SUPREME COURT OF FLORIDA

JANE ROLLINS and DASHA MARIE CATES,

Petitioners,

vs.

MICHAEL PIZZARELLI and MICHELE PIZZARELLI, as parents and natural guardian of CARLENE PIZZARELLI, a minor,

Respondents.
_____/

Case No. 92,080

Fourth DCA No. 96-3628

PETITIONERS' BRIEF ON THE MERITS

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INTRODUCTION

This is a petition to have this Court review a decision of the Fourth District Court of Appeal which has been certified by that court as directly and expressly conflicting with the decision of the Fifth District Court of Appeal in its case of *Kokotis v. DeMarco*, 679 So.2d 296 (Fla. 5th DCA 1996) *rev. denied,* 689 So. 2d 1068 (Fla. 1997).

The Petitioners, JANE ROLLINS and DASHA MARIE CATES, will be referred to throughout this Brief in the capacity that they occupied in the trial court below, or as "Defendants". The Respondents, MICHAEL PIZZARELLI and MICHELE PIZZARELLI, as parents and natural guardians of CARLENE PIZZARELLI, a minor, similarly will be referred to in the capacity that they occupied in the trial court below, or as "Plaintiffs".

References to the record on appeal will be indicated by the symbol "(R.)" and references to the Appendix attached to the Appellants' Initial Brief filed in the district court will be referred to by the symbol "(A.)".

All emphasis, throughout this brief, will be supplied by the writer unless otherwise indicated.

STATEMENT OF THE FACTS AND THE CASE

The Fourth District Court of Appeal articulated the issue in this case as follows:

> "Whether a jury's award for future medical benefits should be offset by any remaining personal injury protection (PIP) benefits."

As the court indicated in its decision, this appeal arises from the trial of an automobile accident personal injury case which took place in July of 1996. At the commencement of the trial, medical bills incurred by the Plaintiffs in the amount of Thirteen Thousand Two Hundred Twelve & 60/100 Dollars ($13,212.60) were admitted into evidence without objection. (R. 436-

521). During the course of the trial, the issue arose as to whether the jury should be advised of the fact that *additional* PIP benefits were available to the Plaintiff for use to defray the cost of *future medical expense*. (A.4, pp. 2-9). The defense argued that the plain language of §627.736(3), Fla. Stat. (1991), required the Court to instruct the jury not to compensate the Plaintiffs for PIP benefits which had been paid or were to be paid in the future and that the Defendant was entitled to a setoff of up to Ten Thousand & No/100 Dollars ($10,000.00) for PIP benefits paid in the past or to be paid in the future. (A.4, pp. 2-4).

The attorney for the Plaintiffs, in turn, argued that §627.7372, Fla. Stat (1991), applied to the cause of action and entitled the Defendants to a set off only for those PIP benefits which had been paid up until the time of trial (A.4, pp. 4-7). The trial judge ruled that since the PIP payments were made a part of the record of the case through the "payout ledger", the question of whether future available PIP benefits would be setoff from any award for future medical damages would be taken up post-trial. (A.4, pp. 8-9).

In its verdict, the jury awarded the Plaintiffs Five Thousand & No/100 Dollars ($5,000.00) in future medical expenses. (R. 393-394).

At the post-trial hearing on the issue of whether future medical expenses should be set off by the amount of the remaining PIP coverage, it was stipulated that Five Hundred Twenty Four & No/100 Dollars ($524.78) in PIP coverage remained available. (T.2, pg. 8). The trial judge applied the language of §627.736(3) to the case, found that there were PIP benefits which were *payable*, and set off the remaining and available coverage of Five Hundred Twenty Four & 78/100 Dollars ($524.78) from the Five Thousand & No/100 Dollars ($5,000.00) future medical expense award.

