IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,052

RONNIE WOODALL, et ux.,

Petitioners,

vs.

TRAVELERS INDEMNITY COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Reference to the record on appeal will be denoted as (R -) followed by the appropriate page number. Reference to the transcripts of hearing will be denoted by (R - trans.) followed by the appropriate page number. Reference to the appendix will be denoted by (A -) followed by the appropriate page number.

The Petitioners, Ronnie and Judith Woodall will be referred to as "the Woodalls"; Respondent, the Travelers Indemnity Company, will be referred to as "the Travelers".

STATEMENT OF THE CASE AND THE FACTS

The Woodalls have requested that this Court invoke its discretionary review of a certified question from the First District Court of Appeal based upon a perception that it is a question of great public importance. However, the facts of this case do not necessitate that this Court consider the certified question based on this Court's prior rulings.

Although in large part the Woodalls' Statement of the Case and Facts is correct, there are some errors which need to be addr-essed. Petitioner, Ronnie Woodall, was involved in a car accident on December 15, 1987 and the accident. was caused by the negligent driving of Mr. John D. Stewart, Jr. and as a result of the accident, Mr. Woodall received injuries. At the time of the accident, Mr. Stewart had an insurance policy with Superior Insurance Company which provided $10,000.00 in coverage for bodily injury liability. According to the Woodalls' Statement of the Case and Facts, page 1, an action was filed against the tortfeasor, Mr-. Stewart, but is was not until September 9, 1993 that the full policy limits of this coverage were tendered to the Woodalls by the tortfeasor's liability insurer. However, the record in this case contains no information as to whether a claim was filed against the tortfeasor or not. In fact, in the Woodalls' answers t0 interrogatories dated May 11, 1995, they denied ever being a party, either Plaintiff or Defendant, in a lawsuit other than the present

matter. Following the tender by Superior Insurance Company of the tortfeasor's policy limits, counsel for the Woodalls wrote a letter to Travelers and requested payment under the Woodalls uninsured motorist policy. (R-218). Travelers responded to counsel. for the Woodalls via correspondence dated November 12, 1993 in which Travelers reminded counsel for the Woodalls that the statute of limitations for uninsured/underinsured motorist claims is five (5) years and that the Woodalls' claim for uninsured/underinsured motorist benefits was no longer viable. (R-219). The Woodalls claim that Travelers made no objection to the settlement; however, this is a statement which is beyond the scope of the record on appeal and should not be considered. Further, on page 2 of the Statement of the Case and Facts, the Woodalls contend that Travelers breached its contract of uninsured motorist insurance by denying coverage. Again, this statement is not supported in the record on appeal nor is this a correct statement of the events which transpired in this case.

A Complaint (R-l) was filed by the Woodalls on December 14, 1993, followed by two Amended Complaints (R-9 and R-23). Of interest, in the Complaint (R-l) and the Amended Complaint (R-9), the Woodalls attached a copy of the declaration sheet as its exhibit and further stated that a complete copy of the policy was in the possession of the Travelers. A hearing on the Motion to Dismiss took place on April 25, 1994, and the Amended Complaint was

dismissed, with leave to amend, pursuant to Court Order (R-21) dated April 29, 1994. According to the Order Granting the Motion to Dismiss, Travelers was to provide the Woodalls with the applicable policy and the Woodalls would then have ten (10) days from the date it receives a copy of the applicable insurance policy to amend the pleadings accordingly. (R-21). Therefore, at the time of the filing of the Complaint (R-1) on December 14, 1993 as well as at the time of the filing of Amended Complaint (R-9) on January 10, 1994, the Woodalls did not possess a copy of the applicable policy despite the Woodalls' current assertions that they failed to file their claim for uninsured motorist benefits within five (5) years from the date of the accident due to their reliance upon the applicable policy language.

On June 30, 1994, following receipt of the applicable policy, a Second Amended Complaint (R-23) was filed and Travelers again filed a Motion to Dismiss (R-47) on July 14, 1994. A hearing occurred on September 15, 1994 and an Order (R-67) Denying the Motion to Dismiss was entered on September 29, 1994. Travelers conducted discovery and filed a Motion for Summary Judgment (R-183) with a hearing on August 8, 1995. Travelers argued that the Woodalls failed to timely file their Complaint in accordance with the applicable statute of limitations. An Order (R-229) Granting the Motion for Summary Judgment was entered on August 10, 1995, and a final Summary Judgment (R-237) was entered on August 14, 1995.

Thereafter, a Notice of Appeal was timely filed on September 9, 1995 (R-245) and the Appeal was reviewed by the First District Court of Appeal. Woodall v. Travelers Indemnity Company, 21 Fla. Law Weekly D2044 (Fla. 1st DCA 1996) (A I). The First District Court of Appeal rendered its opinion affirming the decision of the trial court under the authority of State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So. 2d 632 (Fla. 1982) (A-5). The First District Court also certified the following question to be a matter of great public importance:

> Whether the holding in Kilbreath applies when a Plaintiff's uninsured motorist policy contains a no action/exhaustion clause providing that payment will be made only after the limits of liability have been used up under all applicable bodily injury liability policies.

SUMMARY OF ARGUMENT

Ronnie Woodall was injured in a motor vehicle accident on December 15, 1987. The individual with whom he had the accident had bodily injury insurance limits of $10,000.00. On December 14, 1993, nearly six (6) years after the motor vehicle accident, the Woodalls filed a Complaint (R-1) against the Travelers for uninsured motorist benefits. The Woodalls and Travelers agree that the rights and obligations of the parties are governed by contract law, since these rights and obligations arise out of the insurance contract. Hartford Accident and Indemnity Company v. Mason, 210 So.2d 474 (Fla. 3rd DCA 1968). The parties further agree that the five year limitation period specified by Florida Statute 95.11(2)(b) for actions founded on a contract is applicable to the Woodalls claim under their automobile policy for uninsured motorist benefits against the Travelers. Burnett v. Fireman's Fund Insurance Company, 408 So.2d 838 (Fla. 2nd DCA 1982).

While the parties are in agreement that a five (5) year statute of limitations applies to this claim, Travelers asserts that the statute of limitations begins to run on a claim for uninsured motorist benefits from the date of the motor vehicle accident. State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982). Accordingly, the Woodalls had five (5) years from the date of the accident (December 15, 1987), or until December 15, 1992, in which to file their claim

against Travelers for uninsured motorist benefits

In the Woodalls" Brief on the Merits, they put forth the following arguments:

* This Court's decision in Kilbreath is the law of Florida with respect to uninsured motorist claims only;

* Florida Statute 627.727(6) distinguishes between an uninsured and an underinsured motorist claim;

* Florida Statute 627.727(6) creates an underinsured motorist claim;

* That the accrual date for an underinsured motorist claim accrues when an insurer breaches its insuring agreement, or in the alternative, it accrues when the tortfeasor's liability limits are tendered.

However, each of these arguments put forth by the Woodalls fail for the following reasons:

* This Court has previously held in State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982) that a cause of action for an uninsured/underinsured motorist claim arises on the date of the accident with an uninsured/underinsured motorist;

* Florida Statute 627.727(3), which was in effect at the time of Ronnie Woodall's accident, provides a definition for an underinsured motorist claim which includes instances of underinsurance and no insurance;

* This Court in Williams v. Hartford Accident & Indemnity Company, 382 So.2d 221.6 (Fla. 1980) held that the legislative amendment in 1973 to Florida Statute 627.727 clearly required uninsured vehicle coverage to also function as underinsured vehicle coverage;

* The Woodalls had a right to make a claim for uninsured/underinsured motorist benefits without first making a claim against the tortfeasor.

* The only logical and reasonable accrual date for- a UM claim is the date of the motor vehicle accident

Accordingly, throughout this action, Travelers has asserted that the policy language belatedly relied upon by the Woodalls does not serve to alter the applicable statute of limitations for- an uninsured/underinsured motorist claim and the logic and reasoning of this Court as set out in Kilbreath controls this matter; therefore, the Woodalls had five (5) years from the date of the accident giving rise to a claim for uninsured/underinsured motorist benefits (December 15, 1987) in which to file a claim against Travelers. Since no claim was filed by December 15, 1992, the trial court properly granted Travelers's Motion for Summary Judgment which was properly affirmed by the First Distr-ict Court of Appeal.

