and it appears that the Fourth District would equate "permanent impairment" of earning capacity mentioned in Hubbs to permanent injury. Hubbs at page 70.

Fazzolari set out specific facts appearing in the record in that case which justified the jury's refusal to award future medical expenses. The court recognized that the jury "asked a question during their deliberations about whether future medical costs could be managed by an insurance carrier, thereby implying that there was some question about awarding money directly to the Plaintiff for this purpose." Fazzolari at page 929. Further, the facts as set forth on pages 929 and 930 of Fazzolari indicate that the plaintiff in that action was working full time at a wage 40% higher than he made before the accident. On its facts, Fazzolari

does not conflict with the instant decision or well established precedent. The other cases cited by Petitioner would appear to pre date the no-fault law in their reasoning.

There is no conflict that exists between the District Courts of Appeal and this Court on the issue of tort damages recoverable in the absence of a permanent injury. Indeed, the case law would appear to be settled and supportive of the Second District's opinion in the instant cause.

CONCLUSION

As there is no conflict among the decisions of the District Courts and this Court on the issue presented, this Court should decline to exercise its discretionary jurisdiction.

Respectfully submitted,

GOLDBERG, GOLDSTEIN & BUCKLEY
Attorneys for Respondent
P.O. Box 2366
Ft. Myers, FL 33902
813-334-1146

Jay Cooper
Florida Bar No. 599832

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to CURTRIGHT TRUITT, P.O. Box 2706, Ft. Myers, FL 33902, this 26th day of January, 1994.

GOLDBERG, GOLDSTEIN & BUCKLEY
Attorneys for Respondent
P.O. Box 2366
Ft. Myers, FL 33902
813-334-1146

Jay Cooper