On appeal, the Fourth District Court took note of the fact that the identical issue had been raised in the Fifth District in the case of *Kokotis v. DeMarco*, 679 So.2d 296 (Fla. 5th DCA 1996), *rev. denied,* 689 So.2d 1068 (Fla. 1997). It concurred with the *Kokotis* court that §627.736(3) was the appropriate statute to be applied but disagreed with that court's determination that where a Plaintiff had PIP coverage available for further medical expenses, then to the extent that such coverage existed, a Plaintiff would be precluded from collecting future medical damages from a defendant tortfeasor. Where the *Kokotis* court had specifically found that the word *"payable",* as used in §627.736(3), included expenses which had not yet accrued but would result from a covered injury, the Fourth District found that "the better and more logical interpretation of "*payable"* as used in the statute would be for it to relate to medical bills which the Plaintiff *may incur before trial but which have not been processed by the PIP carrier and remain unpaid".*

The district court below, then, held that the trial court had correctly applied §627.736(3) but found that the award of future medical expenses should not have been offset by the amount of the remaining available PIP coverage. It instructed the trial court, on remand, to reinstate the jury's verdict for the full amount of future damages awarded and to award attorney's fees and costs under the offer of judgment statute, §768.79, Fla. Stat. (1991).

Because it noted that its holding directly conflicted with the Fifth District's opinion in *Kokotis*, it certified to this Court the following question:

> WHETHER THE TERM "PAID OR PAYABLE" IN §627.736(3) FLA. STAT. (SUP. 1996), SHOULD BE DEFINED AS "THAT WHICH HAS BEEN PAID, OR PRESENTLY EARNED AND CURRENTLY OWING" SO THAT THE STATUTORY LANGUAGE IS §627.736 WILL NOT BE INTERPRETED TO PERMIT ANY REMAINING PERSONAL INJURY PROTECTION BENEFITS TO BE USED FOR SETOFFS FOR FUTURE COLLATERAL SOURCES.

Thereafter, on December 24, 1997, this Court accepted the petition for review in this case, postponed its decision on jurisdiction, but instructed the parties to file their briefs on the merits.

POINT ON APPEAL

WHETHER THE TERM "PAID OR PAYABLE" IN §627.736(3) FLA. STAT. (SUPP. 1996), SHOULD BE DEFINED AS "THAT WHICH HAS BEEN PAID, OR PRESENTLY EARNED AND CURRENTLY OWING" SO THAT THE STATUTORY LANGUAGE IS §627.736 WILL NOT BE INTERPRETED TO PERMIT ANY REMAINING PERSONAL INJURY PROTECTION BENEFITS TO BE USED FOR SETOFFS FOR FUTURE COLLATERAL SOURCES.

SUMMARY OF ARGUMENT

Florida's No-Fault Act contains, within its provisions, a "collateral source" provision which states that "any injured party who is entitled to bring suit under the provisions of §627.730-627.7405…shall have no right to recover any damages for which personal injury protection benefits are *paid or payable*.

The District Court, in the case of *sub judice*, defined damages *payable*, as used in the statute, as including those medical bills which a plaintiff may incur before trial but which have not yet been processed by the PIP carrier and, therefore, remain unpaid.

This restricted concept of what is *payable* directly and expressly conflicts with the decision of the Fifth District Court of Appeal in its case of *Kokotis v. DeMarco*, 679 So.2d 296 (Fla. 5th DCA 1996) *rev. denied,* 689 So. 2d 1068 (Fla. 1997). In that case, on the identical issue presented, the Fifth District Court read the term "*payable*" as including expenses *which have not yet accrued but which will result from the covered injury.*

This variance in the application of the word *payable* between the different districts has far-reaching impact in the civil justice system in our state.

For instance, in the case of *sub judice*, the jury made a determination that the Plaintiff should be awarded Five Thousand & No/100 Dollars ($5,000.00) for future medical expenses. The Plaintiff had exhausted most, but not all of her PIP coverage. She, at the time of trial, still had Five Hundred Twenty Four & 78/100 Dollars ($524.78) in benefits available under that coverage.