ARGUMENT

ISSUE I

WHETHER THE HOLDING IN KILBREATH IS "GOOD LAW" FOLLOWING THE ENACTMENT OF FLORIDA STATUTE 627.727(6) 1977 AND SUBSEQUENT AMENDMENT IN 1982.

The Woodalls devote a substantial portion of their initial brief to an issue and argument which they make more complicated than need be. The Woodalls acknowledge that this Court in State Farm Mutual Automobile Insurance Company v. Kilbreath, 41.9 So.2d 632 (Fla. 1982) (A-1) determined that an action for uninsured/underinsured motorist benefits is governed by a five (5) year statute of limitations which begins to run as of the date of the accident. Id at 632. The Woodalls state that the controlling statute at the time of the Kilbreath decision was Section 627.727, Florida Statute (1972), which was silent as to when an uninsured motorist claim or an underinsured motorist claim is created. Despite the earlier acknowledgement, the Woodalls assert that the Florida Legislature in 1977 enacted Florida Statute 627.727(6) which they argue makes Kilbreath obsolete or in the alternative, assert the Kilbreath rationale only applies to claims for uninsured motorist benefits and not to underinsured motorist benefits. However, the Woodalls reliance upon Section 6 of Florida Statute 627.727 is misplaced as this Section simply establishes a procedure for settlement by an injured person of a claim with an uninsured motorist and the injured person's own liability carrier.

The Woodalls' position as to the effect of Section 6 Florida Statute 627.727 is in error for several reasons. First, this Court in Kilbreath specifically stated that the decision applies to uninsured/underinsured motorist claims. This Court held:

> "The cause of action for an uninsured/underinsured motorist claim arises on the date of the accident with an uninsured/underinsured motorist since the right of action stems from the Plaintiff's right of action against the tortfeasor. The statute of limitations thus begins to run on the date of the accident rather than on the date of compliance with the conditions precedent contained in the insuring agreement." Id at 633.

A second reason as to why the Woodalls' argument is in error stems from the fact that the very statutory definition of an underinsured motorist claim includes both uninsured and underinsured motorist benefits. Florida Statute 627.727(3) in 1973 changed the definition of an uninsured motor vehicle Lo include not only a vehicle which had no liability insurance, but in addition, defined the words "uninsured motor vehicle" to include an insured motor vehicle when the liability insurer thereof has provided limits of bodily injury liability for its insured which are less Lhan the limits applicable to the injured person provided under underinsured motorist's coverage applicable to the injured person. Accordingly, the Woodalls have failed to consider the very definition found within Florida Statute 627.727(3) which applies to the instant matter

The Woodalls' position as to the effect of Section 6 of Florida Statute 627.727 is in error for a third reason given this

Court's opinion in the Williams v. Hartford Accident and Indemnity Company, 382 So.2d 1216 (Fla. 1980). There, this Court relied on the 1971 version of Florida Statute 627.727 and this Court discussed the effect of a 1973 amendment to that statute. This Court in Williams, supra, held that the Petitioners' uninsured motorist coverage was required by Section 627.727(1), Florida Statutes (1971), to operate as underinsured motorist coverage

> "Concepts of uninsured and underinsured are so closely related that the legislature's failure in an amendment to the uninsured vehicle coverage statute to use the term "underinsured" and to delete earlier nominal references to "uninsured vehicle coverage" did not provide any inference that the term "uninsured" was to be narrowly construed so as not to include "underinsured." Id at 1217.

Accordingly, both by statutory definition as well as prior cases decided by this Court, it has been clearly held that Florida Statute 627.727 (6) does not mandate a distinction between an uninsured motorist claim and an underinsured motorist claim.

The Woodalls position as to the effect of Florida Statute 627.727(6) is in error for a fourth r-eason. The Woodalls argue that there is a different statute of limitations for underinsured motorist benefits claims versus uninsured motorist benefits claims and this in contrary not only Florida Statute 627.727(3) but also the Traveler-s policy. On page 8 of the Travelers policy, it states:

> "Uninsured motor vehicle means a highway vehicle or trailer of any type:

1) To which no bodily injury liability insurance policy or bond applies at the time of the accident;

2) To which a bodily injury liability insurance policy or bond applies at the time of the accident, but with limits of liability less than the applicable uninsured motorist's limits of liability provided under this policy."

Accordingly, the Travelers policy language defines an uninsured motor vehicle consistent with case law and Florida Statutes.

The Woodalls also argue that an underinsured motorist claim (as opposed to an uninsured motorist claim) is created by Florida Statute 627.727(6). This argument is patently erroneous. This relied upon statutory section simply establishes a settlement protocol. For the Woodalls to argue that this section serves to create an underinsured motorist claim reveals such a basic misunderstanding of Florida law that Travelers is reluctant to even address this argument for fear that doing so lends the appearance of credibility to their argument. The Woodalls argue that:

> "The time is right for this Court to revisit the decision in Kilbreath and honor the Legislature's mandate on the separate and distinct treatment to be applied to an underinsured motorist claim occurring after October 1, 1982." Woodalls' Brief, page 15.

In fact, this Court has already revisited the decision in Kilbreath and considered the Woodall's argument. As previously stated, this Court in Williams, supra, held Florida Statute 627.727 made uninsured vehicle coverage also function as underinsured vehicle coverage and noted the closely related concepts of uninsured and underinsured motorist coverage. Id at 1217. Moreover, recently,

this Court in State Farm Mutual Automobile Insurance Company v. Lee, 21 Fla. Law Wkly S335 (Fla. August 22, 1996) (A-8), addressed the question of when the statute of limitations begins to run on a claim for PIP benefits and this Court specifically distinguished between the accrual of a cause of action for PIP benefits and the accrual of a cause of action for UM benefits. In Lee, supra, this Court relied on Kilbreath stating:

> "We held that a cause of action for an uninsured/underinsured motorist (UM) claim arises on the date of the accident since the right of action stems from the Plaintiff's right of action against the tortfeasor." Id at S335 (emphasis added).

While relying upon the earlier Kilbreath rationale for the accrual of a cause of action for UM benefits, this Court determined that the most logical event to begin the running of a statute of limitations for PIP benefits is the date the insurance contract is breached. Lee at S336. In addition, the Lee Court approved earlier opinions of the Third and Fourth District Courts of Appeal in the decisions of Lee v. State Farm Mutual Automobile Insurance Company, 661 So.2d 1300 (Fla. 3rd DCA 1995) and Levy v. Travelers Insurance Company, 580 So.2d 190 (Fla. 4th DCA 1991). In Levy, the Fourth District Court stated that:

> "The claim for PIP benefits is a first party claim in contract for failure to pay the contractual obligation for personal injuries sustained, regardless of fault.... we see no reason to depart from the usual and customary rules regarding the application of the statute of limitations to insurance contracts unless there is an exception brought about by the nature of the claim as in the UM instance set forth in Kilbreath." Levy at 191

{emphasis added).

Given the foregoing case law analysis, it becomes apparent that this Court has in fact revisited the decision in Kilbreath, that the Kilbreath rationale is still "good law" which supports Travelers's argument that the Kilbreath holding applies to the instant case.

Not only does Kilbreath, supra, and Lee, supra, support the position of the Travelers in this **case** but the rationale as expressed by this Court in the earlier case of Dewberry v. Auto Owners Insurance Company, 363 So.2d 1077 (Fla. 1978) also holds significance to this matter. This Court held the uninsured motorist statute gives the insured the same cause of action against the insurer that he has against the uninsured/underinsured third party tortfeasor for damages for bodily injury. This Court noted the basic theory of uninsured motorist coverage is to compensate a Plaintiff for a deficiency in the tortfeasor's personal liability insurance coverage. Id at 1081. In footnote 5 of the Dewberry decision, this Court relied on Section 627.727(3), Florida Statutes (1973), which changed the definition of an uninsured motor vehicle to include not only a vehicle which had no liability insurance, but in addition, defined the words "uninsured motor vehicle" to include an insured motor vehicle when the liability insurer thereof

> "has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under underinsured motorist's coverage applicable to the injured person." Id at 1081.

