8-15

SUPREME COURT OF THE
STATE OF FLORIDA

JEFFREY L. HANNAH,

Petitioner,

vs.

VERONICA NEWKIRK,

Respondent.

CASE NO: 85,946

District Court of Appeal,
4th District No. 94-1140

Seventeenth Circuit
Court Case No. 92-4868

ON QUESTION CERTIFIED BY 4TH DCA AS ONE OF GREAT PUBLIC IMPORTANCE

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner Jeffrey L. Hannah certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Steven N. Ainbinder (Counsel for Respondent)
2. W. George Allen (Counsel for Petitioner)
3. James K. Clark (Counsel for Respondent)
4. Frances F. Guasch (Counsel for Respondent)
5. Jeffrey L. Hannah (Petitioner)
6. Veronica Newkirk (Respondent)
7. Fidelity and Deposit Company of Maryland (Surety)
8. Government Employees Insurance Company
9. Seitlin & Company Insurance
10. Honorable James M. Reasbeck

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PRELIMINARY STATEMENT

Throughout the course of Petitioner's Initial Brief On The Merits the parties shall be referred to as they appear before this Honorable Court. References to the records shall be as follows:

References to transcript excerpts will be designated with "T" with the corresponding page number. Additionally, the hearing date will be included in the designation.

References to the supplemental transcript will be designated as "ST".

All emphasis will be supplied by the writer unless otherwise indicated.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDING AND DISPOSITION IN THE COURT BELOW

On or about February 20, 1992, the Petitioner HANNAH, filed a Complaint against Respondent NEWKIRK for damages sustained as a result of a motor vehicle accident (R1-3). On or about August 26, 1993, the jury returned a verdict for Petitioner HANNAH in the amount of $7,420.50, representing $6,820.50 in medical expenses and $600.00 in lost wages. The jury found no permanent injury so there was no award of future damages (R42-43). Post trial, Petitioner HANNAH filed a Motion for Final Judgment in the amount of the jury award, specifically $7,420.50 (R51-52). The Honorable Judge Reasbeck granted Petitioner HANNAH's Motion for Final Judgment on October 12, 1993, in the full amount of the jury verdict (R1-56)

On or about October 21, 1993, Respondent NEWKIRK filed a Motion for Rehearing. In that Motion, Respondent requested that the Plaintiff's judgment be reduced by the amount of the PIP payment received by the Plaintiff, specifically, the Respondent requested that the judgment be reduced to $3,180.20 (R59-62).

On or about January 27, 1994, Respondent NEWKIRK filed a Motion for Remittitur pursuant to Florida Statutes §627.737 and §627.739 (R63-74). Specifically, Respondent requested that the Court (1) reduce Plaintiff's judgment by the payments made by the Personal Injury Protection carrier (hereinafter referred to as PIP), and (2) reduce the final judgment by the $2,000.00 deductible applicable to the Plaintiff's policy with TransFlorida Casualty.

Ultimately on or about March 9, 1994, a hearing was held on Respondent NEWKIRK's Remittitur Motion. At that hearing, the Court granted the Motion for Remittitur as far the PIP payments actually received, but denied the Motion for Remittitur with respect to the PIP deductible of $2,000.00. After the deductions for PIP payments actually received were made, a Final Judgment in the amount of $3,146.28 was entered in favor of Petitioner HANNAH (R80).

On or about April 25, 1994, Respondent NEWKIRK timely filed a Notice of Appeal (R81).

The Fourth District Court of Appeal held that the trial court erred when it failed to set off the amount of Petitioner HANNAH's PIP deductible from a jury verdict, and reversed the trial court's ruling.

However, based on this Court's comment in Footnote two (2) of the Mansfield v. Rivero, 620 So.2d 987 (Fla. 1993) opinion, the District Court certified the following question as one of great public importance:

> "Does Section 727.739(1), Florida Statutes, mandate that a trial court set off the amount of the injured party's elected PIP deductible and the amount of benefits paid by the PIP carrier from a verdict against a tortfeasor?"

II. STATEMENT OF THE FACTS:

As a result of the January 11, 1991, automobile accident, Petitioner HANNAH, filed a complaint for damages. Petitioner HANNAH sued for the total amount of all

claims. A separate claim for the $2,000.00 deductible applicable to Petitioner's insurance policy was never made. Petitioner HANNAH sued for the total amount of damages which he sustained, and the jury subsequently awarded him damages in the amount of $7,420.50.

Prior to the trial in this matter, an agreement was reached between counsel for Respondent and counsel for Petitioner to reduce the jury award post-trial by any and all PIP payments to Petitioner HANNAH. Nothing was ever said about, nor was there any agreement in regards to, the PIP deductible because it was never at issue.