Following the *Kokotis* decision, the trial court properly deducted this Five Hundred Twenty Four & 78/100 Dollars ($524.78) from the jury's award of Five Thousand & No/100 Dollars ($5,000.00) as an amount which is "*payable*" under her PIP coverage.

By restricting the definition of the word *payable* to mean only those medical expenses already incurred but not yet processed by a PIP carrier, the court below adopted a limitation to the statute which defeats the legislative intent behind the PIP statute's collateral source provision.

That provision was originally inserted in the PIP statute to prevent an injured person from receiving a double recovery. Since a plaintiff may control what medical expenses are sent to her PIP carrier for processing merely by withholding claim for those benefits, the Fourth District's restrictive interpretation of the word "*payable*" specifically allows a plaintiff the potential for double recovery. As is seen, this is a result which is neither authorized nor contemplated by the statute.

Indeed, in promulgating standard jury instructions, this Court has authorized a jury to be instructed that economic damages are recoverable in the absence of the finding of a permanent injury, in cases subject to the No-Fault Act, to the extent that those economic damages "have not

been paid *and are not payable* by personal injury protection benefits." The plain meaning of this instruction is that a jury may award future economic damages against a tortfeasor only if those damages *are not payable* by PIP.

The more consistent and logical view of the issue presented is one that, if PIP benefits have not been exhausted at a time that a case subject to the No-Fault Act is tried, then, to give effect to the purposes of the Act militating against double recovery, any award of future economic damages should be reduced to the extent that PIP coverage is available to compensate the plaintiff for those future economic damages.

This view, adopted by the court in *Kokotis* represents a more logical reading of the interplay between no-fault provisions. It effectuates the legislature's intent not to allow for double recovery and gives plaintiff the opportunity to achieve full compensation for these economic damages.

As such, the decision of the Fourth District Court in the case of *sub judice* should be reversed, the decision of the Fifth District Court of Appeal in its case of *Kokotis v. DeMarco* should be approved by this Court, and the question certified to this Court by the Fourth District should be answered in the negative.

ARGUMENT

The statutory scheme for the payment of personal injury protection (PIP) benefits under Florida's No-Fault Act, ss. 627.730-627.7405, is a finely woven statute which has been refined over the past twenty-seven years to provide a true "no-fault" insurance plan for those injured in automobile accidents in this state and their insurance carriers.

Under the Act, benefits are recoverable from a PIP insurer on a primary basis and "shall be due and payable as loss accrues, upon receipt of reasonable proof for such loss and the amount of expenses and loss incurred which are covered by the policy." §627.736(4), Fla. Stat. (Supp. 1996).

There is no limitation period found in the Act which restricts the time within which an insured may claim benefits under the Act.. Covered benefits are due and payable *as loss accrues* without restriction as to *when* claim is made. In *State Farm Mutual Automobile Insurance Company v. Lee*, 678 So.2d 818 (Fla. 1996), this court expressly declined to hold that the statute of limitations in PIP cases begins to run from the date of the automobile accident. Rather, this court found, a cause of action for failure to pay PIP benefits accrues at the time that the policy was breached and claimed benefits denied. Accordingly, it from that time that the limitations period runs.

Under the rationale of the *Lee* case, then, an insured in Florida is entitled to PIP benefits, whenever submitted, as long as the claim is a covered claim (that is, a claim for expenses which are *inter alia* reasonable expenses for necessary medical care, or expenses for loss of gross income or loss of earning capacity, which arise from an automobile accident). The insured does not lose the right to claim covered benefits merely through the passage of time.