Thus, while the tortfeasor in the Dewberrv case was "underinsured" the court referred to the claimant's/insured's coverage as "uninsured motorist coverage." Id at 1081. From this footnote, it becomes obvious that the Woodalls have failed to take into account the existing definitions contained within Florida Statute 627.727(3). Consequently, it is readily apparent the Woodalls' argument that Kilbreath applies only to uninsured motorist claims while Florida Statute 627.727(6) governs underinsured motorist claims is without support.

THE WOODALLS HAD A RIGHT TO MAKE A CLAIM FOR UNINSURED/UNDERINSURED MOTORIST BENEFITS WITHOUT FIRST MAKING A CLAIM AGAINST THE TORTFEASOR.

Not only do the Woodalls' arguments fail for the reasons previously stated, the Woodalls have completely failed to distinguish a line of Florida cases which hold there need be no claim or recovery against a tortfeasor prior to an insured's ability to bring a claim for uninsured motorist benefits. This demonstrates the accrual of the action is independent of the settlement. Beginning with Arrieta v. Volkswaqen Insurance Company, 343 So.2d 918 (Fla. 3rd DCA 1977), the Appellate Court held that the Plaintiff could petition to compel arbitration with her uninsured motorist carrier without first bringing an action against the underinsured tortfeasor. In Arrieta, it was the 1973 version of Florida Statute 627.727 which applied and the Appellate Court noted:

> "By statutory definition, Arrieta sustained injuries as a result of an uninsured motor vehicle because the tortfeasor's liability limits were less than the uninsured motorist limits applicable to the Plaintiff." Id at 920.

The Court held that "for- all purposes of the statute", a motor vehicle is "uninsured" when its liability insurer has provided limits less than the uninsured motorist's limits applicable to the injured person and that test is clearly dependent only on limits of liability." Id at 921.

Similarly, in Apodaca v. Old Security Casualty Insurance Company, 343 So.2d 677 (Fla. 3rd DCA 1977), the Appellate Court held that an injured Plaintiff, who had available uninsured motorist coverage, could compel arbitration on an uninsured motorist claim without first proceeding to judgment against the negligent tortfeasor if the tortfeasor's liability insurance limits were less than the limits of the underinsured motorist coverage. The Court noted that the law was clear that the Appellant need not proceed to judgment against the negligent tortfeasor prior to compelling arbitration with the uninsured motorist carrier. Id at 677.

In United States Fidelity and Guaranty Company v. State Farm Mutual Automobile Insurance Company, 369 So.2d 410 (Fla. 3rd DCA 1979), an insurer brought a declaratory action against its insured seeking a to compel the insured to pursue her claim against the third party tortfeasor before proceeding with her underinsured

coverage claim. The Third District Court of Appeal held that, where the third party tortfeasor's insurance limits were less than the underinsured coverage provided by the insured's own policy, the insured had the absolute right to arbitrate that claim without first resorting to an action against, or achieving a settlement with, the third party tortfeasor. Id at 369. Further, the Court noted that the insured had an existing right to have the issue of the value of injuries as well as the liability of the underinsured motorist determined through the contractually provided means of arbitration. Id at 411.

Finally, in Jones v. Integral Insurance Company, 631 So.2d 1132 (Fla. 3rd DCA 1994), the uninsured motorist carrier asserted that no uninsured motorist claim could be brought since its insured failed to timely file a claim against the tortfeasor. In Jones, as in the case sub iudice, the applicable uninsured motorist policy did not require the insured/injured party file an action against the tortfeasor. Therefore, the Court held Jones had no obligation at law to bring suit against the tortfeasor-. Similarly, no such requirement was placed on the Woodalls by their policy with the Travelers.

Jones, supra, as well as the other cases previously cited, demonstrate an insured/injured party can bring an uninsured motorist claim without taking any action against the tortfeasor. Given Arrieta, supra, Apodaca, supra, USF&G, supra and Jones,

supra, the Woodalls' argument that they first had to exhaust the policy limits of the tortfeasor prior to filing a claim for uninsured motorist benefits is a misstatement of the law. No such requirement exists. Therefore, the Woodalls need not have made any effort to recover the tortfeasor's bodily injury limits prior to filing their claim for uninsured motorist benefits against the Travelers.

THE WOODALLS' INTERPRETATION OF THE TRAVELERS POLICY LANGUAGE IS CONTRARY TO FLORIDA LAW.

A portion of the Woodalls' argument contained within Issue I concerns the Travelers policy language. The Woodalls take the position that the policy language, which they label a "no action/exhaustion clause", required the Woodall:; to exhaust a non-contractual remedy against a third party tortfeasor prior to bringing a claim for uninsured motorist benefits. As already shown, this argument is contrary to the rationale of the line of cases beginning with Arrieta v. Volkswagen Insurance Company, 343 So.2d 918 (Fla. 3rd DCA 1977) which state the insured need take no action against the tortfeasor prior to filing a claim for uninsured/underinsured motorist benefits. Further, in Liberty Mutual Insurance Company v. Reyer, 362 So.2d 390 (Fla. 3rd DCA 1978), Reyer was involved in a car accident on September 11, 1976 and she had a policy of insurance which provided uninsured/underinsured motorist coverage in the amount of $300,000.00 and the tortfeasor's bodily insurance limits were

$100,000.00. At arbitration, Reyer contended she was entitled to bring an underinsured motorist claim even though the driver's insurance company had not tendered the policy limits. Liberty Mutual contended that its policy language expressly provided that Reyer was not entitled to make a claim and that they were under no obligation to make payment, until after the limits of liability under all bodily injury policies applicable at the time of the accident had been exhausted. The Third District Court of Appeal determined that these contentions give rise to a basic questions, i.e., whether, under Florida law, an insurer and insured may enter into a bonified contract (policy) provision which requires that the insured must pursue the uninsured/underinsured motorist to a judgment or settlement prior to proceeding against its own insurer. The Third District Court held the answer to this question was no. Id at 391 (emphasis added). The Court relied on its earlier decision in Arrieta v. Volkswagen Insurance Company, supra, as well as public policy as indicated by the clear expression of legislative intent in Florida Statute 627.727 (1975). It also relied on Great American Insurance Company v. Pappas, 345 So.2d 823 (Fla. 4th DCA 1977) in which it was noted that uninsured motorist coverage includes underinsured motorist coverage. Similarly, in Weinstein v. American Mutual Insurance Company of Boston, 376 So.2d 1.219 (Fla. 4th DCA 1979), the Appellate Court held:

> "An insured was not required to seek and obtain payment, by settlement or after judgment, of **all** bodily injury liability insurance benefits from any alleged tortfeasor before he could compel arbitration under his own uninsured-underinsured motorist provision, despite the applicable policy language in that case which specified the insurer would not be obligated to make any payment for bodily injury until after the limit:; of liability under all applicable bodily injury liability bonds or insurance policies had been exhausted." Id at 1219.

While the Woodalls argue that the Reyer decision has been obviated by the legislature as a result of the amendment to Section 627.727(6) in 1977, this argument is incorrect. In Weinstein, the Fourth District Court of Appeal reached the same conclusion as the Reyer court and in footnote 1 of their decision, relied on Section 627.727, Florida Statutes (1977). The Woodalls further ignore the case of New Hampshire Insurance Company v. Knight, 506 So.2d 75 (Fla. 5th DCA 1987). In Knight, the uninsured motorist carrier argued Florida Statute 627.727(6) explicitly required the tortfeasor's policy limits be first exhausted before a claim could be made for uninsured coverage. The policy language at issue was similar to the policy language contained within the Travelers uninsured motorist policy. Specifically, each carrier's policies contained provisions which provided that the underinsured benefits would be payable only after any applicable bodily injury liability policy had been exhausted. The Knight Court as well as the Courts in Reyer and Weinstein,supra, all held that such a provision is unenforceable

Accordingly, this Court's conclusion in Kilbreath and most

recently in Lee, i.e., that the statute of limitations for an uninsured motorist claim begins to run as of the date of the accident, has not been affected by subsequent legislation nor is it affected by the Travelers policy language. The Woodalls asserted their claim for uninsured motorist benefits more than five (5) years from the date of the accident, the Travelers timely asserted its statute of limitations defense, and the trial court granted a summary judgment on this issue which was subsequently affirmed by the First District Court of Appeal. Concerning the certified question of whether the policy language affects the Kilbreath rationale, the answer is, simply no. See Lee, Dewberry, Arrieta, Apodaca, USF&G, Jones, Reyer, Weinstein, and Knight, supra. The two paragraphs from the Travelers policy are not in pari materia nor intended to be interpreted in the manner claimed by the Woodalls. Further, even if the policy sought to accomplish what the Woodalls assert, then the policy language would be invalid and unenforceable and the Woodalls' recourse remained to file a claim for uninsured motorist benefits within five (5) years from the date of the accident. This they failed to do.

