ORIGINAL

SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 26 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et. al.,

Petitioners,

vs.

KUNBOK LEE, et. al.,

Respondents.
_____/

CASE NO. 86,969
DISTRICT OF APPEAL
CASE NO. 94-2424

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

RESPONDENTS' ANSWER BRIEF

ROBERT A. ROSENBLATT
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Attorney for Respondents

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TABLE OF AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

The Respondents adopt the statement of the case and facts as set forth in the Petitioner's brief on the merits, subject to any additions, or connections the Respondents may argue in their brief. Respondents further adopt the statement of the case and facts as set forth in the brief of the amicus curiae.

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ISSUE PRESENTED FOR REVIEW

Whether the District Court was correct when it found that the statute of limitations commenced running at the time of the breach of the contract rather than the date of the accident.

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SUMMARY OF ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE STATUTE OF LIMITATIONS PERIOD IN AN ACTION FOR A BREACH OF CONTRACT FOR PERSONAL INJURY PROTECTION (PIP) COMMENCES RUNNING WHEN THE INSURER FAILS TO PAY THE BENEFITS RATHER THAN ON THE DATE THE ACCIDENT OCCURRED.

The District Court correctly held that it is the act of failing to pay PIP benefits that causes the breach of the contract, that starts the clock for statute of limitations purposes.

Florida Statutes provide that PIP benefits are overdue if not paid certain 30 days after the insurer is notified in writing. Therefore a breach of the contract can only occur when the insurer fails to pay the benefits after being requested by the insured.

This follows the general rule that a cause of action for a breach of contract arises at the time of the breach. Therefore, the District Court was correct in rejecting the Petitioner's claim that in determining when the breach occurred, the Courts should calculate the commencement as the date of the accident rather than the date of breach.

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ARGUMENT

Florida Statute 627.736(4)(b) states that PIP benefits

shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.

The PIP benefits are overdue and a breach occurs only after the insured sends proper written notice and the insurer fails to pay the benefits during that period, only then can a PIP suit be instituted against the insurer for their breach of contract.

The Fourth District has held that a cause of action against an insurer for failure to provide PIP benefits does not accrue until the injured party has made a written claim for PIP benefits and the insurer has failed to pay the claim within the 30 day time period. Levy vs. Travelers Insurance Company, 580 So.2d 190, 191 (Fla. 4th DCA 1991).

The Levy court reasoned that the insurer voluntarily pays within the 30 days period as set forth in Florida Statute 627.736(4)(h) then there is no breach of contract, and consequently no cause of action. It is only actionable after the 30 day time period has expired.

Similarly, the Third District has correctly reasoned that the limitations period in a PIP action cannot accrue until the insurer has failed to pay on a written PIP claim within the 30 day trial period. Lee vs. State Farm Mutual Automobile

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Insurance Company, 661 So.2d 1300 (Fla. 3rd DCA 1995).

The Petitioners rely heavily upon the Fladd vs. Fortune Insurance Company, 530 So.2d 388 (Fla. 2d DCA) review denied 539 So.2d 475 (Fla. 1988). As was demonstrated in the court below, this reliance is misplaced. Fladd dealt with a situation in which there was an issue of uninsured motorist claims along with a PIP action. The District Court concluded that where there was a PIP action, and an uninsured motorist action that the date of the accident should govern both potential causes of action. The Fladd fact pattern is easily distinguished in the present case in that unlike Fladd, there is no claim for uninsured motorist benefits pending in the lower court.

In fact, the viability of the Fladd decision has to questioned in light of the fact that after Fladd was decided the Second District decided Donovan v. State Farm Mutual Automobile Insurance Company, 574 So.2d 285 (Fla. 2nd DCA 1991). [1] Donovan held that a cause of action accrues at the time of the insured's refusal to pay benefits.

Therefore, it appears that the Donovan Court has if not by interference overruled Fladd, has restricted Fladd to the facts that are unique to Fladd.

The Petitioner mistakenly rely upon this Court's decision

[1] The Donovan panel consisted of 2 of the same judges that had decided Fladd in 1988.

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in State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982). This case simply held that a claim for UM benefits arises from the insured's case of action against the tort feasor. The UM carrier stands in the shoes of the tort feasor and can raise as a defense any defense the tort feasor can raise against the insured. Since the tort feasor would be liable for medical expenses, so would the UM carrier. Kilbreath was not concerned with a PIP cause of action, and is therefore not applicable.

An insured's claim for PIP benefits arises from a contractual agreement between the insured and the insurer and as governed by Florida Statute 627.736(1). Whether any third party is liable in tort is if no consequence to PIP benefits being paid by the insurer. Therefore PIP benefits under this statute should be governed by the same general law that an action for a breach of contract arises only upon the act which causes the breach. Fradley v. County of Dade, 187 So.2d 48 (Fla. 3rd DCA 1966) see also Levy and Donovan, supra.

The District Court held properly that a cause of action for PIP benefits is no different than the general rule for governing breach of contract actions and accrues only at the time of the breach.

Therefore it is respectfully submitted that this honorable Court affirm the decision of the trial court.

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CONCLUSION

Based upon the facts and law cited above, this Honorable Court should affirm the District Court's decision.

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CERTFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this February 21, 1996, to: JOHN W. REIS, ESQ., Sparkman, Robb, Nelson & Mason, P.A., 19 West Flagler Street, Suite 1003, Miami, Florida 33130 and EDWARD S. SCHWARTZ, ESQ., Law Offices of Philip Gerson, P.A., 100 Chopin Plaza, Miami Center, Suite 1310, Miami, Florida 33131.

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