Working in concert with the statutory provisions cited above is the provision found at §627.736(3), Fla. Stat. (1996), which states as follows:

> Insured's rights to recovery of special damages and tort claims.-- no insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for personal injury protection benefits, whether suit has been filed or settlement has been reached without suit. An injured party who is entitled to bring suit under the provisions of ss. 627.730-627.7405, or his or her legal representative, shall have no right to recover any damages for which personal injury protection benefits are *paid or payable*. The

> Plaintiff may prove all of his or her special damages notwithstanding this limitation, but if special damages are introduced in evidence, the trier of facts, whether judge or jury, shall not award damages for personal injury protection benefits *paid or payable*. In all cases in which a jury is required to fixed damages, the Court shall instruct the jury that the Plaintiff shall not recover such special damages for personal injury protection benefits *paid or payable*.

This court, in *Prude v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325 (Fla. 1981), explained the purpose of this subsection as altering the common-law collateral source rule by precluding an insured's right to recover, from a tortfeasor, damages for which personal injury protection benefits are either *paid or are payable,* thereby effecting a double recovery:

> Basically, §§627.736(3) and 627.7372 reduce the amount of damages injured plaintiffs can recover from tortfeasors by the amount of benefits they have received from collateral sources. Appellants argue the statutes therefore abolish the common-law collateral source rule that injured plaintiffs are entitled to recover the full amount of their damages from tortfeasors regardless of the amount of benefits they have received from collateral sources such as insurance proceeds. This argument assumes that common-law plaintiffs were allowed to keep the full amount of money they recovered in a lawsuit, which was not the case. Their right of recovery was subject to the insured's right of subrogation. That is, as a matter of equity, it was the insurers who were entitled to bring suit against tortfeasors for reimbursement of any payments made to an insured. This right of subrogation was statutorily recognized by the Florida Automobile Reparations Reform Act, §§627.730-627.741, Fla. Stat. (1971), when it was first enacted. §627.736(3) was previously a provision concerning an insured's right to reimbursement of any payments made to an insured who subsequently recovered against a tortfeasor. Its main purpose was to prevent injured plaintiffs from receiving double recovery. This provision entitled the injured plaintiff to an equitable distribution of the cost of litigation which resulted in a lot a litigation. One District Court Judge suggested the legislature revisit the statutes because it encouraged litigation….In 1976, the legislature revamped this subsection to take care of these problems by passing the current provision. Ch. 76-266, s. 4, Laws of Florida. Now insurers are no longer entitled to reimbursement of any personal injury payments made to injured persons. To prevent the injured persons from receiving double recovery, the legislature has

> provided that any PIP benefits they have received from their insurers will be set off from the amount they are entitled to recover from the tortfeasors. Although this provision primarily benefits the tortfeasor, it is in keeping with the "no-fault" concept of the Florida Automobile Reparations Reform Act. The benefits obtained by tortfeasors will enure to their insurance carriers. Supposedly these benefits will eventually be shared by all carriers without the need of litigation. This should result in lower premiums.
>
> (At pages 1327-1329).
> (Citations omitted).

In *Blue Cross and Blue Shield of Florida, Inc. v. Matthews*, 498 So.2d 421 (Fla. 1986), this court expounded on the *Purdy* rationale by indicating that, in precluding the recovery of PIP benefits from a tortfeasor, an equitable and beneficial arrangement emerges among insurance carriers in the state "because each insurer receives both benefits and detriments; in other words, losing the right to sue other motor vehicle insurers is washed out by gaining the right not to be sued by other such insurers." *Id.* at 423.

As seen then, the statutory scheme calls for an insured to receive PIP benefits *at any time* so long as those benefits represent covered expenses under the Act, *i.e.* they are reasonable, necessary, and related to the car accident for which claim is made. This ensures that individuals involved in automobile accidents in the State of Florida, who are subject to the Act, will recover promptly their major and salient economic losses from their own insurance carrier. *Chapman v. Dillon*, 415 So.2d 12, 17 (Fla. 1982). By receiving PIP benefits from one's own carrier, however, an insured loses their right to recover these same benefits from a tortfeasor. As this Court has expressed, by substituting the insured's own insurance carrier for that of the tortfeasor, under the statutory scheme, an "equitable arrangement" arises which restricts legal wrangling, and resulting litigation, between insurance carriers as to whom is ultimately obligated for those expenses.