ISSUE II

THE ACCRUAL DATE OF A CAUSE OF ACTION FOR AN UNINSURED/UNDERINSURED MOTORIST CLAIMACCRUES ON THE DATE OF THE ACCIDENT.

The second issue presented by the Woodalls concerns their position that the accrual date for an uninsured/underinsured (UM)

motorist claim is governed by Florida Statute 627.727(6) or in the alternative, on the date an uninsured/underinsured motorist contract is breached. This argument can be rebutted quite simply as the question regarding the accrual date has previously been answered by this Court in State Farm Mutual Automobile Insurance. Company v. Kilbreath, 419 So.2d 632 (Fla. 1982).

The Woodalls and Travelers agree that the rights and obligations of the parties are governed by contract law, since these rights and obligations arise out of the insurance contract. Hartford Accident and Indemnity v. Mason, 210 So.2d 474 (3rd DCA 1968). Accordingly, the parties further agree that the five (5) year limitation period specified by Florida Statute 95.11(2)(b) for actions founded on a contract is applicable to the Woodalls claim under their automobile policy for UM benefits against the Travelers. Burnett v. Firemen's Fund Insurance Company, 408 So.2d 838 (2nd DCA 1982). While the parties are in agreement that a five (5) year statute of limitations applies to this claim, Travelers asserts that the statute of limitations begins to run on a claim for UM benefits from the date of the motor vehicle accident. Kilbreath, supra; Lee, supra. The Woodalls propose several alternative accrual dates rather than rely on the accrual date as established by this Court in Kilbreath and Lee, supra, with their attendant adverse consequences to the Woodalls' claim.

On page 29 of the Woodalls' Initial Brief, it is suggested

there are two possible times that an underinsured motorist claim could accrue under Florida law. First, they argue the underinsured motorist claim accrued on the date it was created pursuant to Florida Statute 627.727(6), i.e., when a tortfeasor's liability insurer tenders its policy limits. The logic of this argument has been previously addressed on pages 10 through 14 of this Answer Brief. In addition, both parties ironically rely on Lumberman's Mutual Casualty Company v. August, 530 So.2d 293 (Fla. 1988) as that opinion relates to this issue. In Lumberman's, the Plaintiff was involved in a motor vehicle accident with an uninsured motor-ist on February 17, 1979. The applicable statutory provision of Florida Statute 627.727(6) contained language which the Woodalls suggest delays the accrual of a cause of action for underinsured motorist benefits until such time as settlement has been effected with the tortfeasor. However, a careful reading of Lumberman's, supra, as well as the prior Appellate decision in Lumberman's at 509 So.2d 352 (Fla. 4th DCA 1987), does not support the Woodalls' argument. At the Appellate level, the Court held:

> "For an uninsured motorist claim, a cause of action accrues and the statute of limitations begins to run, on the date of the accident, rather than on the date of compliance with the conditions precedent contained in the insuring agreement." Id at 353.

In Lumberman's, the Plaintiff filed a claim for uninsured motorist benefits on February 9, 1984 based on a February 17, 1979 car accident. The question for the Appellate Court involved a

determination concerning where the cause of action arose, Florida or- Massachusetts. This question was significant since Florida's applicable statute of limitations period was five (5) years, while the applicable statute of limitations period under Massachusetts law was three (3) years. The Appellate Court held Florida law applied since the motor vehicle accident occurred within the state. It went on to hold the five (5) year statute of limitations period began to run from the date of the accident. This Court reviewed the Appellate Court decision as it was in direct conflict with prior- Supreme Court opinions. This Court noted the insured stands in a tort relationship to the uninsured motorist but this does not change the fact that an action by an insured against an insurer arises out of the insurance contract between the parties." Id at 295. This Court also recognized that an action to recover uninsured motorist benefits is not strictly an action dealing with contract, but also involves some aspects of a tort action. Id at 295. Therefore, this Court applied the lex loci contractus rule and concluded the cause of action between the parties in arose in Massachusetts, and accordingly found that Massachusetts law governed the applicable statute of limitations. Id at 296. The Woodalls suggest this Court's opinion in indicates contract law should be looked to for a determination of the accrual date for an underinsured motorist claim. However, this Court's opinion makes no such suggestion and in fact, in footnote 3 of the opinion, this

Court notes:

> "issues relating to the right of the insured to recover from the insurer that depend on the insured's right against the uninsured motorist/tortfeasor, however, are determined according to the law of the state which has the most 'significant relationship' to the accident." Id at 295.

This language found in footnote 3 comes from a prior Supreme Court opinion, that of State Farm Mutual Automobile Insurance Company v. Olsen, 406 So.2d 1109 (Fla. 1981) and parallels the language this Court used in Kilbreath, supra, that being,

> "the cause of action for an uninsured/underinsured motorist claim arises on the date of the accident with an uninsured/underinsuredmotorist since the right of action stems from the Plaintiff's right of action against the tortfeasor. The statute of limitations thus begins to run on the date of the accident rather than on the date of compliance with conditions precedent contained in an insuring agreement." Kilbreath at 633.

Accordingly, this Court has consistently used and relied on the rationale of Kilbreath to hold it is the date of the accident upon which a claim for UM benefits accrues

The illogic of the Woodalls' position that a cause of action for UM benefits does not accrue until the tortfeasor's liability policy limits are tendered belies the purpose of a statute of limitations and the need for certainty, predictability and uniformity of result. Under the theory proposed by the Woodalls, the accrual date for an underinsured motorist claim would differ on a case by case basis, depending upon the date the tortfeasor's liability insurer tenders its full policy limits. This conceivably

could occur on the date of the accident itself or, conceivably, the liability insurer may never tender the full policy limits and under the Woodalls' logic in such an instance, an underinsured claim would never accrue. Accordingly, the Woodalls' argument defies logic and Florida law.

The second argument proposed by the Woodalls is that the accrual date for an underinsured motorist claim occurs when an underinsured motorist contract is breached. The Woodalls read this Court's recent decision in Lee, supra, to suggest that a cause of action for an underinsured motorist claim accrues on the date that the underinsured motorist insurer breaches its obligations to pay, i.e., breaches the insuring agreement. In making this argument, the Woodalls fail to recognize a distinction between a PIP claim which was present in the Lee scenario versus a UM claim which is present in the instant case. The underinsured motorist carrier de facto stands in place of and acts as an insurer of the tortfeasor not the claimant. In fact, this Court, as previously stated, distinguished the Lee scenario from that involving a claim for UM benefits and specifically referred to the prior Kilbreath decision. Further, the Woodalls attempt to draw a parallel between the settlement protocol as prescribed in Florida Statute 627.727(6) and the statutory scheme which governs the payment by an insurer of PIP benefits which is yet another example of either grasping at straws or misleading this Court.

The Woodalls also contend that they had no ascertainable claim until the policy limits of the tortfeasor were tendered to them. Again, this is a disingenuous argument. Petitioner, Ronnie Woodall, was involved in an auto accident with the tortfeasor on December 15, 1987. The tortfeasor had $10,000.00 in bodily injury liability coverage. Pursuant to Florida Statute 95.11(3) (a), the Woodalls had four (4) years to file a claim against the tortfeasor as a result of his negligence. Therefore, the Woodalls had an additional, year in which to conduct discovery in order to determine the extent of the tortfeasor's bodily injury insurance coverage. Once the tortfeasor's coverage is known, the existence of an underinsured motorist claim according to the definition in Florida Statute 627.727(3) is mere mathematics. The Woodalls were readily able to ascertain that an underinsured motorist claim existed and making their argument to the contrary, the Woodalls once again overlook the statutory definition of an underinsured motorist claim. Further, they continue to ignore the line of cases previously referred to in this Brief beginning with Ar-rieta, supra, which hold that a claim for UM benefits can be made prior the initiation of any action by the UM insured against the tortfeasor.