Pursuant to the agreement to reduce the jury award post-trial by any collateral sources received by the Plaintiff from his PIP carrier, the trial judge gave the following jury instruction:

> You should not reduce the amount of compensation to which Jeffrey L. Hannah is otherwise entitled on account of any wages or medical insurance payments which the evidence shows that Jeffrey L. Hannah received from his employer, insurance company or any other source.
>
> You know everyone has to have PIP insurance and it pays from your medical insurance. Your aren't to do any deduction. I will take care of that later on.
>
> The Court will reduce as necessary the amount of compensation to which Jeffrey L. Hannah is entitled to on account of any such payments. (T. 9-10, 8/26/93)

There was no mention made regarding Petitioner HANNAH'S, PIP deductible of $2,000.00.

During closing argument, trial counsel for Petitioner HANNAH requested that the jury return a verdict for the total medical expenses in the amount of $10,130.50.

Ultimately, the jury came back with a verdict for Petitioner HANNAH in the amount of $7,420.50. This amount represented $600.00 in lost wages and $6,820.50 in medical bills. (R. 42-43).

At a hearing on Respondent's post-trial Motion for Remittitur, the parties agreed to reduce the jury verdict of $7,420.50 by the total PIP pay out in the amount of $4,274.22. Accordingly, a Final Judgment was entered in favor of Petitioner HANNAH in the amount of $3,146.28 (R80). The trial judge declined to further reduce the judgment by the $2,000.00 applicable to Petitioner's PIP insurance policy (R76, 77).

SUMMARY OF ARGUMENT AND STANDARD REVIEW

The trial court was correct in determining that Petitioner HANNAH was entitled to the full amount of the jury award less the amount of medical expenses previously paid by his PIP carrier. The Respondent herein would seek to hold the Petitioner to be a self-insurer requiring him, an innocent victim, to pay the deductible on his insurance policy, and unreimbursed medical bills associated with his treatment.

The issue of whether an accident victim is required to subtract the amount of insurance deductible from a jury award was specifically addressed in Rivero v. Mansfield, 584 So.2d 1012, 1014 (Fla. 3rd DCA 1991) which held that §627.739(1) Fla. Stat. (1983) does not require the subtraction of the deductible from the jury award. (emphasis added), quashed on other grounds, Mansfield v. Rivero, 620 So.2d 987 (Fla. 1993).

The intent of the personal injury protection system as enacted into law, and as the courts have subsequently interpreted it, is to offer a form of protection to a person regardless of fault. The statutes were never intended, nor could they be intended, to make individuals self-insurers or to afford exoneration to culpable parties. Kwechin v. Industrial Fire and Gas Company, 409 So.2d 28, 30 (Fla. 3rd DCA 1981), approved 446 So.2d 1337 (Fla. 1983); Fortune Insurance Company v. McGhee, 571 So.2d 546 (Fla. 2nd DCA 1990).

There is no statutory authority that allows a culpable party and their insurance carrier to escape liability for their negligent actions. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1329 (Fla. 1981).

The exercise of the trial court's discretion is subject to review on appeal in order to determine whether there was an abuse of discretion. Brenner v. Gelernter, 91 So.2d 306 (Fla. 1956). Whether there has been an abuse of discretion is determined by whether reasonable men could differ as to the propriety of the action taken by the trial court. If reasonable men could differ, then the action is not unreasonable, and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his discretion fails to satisfy this test of reasonableness. Canakaris v. Canakaris, 383 So.2d 1197 (Fla. 1980); Erie Woods, N.V. v. Crab Pot, 426 (Fla. 4th DCA 1984).

The trial court's ruling in the case sub judice satisfies the reasonableness test as set forth supra, and therefore should be affirmed by this Court.

ARGUMENT

DOES SECTION 627.739(1), FLORIDA STATUTES, MANDATE THAT A TRIAL COURT SET OFF THE AMOUNT OF THE INJURED PARTY'S ELECTED PIP DEDUCTIBLE AND THE AMOUNT OF BENEFITS PAID BY THE PIP CARRIER FROM A VERDICT AGAINST A TORTFEASOR?

The legislative purpose behind Florida Statute §627.739(1) is to assure complete insurance coverage for injuries. Kwechin v. Industrial Fire and Casualty Insurance Company, 409 So.2d 28 (Fla 3rd DCA), approved, 447 So.2d 1337 (Fla 1983). In Kwechin, the court found that the legislative purpose of assuring complete coverage was accomplished by permitting an insured to elect a deductible if the insured is covered by other insurance which would pay for the loss. The purpose of the Statute is not to deprive a successful plaintiff damages awarded by a jury verdict which was properly supported by the facts and evidence at trial.

The issue of whether an automobile accident victim is required to subtract the insurance deductible from a jury award was specifically addressed in Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3rd DCA 1991). In that case, a victim of an automobile accident brought suit against the tortfeasor for damages. A judgment was entered based on the jury verdict which awarded the amount of the victim's unpaid medical bills but found that the victim had sustained no permanent injury. Subsequently, the trial court amended the final judgment reducing the amount by the applicable PIP benefits recoverable under the policy.