In the case *sub judice* the District Court recognized this equitable interplay in the Act but carved out an exception, not contained in the statute, for future benefits. The court below, in restricting the word *payable* to mean only those benefits which "have not been processed by the PIP carrier and remain unpaid". To be *payable*, then, under the lower court's rationale, benefits must be "presently earned and currently due and owing." This places an impermissible limitation upon the statutory scheme by excluding from the operation of the statute those benefits which are fortuitously incurred *after* the insured's action is tried against the tortfeasor. Indeed, under the the court's decision below, benefits which have been incurred, but not sent in for processing by the PIP carrier, would not be defined as "payable" and, accordingly, would represent damages for which a plaintiff would be entitled to double recovery, once from the tortfeasor and, under the rationale of *Lee* decision, again from the PIP carrier.

The court below acknowledged that its holding here directly conflicts with *Kokotis v. DeMarco*, 679 So.2d 296 (Fla. 5th DCA 1996) *rev. denied,* 689 So. 2d 1068 (Fla. 1997). There, in an identical factual scenario, the Fifth District Court of Appeal found that:

> §627.736(3) provides that an injured party shall have no right to recover any damages for which PIP benefits are "paid or payable." Since DeMarco has PIP benefits which were and are available to cover his medical expenses associated with this injury, then to the extent of such coverage, he may not collect such damages from Kokotis. *We find that payable as used in this statute includes expenses which have not yet accrued but which will result from the covered injury.*

As a basis for it reasoning on this issue, *Kokotis* cited to the case of *Hannah v. Newkirk,* 675 So.2d 112 (Fla. 1996), where this Court found that an injured party may not seek recovery of a PIP deductible from a tortfeasor under §627.739 even though that party may be uninsured as to the amount of the deductible. The *Kokotis* court found that it would be inconsistent with the reasoning of *Hannah* to hold that an insured may nevertheless collect future expenses, which are

covered but not yet suffered or paid for, from the tortfeasor. The Fifth District felt that this would permit a double recovery for these expenses, a result neither contemplated nor authorized by the statute.

Additionally, in support of this *Kokotis* view, it should be noted that this court has approved Standard Jury Instructions which, in recognizing what damages are available to a plaintiff subject to the threshold requirements of §627.737, Fla. Stat. (1991), specifically advise a jury that economic damages are recoverable in the absence of a finding of a permanent injury to the extent that they "have not been paid *and are not payable* by personal injury protection benefits." Florida Standard Jury Instructions (Civ.) §6.1(d).

Therefore, the more consistent and logical view of the issue presented appears to be that if PIP benefits have not been exhausted at the time that a case subject to the Act is tried, then, to give effect to the purposes of the Act militating against double recovery, any award of future economic damages should be reduced to the extent that PIP coverage is available.

CONCLUSION

The lower court's decision in this case should be disapproved and the decision of the Fifth District Court of Appeals in the case of *Kokotis* approved by this court. The question certified to this court should be answered in the negative and the matter should be remanded with instructions to approve the trial court's reduction of the future medical expense award by the amount of PIP benefits remaining under the Plaintiff's policy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on May 11, 2000, to: GARRISON M. DUNDAS, ESQUIRE, Co-Counsel for Petitioners, P.O. Box 3779, Ft. Pierce, Florida 34948-3779. Telephone: (561) 461-2310; MICHAEL OVERBECK, ESQUIRE and JULIE H. LITTKY-RUBIN, ESQUIRE, P.O. Box 4056, West Palm Beach, Florida 33402-4056; and DOCK BLANCHARD, ESQUIRE, P.O. Box 1869, Ocala, Florida 34478.

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