The Woodalls' suggest yet another alternative accrual date for the statute of limitations. They suggest it may have occurred when Travelers "breached the contract," which they claim occurred when Travelers directed correspondence to counsel for the Woodalls

indicating that the Woodalls had five (5) years within which to file the claim for UM benefits and that more than five (5) years had elapsed since the date of the accident. In this correspondence, Travelers simply raised a well-recognized defense to a claim, i.e., the statute of limitations. Travelers did not "breach the contract". In fact, if the Woodalls' argument is taken to its logical conclusion, if Travelers, rather than assert a statute of limitations defense to a claim for UM benefits (which the Woodalls interpret as a denial of coverage and a breach of the insuring contract) , had instead offered the Woodalls one dollar ($1.00) for their damages, no denial of coverage or breach of the contract would have occurred. Under the Woodalls' logic, their cause of action for UM benefits would never accrue in this scenario. This argument propounded by the Woodalls defies logic. Rather, under previously established Florida law, the Woodalls entitlement to enforce their contractual rights accrued on the date they were injured. Kilbreath, supra. The Woodalls mis-focus by arguing the "contract was breached" when the Travelers asserted a statute of limitations defense. The action by the Woodalls is not for breach of contract but rather an action to enforce their contract with the Travelers. The correct focus should consider "when did the Woodalls first have a right to enforce their contractual claim against Travelers?" Under Florida law, this right to enforce their contractual claim accrued as of the date of

the accident with the tortfeasor (December 15, 1987) and pursuant to the five (5) year statute of limitations found in Florida Statute 95.11(2)(b), the Woodalls had unt 1 December **15,** 1992 in which to file their claim for UM benefits against the Travelers. In their attempt to avoid the adverse consequences of their untimely filing of their claim for UM benefits against, the Woodalls propose numerous alternative arguments which create differing accrual dates for their cause of action; however, no argument proposed by the Woodalls can be supported by Florida Law and should not be entertained by this Court.

CONCLUSION

The accrual date for a cause of action for UM benefits occurs as of the date of the motor vehicle accident with an uninsured or underinsured motorist as defined in Florida Statute 627.727(3) as previously determined by this Court in State Farm Mutual Automobile Insurance Company v. Kilbreath, 41.9 So.2d 632 (Fla. 1982) and State Farm Mutual Automobile Insurance Company v. Lee, 21 Fla. Law Wkly S335 (Fla. August 22, 1996). While the Woodalls argue this Court should revisit Kilbreath, supra, o distinguish between an uninsured motorist claim and an underinsured motorist claim, the Woodalls ignore this Court's decision in Williams v. Hartford Accident and Indemnity Company, 382 So.2d 1216 (Fla. 1980) where this Court held no such distinction was necessary. The Woodalls further ignore Arrieta v. Volkswaqen Insurance Company, 343 So.2d 918 (Fla. 3rd DCA 197'7) and subsequent case law which provide the Woodalls with a right to enforce their contractual agreement with the 'Travelers for uninsured motorist benefits as of the date of the motor vehicle accident with an uninsured or underinsured motorist with no requirement that the Woodalls pursue a claim against the tortfeasor. The policy language contained within the Travelers insuring agreement does not affect the Woodalls' cause of action for UM benefits nor does it affect the accrual date for the cause of action for UM benefits as established by this Court in Kilbr-eath, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard J. Delmond, Esq., 9211 N.W. 13th Place, Gainesville, Florida 32606; Susan J. Silverman, Esq., 1800 Second Street, Suite 819, Sarasota, Florida 34236; Rhonda B. Boggess, Esq., Barnett Center, Suite 3500, 50 North Laura Street, Jacksonville, Florida 32202; and to Robert J. Denson, Esq., Santa Fe Community College, Office of the President, 3000 N.W. 83rd Street, Gainesville, Florida 32606-6200, on this 24 day of January, 1997.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,052

RONNIE WOODALL, et ux.,

Petitioners,

vs.

TRAVELERS INDEMNITY COMPANY,

Respondent.

APPENDIX TO
RESPONDENT'S BRIEF ON THE MERITS

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INDEX TO APPENDIX

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

RONNIE WOODALL and JUDITH WOODALL,

Appellants,

v.

CASE NO. 95-3293

TRAVELERS INDEMNITY COMPANY,

Appellee.

_____/

@pinion filed September 11, 1996.

An appeal from the Circuit Court for Alachua County. Nath C. Doughtie, Judge-.

Robert J. Denson & Richard J. Delmond, of Robert J. Denson, P.A., Gainesville, for Appellant.

Deborah C. Drylie, of Jones, Carter & Drylie, P.A., Gainesville, for Appellee.

MICKLE, J.

Appellants, Ronnie Woodall and his wife Judith Woodall, appeal a final summary judgment declaring their action for uninsured (UM) motorist benefits barred by the statute of limitations. We affirm on the authority of State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So. 2d 632 (Fla. 1982). However, we certify a question of great importance based on the facts of this case.

On December 15, 1987, while insured by the Travelers Indemnity Company (Travelers), Ronnie Woodall was injured in an automobile accident caused by an underinsured motorist. The Travelers policy held by Woodall contained the following pertinent provisions:

> We will pay damages that the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury suffered by the insured and caused by accident. Liability for such damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.
>
> We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds or policies.
>
> The insured's right to recover these damages from the owner or operator of an uninsured motor vehicle and the amount of these damages will be agreed to by the insured and us. Disagreement as to such right or amounts of damages will be settled by arbitration upon written request of the insured or us.
>
> * * *
>
> Legal action may not be brought against us under any coverage provided under this policy, unless the insured has fully complied with all the provisions of the policy.

(Emphasis added).

On September 9, 1993, almost six years after the accident, the tortfeasor's bodily injury liability limit of $10,000.00 was tendered to the Woodalls. Thereafter, the Woodalls submitted a claim for UM coverage under their policy with Travelers. When the claim was denied on November 12, 1993, the Woodalls immediately filed the instant lawsuit against Travelers for recovery of UM

benefits. Travelers in turn moved for summary judgment on the grounds that the statute of limitations barred the action. The lower court entered summary judgment in favor of Travelers, citing as authority the Florida Supreme Court's holding in Kilbreath that a cause of action for an uninsured/underinsured motorist claim arises on the date Of the accident with an uninsured/underinsured motorist since the right of action stems from the plaintiff's right of action against the tortfeasor.

In Kilbreath, the plaintiff's policy language provided that no action shall lie against the insurer unless, as a condition precedent thereto, there shall have been full compliance with the terms of the policy. The two pertinent conditions precedent therein were (1) an effort to agree amicably on the issue of entitlement and amount of damages, and failing that, (2) arbitration. The court held that, while both were conditions precedent to an action against the insurer, neither had any effect on when the cause of action arose. Id. at 634. Sub iudice, the Travelers policy contains an additional proviso that payment will be made only after the limits of liability have been used up under all applicable bodily injury liability policies. Arguably, by its very terms, this clause effectively provides that the statute of limitations on the Woodalls' claim for UM benefits was not triggered until Travelers became obligated to make payments under the policy and failed to do so, thereby creating a cause of action on the date the contract was breached. Certainly, it can be argued

that while the Woodalls were awaiting the offer of the tortfeasor's policy limits, they also had the option to file an action against Travelers. However, by the very terms of the Travelers policy, the Woodalls' opportunity to recover UM benefits was obviated until the tortfeasor's liability insurer tendered payment. The tortfeasor's insurer tendered payment beyond the applicable statutory time limit under Kilbreath, and, when the Woodalls turned to Travelers for recovery, Travelers relied on the statute cf limitations as a bar. Uncertain as to whether the court in Kilbreath envisioned such a result, and considering the issue presented in this appeal to be a matter of great public importance, we certify the following question to the Florida Supreme Court:

> Whether the holding in Kilbreath applies when a plaintiff's UM policy contains a no-action/exhaustion clause providing that payment will be made only after the limits of liability have been used up under all applicable bodily injury liability policies.