The District Court reversed and remanded the trial court's decision, holding (1) that an injured party's recovery for unpaid medical bills for non-permanent injury

should not be reduced by the amount of benefits recoverable under the injured parties PIP policy, and (2) that §627.739(1) did not require the subtraction of the amount of the Plaintiff's deductible from the jury award. Specifically, the court stated that §627.739(1) contained no mandate that a tortfeasor's obligation to pay damages be reduced by the amount of the victim's deductible. Id. at 1014. Based on the lack of support for what the court termed Petitioner's "unorthodox proposition", the court declined to construe the Statute to require the deduction of the deductible and thereby reversed the amended final judgment and remanded the case to the trial court to reinstate the final judgment. Id. at 1014.

The decision of the District Court was subsequently quashed on other grounds. Mansfield v. Rivero, 620 So.2d 987 (Fla. 1993)

This Court in Mansfield quashed the decision of the District Court and held that the "No Fault Law's" statutory exemption from tort liability exempted tortfeasors to the extent that PIP benefits would be payable under insured's policy where jury had found no permanent injury. The issue of whether an insured could recover their PIP deductible from the tortfeasor was not addressed on appeal with the exemption of footnote (2) which provides:

> "In accordance with sections 627.737(1) and 627.736(a), the Riveros should recover 80% of all their reasonable medical expenses from their own PIP carrier. Consequently, under this statutory scheme, the Mansfields are obligated to pay the remaining 20% of these expenses. This calculation should not be confused with the optional deductible provided for under section 627.739, which allows an insured to elect a $250, $500, $1,000 or $2,000 deductible from the benefits the insured is entitled to receive from the insured's PIP carrier." Id. at 990.

In Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974) the

Supreme Court upheld as constitutional the entire "No Fault Insurance Law" as set forth in Florida statutes 627.736 et seq. Subsequently in Industrial Fire and Casualty Insurance Company v. Kwechin, 447 So.2d 1337 (Fla. 1983) the court addressed the issue of deductibles in light of the language of Florida Statute §622.739 and the intent of the "No-Fault Law" in regards to the issue of deductibles. In that regard, the court stated:

> Further support for this reading of 627.739 comes from reading in pari materia with the rest of Florida's No Fault Insurance Law. To allow one who lacks any other applicable insurance coverage to purchase personal injury protection subject to a deductible of several thousand dollars makes that person, in effect, a self-insurer for that not inconsiderable amount without subjecting the insured to any showing of financial responsibility as required by 627.733(c)(b), Florida Statutes (1977). Indisputably, allowing insurance company fees to issue policies with large deductibles not covered by other insurance circumvents the general policy of this law as articulated in Lasky. Id. at 1339.

The court further stated that, "to read the statute to permit an issuance of inappropriate coverage while it denies access to the Courts to remedy the loss raises grave constitutional problems." Id. at 1339.[1]

A person has a right to carry a deductible waiving coverage and retaining the right to collect same against a tortfeasor. As noted by the district court in Rivero v. Mansfield, supra, there is no mandate that a tort feasor's obligation to pay damages be reduced by the victim's deductible. Rather, it is the overriding purpose of the

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[1] In Fortune Insurance Company v. McGhee, 571 So.2d 546 (Fla. 2nd DCA 1990) the court noted that while 627.737 had been amended subsequent to the decision in Kwechin the amendment to the statute did not alter legislative purpose behind that statute. Id. at 548.

statute is to assure complete insurance coverage for the injuries sustained by the plaintiff. Kwechin, supra.

The cases cited by Respondent NEWKIRK in Initial Brief of Appellant refer only to the constitutionality of the "No Fault Law", and do not specifically address the issue of whether a PIP deductible can be deducted post-trial from a jury verdict in favor of a plaintiff. In Verdecia v. American Risk Assurance Co., 543 So.2d 321 (Fla. 3rd DCA 1989) the court upheld the statutory provision eliminating the tort remedy against the tortfeasor for the PIP deductible in the face of a challenge to its constitutionality. The court did not hold that a PIP deductible could be deducted from the judgment post-trial.

A person who is injured in an accident should not be punished simply because they have a deductible to their PIP insurance, thereby making him a self-insurer for those medical bills. No court has ever imposed a self-insurance obligation on an injured person so that their right to be made whole is destroyed. The purpose of the No-Fault statute is to (1) provide complete coverage for injuries and (2) prevent double recovery. Further, the intent of the "No-Fault Law" is not to shield at fault parties while leaving innocent, injured parties, to be self-insurers.

Court's addressing the constitutionality of the "No-Fault Law" have consistently held that between insurance payments and the right to recover medical bills and lost wages not covered, no constitutional impairment exists in the enactment and enforcement of the law. However, to accept the Respondent's position and to require that the Plaintiff's jury verdict be reduced by the amount of the innocent parties PIP

deductible would be to graph into the law an unconstitutional application of the existing "No-Fault Law".

CONCLUSION

Based on the Authorities and reasons set forth above, the decision of the District Court should be quashed, and the case remanded with directions that the trial court's judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail this 21st day of July, 1995 to Frances F. Guasch, Esq., 19 West Flagler Street, Suite 1003, Miami, Florida 33130.

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