AFFIRMED.

WEBSTER and LAWRENCE, JJ., CONCUR.

the act in existence at the time he became a member of the Police and Firefighters Retirement System, he should have been allowed to continue his service with the City until age 55. The trial court thereafter entered final judgment in favor of Nation.

The City then appealed to the Fourth District which reversed and held that the City could amend its pension plan to lower the mandatory retirement age at which firemen must retire from 55 to 50 years of age, even though the amendment adversely affected those who became participants when the retirement age was more onerous.

The district court, although confident that its result was consistent with the present law in Florida, expressed concern with language utilized by this Court in *City of Jacksonville Beach v. State,* 151 So.2d 430 (Fla.1963). In that case, we stated that retirement systems should be sustained on the theory that "they offer an added inducement to those with special skills and techniques to remain in government employment . and make government service a career rather than a passing interlude.... It is not difficult to conceive how this theory would be exploded if prospective employees were told that, after a short service or a long one, the legislature could, nevertheless, disturb the arrangement anytime it saw fit since all employees in a given category were required to be members of a standard plan. Id. at 431–432." City of Fort Lauderdale v. Nation, 400 So.2d at 1276–77.

Nation contends that the City of Fort Lauderdale Police and Firefighters System is a voluntary pension plan and that the principle announced by the First District Court and this Court in State ex rel. *O'Donald v. City of Jacksonville,* 142 So.2d 349 (Fla. 1st DCA 1962), aff'd, 151 So.2d 430 (Fla.1963), applies here. This principle is that benefits provided employees under a *voluntary* pension plan created by a legislative act may not be modified or reduced by subsequent amendatory act.

We disagree with Nation's contention and hold that the Fourth District correctly decided that the retirement plan in issue was not voluntary, but rather was mandatory since Nation was required to participate in one of the City's pension plans and was not free to choose not to participate in the pension scheme. ***Florida Sheriff's Association v. Department of Administration, 408*** So.2d 1033 (Fla.1981).

Furthermore, we do not find that our earlier decision in *City of Jacksonville Beach v. State,* wherein we affirmed the First District's decision in State ex rel. *O'Donald v. City of Jacksonville,* in any way precludes the result reached by the district court in the present case.

Accordingly, we find that the Fourth District correctly resolved the certified question and approve its decision.

It is so ordered.

BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

ADIUNS, J., dissents.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner,

v.

Floyd Michael KILBREATH, Respondent.

No. 61133.

Supreme Court of Florida.

Sept. 2, 1982.

Suit was instituted to recover underinsured motorist benefits. Dismissal of action was reversed by the District Court of Appeal, 401 So.2d 846, and application for review was granted. The Supreme Court, Ehrlich, J., held that statute of limitations on an insured's claim for uninsured/unde-

rinsurcd motorist benefits begins to run on date of accident rather than on date of compliance with conditions precedent contained in insuring agreement and, hence, is not delayed until arbitration has occurred or has been waived or denied by insurer.

Decision of the District Court of Appeal quashed, and cause remanded with directions to reinstate dismissal.

Adkins and Sundberg, JJ., dissented.

Limitation of Actions ⇐46(1), 65(5)

Statute of limitations on an insured's claim for uninsured/underinsured motorist benefits begins to run on date of accident rather than on date of compliance with conditions precedent contained in insuring agreement and, hence, is not delayed until arbitration has occurred or has been waived or denied by insurer. West's F.S.A. § 95.-11(2)(b).

Thomas G. Kane of Driscoll, Langston & Kane, Orlando, for petitioner.

William H. Roundtree, Cocoa, for respondent.

EHRLICH, Justice.

We have for review the decision of the District Court of Appeal, Fifth District, in ***Kilbreath v. State Farm Mutual Automobile Insurance Co., 401*** So.2d 346 (Fla. 5th DCA 1981), which expressly and directly conflicts with ***Mendlein v. United States Fidelity & Guaranty Co., 277*** So.2d 538 (Fla. 3d DCA 1973). We have jurisdiction.[1]

The determinative issue in ***Kilbreath*** is whether, in an action under an uninsured motorist insurance policy, the statute of limitations begins to run as of the date of the accident. Wc hold that it does.

The pertinent facts may be stated briefly. Kilbreath had automobile insurance coverage under four separate policies issued to him by State Farm. On June 11, 1972, Kilbreath was injured in a motor vehicle accident He requested arbitration of his claim on April 26, 1976, which request was denied on May 19, 1976. On May 16, 1980, almost eight years after the accident, Kilbreath filed suit against State Farm seeking underinsured motorist benefits under the uninsured motorist coverage. The trial court dismissed the action with prejudice reciting in the order of dismissal that the claim was barred by the statute of limitations.[2] The Fifth District Court of Appeal reversed, stating that arbitration or its waiver or denial by the company is a condition precedent to an action on the policy and that the statute of limitations did not begin to run until all conditions precedent to recovery under the contract had occurred. It held that the statute of limitations did not begin to run until arbitration had occurred or had been waived or denied by the insurance company. This petition followed.

The cause of action for an uninsured/underinsured motorist claim arises on the date of the accident with an uninsured/underinsured motorist since the right of action stems from the plaintiff's right of action against the tortfeasor. The statute of limitations thus begins to run on the date of the accident rather than on the date of compliance with the conditions precedent contained in the insuring agreement. *Mendlein; Bocek v. Inter-Insurance Exchange* of *Chicago Motor Club,* 175 Ind.App. 69, 369 N.E.2d 1093 (1977).

Kilhreath's policy of uninsured motorist insurance contains the following language:

> To pay all sums which the insured or his legal representative shall be legally enti-

1. Art, V, § 3(b)(3), Fla.Const

2. The trial court held the claim stale under the five year statute of limitations for an action on a contract, section 95.1 1(2)(b), Florida Statutes (1979). The district court likewise viewed five years as the proper measuring period, albeit running from a different starting point. It is not necessary to the outcome in this case to decide now and thus we reserve the issue of whether the applicable limitations period is the five year contract period or the four year tort period, since in any event the instant lawsuit was filed eight years after the date of the accident.

> tied to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

The policy does not preclude the insured from maintaining an action at law against the tortfeasor. That cause of action against the third party tortfeasor clearly arises on the date of the accident. If the insured elects to proceed under his uninsured/underinsured motorist coverage, hi first remedy is by the agreement of the parties. If the parties are unable to agree, his next remedy is by arbitration. If the insurer waives arbitration or refuses to arbitrate, the insured may then maintain an action at law against the insurer. The policy also provides that no action shall lie against the insurer unless as a condition precedent thereto there shall have been full compliance with all terms of the policy. An effort to agree amicably on the issue of entitlement and amount of damages, and failing that, arbitration, are both conditions precedent to an action against the insurer, but neither has any effect on when the cause of action arises. These arc *remedies* provided by the insurance policy which the insured must exhaust before he can sue the insurer, but the statute of limitations is not tolled during the running of these times.

The uninsured motorist statute gives the insured the same cause of action against the insurer that he has against the uninsured/underinsured third party tortfeasor for damages for bodily injury. *Dewberry* v. *Auto-Owners Insurance Co.*, *363* So.2d 1077 (Fla.1978). It provides a new *procedure* whereby the insured may recover his loss against his own insurer. The accrual of **the** action occurs at the time of the accident with the uninsured motorist. As pointed out by Judge Sharp in her dissent in the opinion below:

> In an action against an insurance company for "underinsured" or "uninsured" motorist coverage the right of action stems from the plaintiff's right of action against the tortfeasor .

401 So.2d at 847 (Sharp, J., dissenting).

The decision of the district court is quashed, and this cause is remanded with directions to reinstate the order of dismissal.

It is so ordered.

ALDERMAN, C. J., and BOYD, OVERTON and McDONALD, JJ., concur.

ADKINS and STJNDBERG, JJ., dissent.

J. B. THOMAS, Petitioner,

v.

STATE of Florida, Respondent.

No. 60477.

Supreme Court of Florida.

Sept. 2, 1982.

Defendant was convicted in the Circuit Court, Brevard County, Roger F. Dykes, J., of false imprisonment, sexual battery and theft, and he appealed. The District Court of Appeal, Fifth District, 394 So.2d 548, vacated in part, affirmed in part, and remanded. On application for review, the Supreme Court, McDonald, J., held that: (1) point concerning State's closing argument was preserved for appeal by objection and request to make a motion; (2) remark could not properly be characterized as a "racial slur"; and (3) failure to give requested instruction on penalties was preserved for review despite failure to use words "I object."

Insurance—Personal injury protection-Limitation of actions—Statute of limitations for action based on insurer's failure to nav PIP benefits begins to run when insurer breaches its obligation to pay rather than on date of accident in question

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and **STATE** FARM FIRE AND **CASUALTY** COMPANY, **Petitioners**, vs. **KUN**-BOK LEE and GISUN LEE. **Respondents**. Supreme **Court** of Florida. **Case** No. 86.969. **August** 22. **1996**. Application for Review of **the** Decision of **the** District **Court** of **Appeal - Certified** Direct Conflict of Decisions. **3rd District** - Case No. 94-2424 (Dade **County**). Counsel: **James T.** Sparkman and John **W. Reis** of Sparkman, **Robb, Nelson** & Mason, Miami, for Petitioners. Robert A. Rosen**blatt**, Miami, for **Respondents**. **Edward** S. **Schwartz** of the Law Offices of Philip hi. **Gerson, P.A.**, Miami, Amicus Curiae for **the Academy** of Florida Trial **Lawyers**.

(PER CURIAM.) We have for review Lee v. ***State Farm Mutual Automobile Insurance Co.***, 661 So. 2d **1300** (Fla. 3d DCA **1995**), which expressly and directly conflicts with the opinion in ***Fladd v. Fortune Insurance Co., 530 So.*** 2d 388 (Fla. 2d DCA), ***review denied, 539*** So, 2d 475 (Fla. 1988). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. For the reasons expressed below, WC approve ***Lee,*** disapprove ***Fladd***, and hold that the statute of limitations for an action based on an insurer's failure to pay personal injury protection (PIP) benefits begins to run when the insurer breaches its obligation to pay.

The respondents, Kunbok and Gisun Lee, are policyholders of petitioners State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively referrcd to as "State Farm"). The Lees and their daughter were involved in an automobile accident on December 18, 1988. As a result of the accident, the minor daughter sustained personal injuries and sought and received medical treatment at Jackson Memorial Hospital.' A claim for personal injury protection (PIP) benefits under the State Farm policy was denied on or about February 18, 1989. On February 14, 1994. over five years after the accident. respondents filed suit against State Farm for recovery of the PIP benefits.

State Farm moved to dismiss the action on the ground that it was barred by the statute of limitations-which it claimed began to run on the date of the accident. The trial court granted petitioners' motion and dismissed the action. The district court reversed, holding that the limitations period ran from the time the insurer breached its contract of insurance by failing to pay the claim and that, therefore, the action was not barred. Lee, 661 So. 2d at *1300*.

There is a clear division among the district courts as to what event triggers the commencement of the statute of limitations for filing an action for PIP benefits. The Second District has held that the statute of limitations for an action based on an insurer's failure to pay PIP benefits begins to run on the date of the accident. *Fladd* v. *Fortune Insurance* Co., 530 So. 2d 388 (Fla. 2d DCA), *review denied, 539* So. 2d 475 (Fla. 1988). The *Fladd* court reached this conclusion by applying the rationale of our decision in ***State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So. 2d 632*** (Fla. 1982). In ***Kilbreath,*** we held that a cause of action for an uninsured/underinsured motorist (UM) claim arises on the date of the accident since the right of action stems from the plaintiffs right of action against the tortfeasor. Thus, we found that the statute of limitations begins to run on the date of the accident rather than on the date of compliance with the conditions precedent contained in the insurance contract. ***Id.*** at 633. Our decision took into account the fact that the uninsured motorist statute gives the insured the same cause of action against the insurer that he has against the uninsured/underinsured third party tortfeasor for damages for bodily injury. ***Id. at 634.*** Although *Kilbreath* involved an uninsured motorist claim, the *Fladd* court believed the ***Kilbreath*** rationale should apply to a cause of action for a PIP claim:

> Section 627.736(4)(d)4, Florida Statutes (1981), specifically provides that the insurer of the owner of the motor vehicle must pay PIP benefits for accidental bodily injury sustained in this state by any other person while occupying the owner's motor vehicle. Section 627.736(3), Florida Statutes (1981), provides that **the injured party, or** his legal representative, may not recover any damages for which PIP benefits are paid or are payable. **Clearly, the accidental** bodily injury triggers the insurer's duty to pay. ***A cause of action for a PIP claim, like a cause of action for an uninsured/underinsured motorist claim, "stems from the plaintiffs right of action against the tortfeasor" and, thus, arises on the date of the accident.***

530 So. 2d **at 390-91** (emphasis added).'

The Third District, on the other hand, has subscribed to the position taken earlier by the Fourth District in ***Levy*** v. ***Travelers Insurance*** Co., 580 So. 2d 190 (Fla. 4th DCA 1991). *Levy* held that the limitations period begins to run on the date of the insurer's alleged breach of contract-i-e., the date when PIP benefits under the policy become overdue.' In its opinion, the ***Levy court*** concluded that *Fladd* was wrongly decided because it relied on an uninsured motorist case:

> The *Fladd* case. in turn, relied upon ***State Farm Mutual Automobile Insurance Co. v. Kilbreath,*** 419 So. 2d 632 (Fla. 1982), in arriving at is conclusion. *Kilbreath* involved a cause of action for uninsured motorist **(UIM)** coverage. which the supreme court described as a cause of action that stems from plaintiff's right of action against the tortfeasor and, thus, arises on the date of the accident. As the court said in that case, "the uninsured motorist statute gives the insured the same cause of action against the insurer that he has against the uninsured/underinsured third party tortfeasor for damages for bodily injury." ***Id.*** at 632,633,
>
> The **cause of** action in this case is a first party claim in contract for failure to pay the contractual obligation for personal injuries sustained, regardless of fault. **The** coverage is mandated by section 627.736(1), Florida Statutes (1981). in all policies complying with the security requirements of section 627.733, Florida Statutes. With regard to the payment of PIP benefits, section 627.736(4)(b) provides:
>
> > Personal injury protection insurance benefits paid pursuant to this sectionshall 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.**
>
> It is apparent that, pursuant to the statute, the insurer has no obligation to pay benefits to the insured until thirty days after receipt of the insured's claim. *We* see ***no reason to depart from the usual and customary rules regarding the application of the statute of limitations to insurance contracts unless there is an exception brought about by the nature of the claim as in the UIM instance set forth in Kilbreath.***

580 So. 2d at 191 (emphasis added); see also *Lumbermens Mut.* ***Casualty Co. v. August, 530 So.*** 2d 293,295 (Fla. 1988) (recognizing that action to recover uninsured motorist benefits is not strictly an action dealing with contract, but also involves some aspects of tort action); ***Fradley v. County of Dade,*** 187 So. 2d 48 (Fla. 3d DCA 1966) (holding that where plaintiff elected to bring action on breach of contract theory, cause of action accrued from time of breach or ncglcct, rather than from time when consequential damages resulted or became ascertained).

The *Levy* court also quoted with approval a New York appellate opinion:

> Turning now to the accrual date, it is the general rule that "[i]n contract cases, the cause of action accrues and the Statute of Limitations begins to run from the time of the breach . . ." (*Kassner & Co. v. City of New York, 46* N.Y.2d 544, *550,* 415 N.Y.S.2d 785, 389 N.E.2d 99). Application of this principle mandates rejection of the accrual date urged by defendant, for at the time of the accident defendant owed no contractual obligation to pay first-party benefits and. therefore. it had not yet breached.

any contractual obligation. Defendant's obligation to pay the first-party benefits required by its policy arose "as the loss [was] incurred" and benefits "are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained" (Insurance Law, § 675, subd. 1; see. also, *Montgomery v. Daniels*, *38* N.Y.2d *41, 47.* 378 N.Y.S.2d 1, 340 N.E.2d 444). Interest on the benefits begin to accrue when tbe payment is overdue (*Young v. Utica Mut. Ins. Co.,* 86 A.D.2d 764, 448 N.Y.S.2d 83), and we conclude that an insured's cause of action to recover the unpaid benefits **accrues at the same time.**

Micha v. Merchants Mut. Ins. Co., *463* N.Y.S.2d 110, 111-12 (N.Y. App. Div. 1983).

After careful consideration, we adopt the Third and Fourth Districts' position on this issue. Using the date the insurance contract is breached is the most logical event to begin the running of the statute of limitations. Section 95.1 1(2)(b), Florida Statutes (1995), provides that a "legal or equitable action on a contract, obligation, or liability founded on a **written instrument" should be commenced within five years. The intent of section 95.11(2)(b)** is to limit the commencement of actions from the time of their accrual. *Cf. Walker v. Beech Aircraft Corp., 320 So.* 2d 418 (Fla. 3d DCA 1975) (applying same intent to statute of limitations for wrongful death actions), *cert. dismissed, 338 So.* 2d 843 (Fla. 1976). However, a cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought. *Loewer* v. New York *Life Ins.* **Co., 773 F.** Supp. 1518, 1521 (M.D. Fla. 1991). Generally, a cause of action on a contract accrues and the statute of limitations begins to run from the time of the breach of contract. *Fradley*, **187** So. 2d at 49,

In determining when the insurance contract at bar was breached, when an action could have been brought, and thus, when the statute of limitations began to run, the statutory provision regarding PIP **benefits** is also relevant. Section 627.736(4)(b), Florida Statutes (1995), provides in part: "Personal injury protection insurance benefits paid pursuant **to this** section shall be overdue if not paid within **30 days after the in**surer is furnished written notice of the fact of a covered loss and of the amount of same." Pursuant to this statute, State Farm had no contractual obligation to pay PIP benefits until thirty days after receipt of respondents' PIP claim. However, once the thirty days elapsed and no benefits were paid on the **claim, assuming** they were properly due, State Farm had **effectively breached** their contract with respondents. At the time of the accident, and before any PIP benefits were due, respondents could not have brought an action against State Farm for PIP benefits and thus the statute of limitations did not begin to run. It was only upon State Farm's denial of the actual PIP claim that the limitations period began running.

Accordingly, we approve the decision of the district court below and hold that the statute of limitations for an action based on an insurer's failure to pay PIP benefits begins to run on the date of the insurer's alleged breach of contract. We disapprove *Fladd v. Fortune Insurance Co., 530 So.* 2d 388 (Fla. 2d DCA), *review denied,* 539 So. 2d 475 (Fla. 1988), insofar as it is inconsistent with our holding here today.

It is so ordered. (KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.)

'On January 23, 1989, the respondents' daughter died fmm injuries sustained in the automobile accident.

²The Second District's rule appears to beg the questions: What happens if an insurer voluntarily pays PIP b&fits to the end of the limitations period and then declines further benefits? Is the insured foreclosed from recovery because the limitations period has run and no complaint has been filed? Although this precise issue *was* not considered by the *Fladd* court, *see* 530 So. 2d at 391 n. 1, the Second District confronted this issue in Donovan V. *State Farm Fire & Casualty* Cu.. 574 So. 2d 285 (Fla. 2d DCA 1991). In *Donovan, the* Second District carved out an cxceprion to the *Fladd* rule and noted that "the clear intent of the [*Fladd*] court was to exempt from the operation of the opinion those situations in which the insurer has accepted a PIP claim. made payments thereon, and then for any reason. refused further benefits. *Fladd*, therefore, has no application here." *Id.* at 286. Ironically, the newly created exception in *Donovan* was grounded in contract law:

> Such situations arc to be governed by the general principles of contract law. When panics are voluntarily acting pursuant to a contract. ther cause of action upon that contract until a breach occurs. In re insurance contracts, a specific refusal to pay a claim is the breach triggers the cause of action and begins the statute of limitations n Here, Donovan submitted medical bills and State Farm paid them period of three years until State Farm notified Donovan in writing, vembcr 17. 1986. that it would make no further payments. Only at th did Donovan acquire a right to sue which began the statute runni complaint was therefore timely filed within the five-year limitation pe

Id. (citations omitted); *see* also *Roth v. State Farm Mut. Auto.* Ins. Co.. 2d 981 (Fla. 2d DCA 1991) (applying *Donovan* exception and noting sured cannot extend limitations period by repeatedly resubmitting same c

³In *Levy*, the insured, Howard Levy, sought PIP benefits fmm his Travelers Insurance Company. Travelers refused to pay the benefits ar brought suit against Travelers. The trial court dismissed Levy's complah on the five-year statute of limitations found in section 95.11(2)(b), Statutes (1981). On appeal. Travelers contended tbat the statute of lin commenced upon the date of the accident giving rise to the claim. Levy other band, argued that the statute did not commence running until the was breached. 580 So. 2d at 191. The district court agreed with Levy a that "the tolling of the five-year statute of limitations commences t breach of the insurance contract." *Id.*

* * *

Injunctions-Domestic violence-Statutory directive th mestic violence injunctions "shall" be enforced by civil co is permissive rather than mandatory-Legislature canno nate court's inherent indirect criminal contempt power-1 of statute expressing legislative intent that indirect cr contempt may not be used to enforce compliance with injur for protection against domestic violence is unconstitutiona

ROBERT JAMES WALKER, Petitioner. v. E. RANDOLPH BENTLI Respondent. Supreme Court of Florida. Case No. 86,568. August 2: Application for Review of the Decision of the District Coun of Appea fied Great Public Importance. **Second** District - Case *No.* **95-01084.** (**James Marion Moorman, Public Defender and Deborah K. Bruec Assistant Public Defender, Tenth Judicial Circuit, Bartow, for P Thomas C. MacDonald, Jr. of Shackleford. Farrior, Stallings & Eva Tampa, for Respondent.**

(OVERTON, J.) We have for review *Walker* v. **Bentley.** 6 2d 313 (Fla. 2d DC4 1995), in which the district court Robert James Walker's petition for writ of prohibition. petition, Walker sought to prevent Judge E. Randolph i from exercising his power of indirect criminal contempt . ish Walker's alleged violation of a domestic violence inju which was issued pursuant to section 74 1.30, Florida S (Supp. 1994). In denying Walker's petition, the distric found that the legislature has no authority to limit a circu judge's inherent power of contempt, as it apparently attem do by restricting the circuit court's jurisdiction to the use contempt in enforcing injunctions issued under section 7 In reaching its decision, the district court certified the fol two questions as being of great public importance:

> IS THE WORD "SHALL" AS USED IN SE(741.30(8)(a), FLORIDA STATUTES (SUPP. 1994). INTERPRETED AS MANDATORY RATHER THA PERMISSIVE OR DIRECTORY?
>
> IF INTERPRETED AS MANDATORY, IS SE 741.30(8)(a), FLORIDA STATUTES (SUPP. 1994), A CONSTITUTIONAL ENCROACHMENT ON THE TEMPT POWER OF THE JUDICIARY IN VIOLATI(ARTICLE II, SECTION 3 OF THE FLORIDA CON: TION?

660 So. 2d at 321. We have jurisdiction, Art. V, § 3(b)(4 Const. For the reasons expressed, we approve the well-re opinion of the district court and answer the first question t ing that the word "shall" in section 741.30(8)(a) is to b preted as directory rather than mandatory, Our answer to t question renders the second certified question moot.

Section 741.30 creates a cause of action for and enfor of injunctions for protection against domestic violence section has been the subject of numerous modifications ir years as a result of the legislature's increasing recogni domestic violence as an important issue in our society. ' velopmental history of that section over the last decad forth in detail in *Walker.* Pertinent to this appeal is th amendment to the statute in which the legislature attem