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' REPLY BRIEF ON THE MERITS

JAMES K. CLARK, ESQUIRE
Attorney for Petitioners
James K. Clark & Associates
SunTrust International Center, Suite 1800
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 416-2200
Florida Bar No.: 161123

TABLE OF CONTENTS

TABLE OF CONTENTS ii
INTRODUCTION 1
POINT ON APPEAL 1

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 OF §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 1
ARGUMENT 3
CONCLUSION 7
CERTIFICATE OF SERVICE 7

TABLE OF CITATIONS

Cases:

Cobb v. Maldonado,

451 So. 2d 482 (Fla. 4th DCA 1984) 6

Kokotis v. DeMarco,

679 So. 2d 296 (Fla. 5th DCA 1996), *rev. denied,* 689 So. 2d 1068 (Fla. 1997) 1, 3, 6, 7

Purdy v. Gulf Breeze Enterprises, Inc.,

403 So.2d 1325, 1329 (Fla. 1981) 3, 5

State Farm Mutual Automobile Insurance Company v. Lee,

678 So. 2d 818 (Fla. 1996) 2, 5

State Farm Mutual Automobile Insurance Company v. Swearingen,

590 So. 2d 506 (Fla. 4th DCA 1991), *rev. denied*, 599 So. 2d 1280 (Fla. 1992) 2, 4

State v. Egan,

287 So. 2d 1 (Fla. 1973) 6

Van Pelt v. Hilliard,

75 Fla. 792, 78 So. 693 (1918) 6

Statutes:

§627.736, Fla. Stat. (1995) 1, 5

§627.736(1), Fla. Stat. (1995) 5

§627.736(3) Fla. Stat. (Supp. 1996) 1

§627.736(4)(f), Fla. Stat. (1989) 2

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".

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

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 OF §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

In the Answer Brief filed by the Plaintiffs and their *amicus,* emphasis is placed upon two arguments which, it is said, militate for this Court's adoption of the of the reasoning of the Fourth District in the case *sub judice*.

First, they argue that a claim for personal injury protection (PIP) benefits grows stale over time and will not be honored if presented at some point in the future.

The second argument seeks to apply an unusual and tortured interpretation to the word *payable* as it is used in the no-fault act..

As will be demonstrated, however, this Court has addressed the issues raised by both arguments and has decided these questions contrary to the positions taken by the Plaintiffs here.

Essentially, there is no time limitation contained in the no-fault statute for bringing a claim for PIP benefits. As this Court noted, in *State Farm Mutual Automobile Insurance Company v. Lee*, 678 So. 2d 818 (Fla. 1996), an insured is entitled to make claim for PIP benefits, whenever submitted, as long as it seeks benefits allowable under the no-fault statute. The *Lee* decision specifically decided that the statute of limitations for PIP benefits runs not from the date of the automobile accident but, rather, from the date that benefits are denied. This effectively extends any statute of limitations for PIP benefits to a point well into the future.

In accord with this philosophy of making PIP benefits available without time limitation is the case of *State Farm Mutual Automobile Insurance Company v. Swearingen*, 590 So. 2d 506 (Fla. 4th DCA 1991), *rev. denied*, 599 So. 2d 1280 (Fla. 1992). In the *Swearingen* case the Court found that an insurance policy restriction on the presentation of med pay benefits to those which were incurred within three years of the date of an accident was an impermissible restriction on the PIP co-payment required under §627.736(4)(f), Fla. Stat. (1989). Since the PIP statute specifically provides that med pay benefits become the co-payment for PIP coverage, the Court found that any time restriction on the co-payment would be disallowed.

Additionally, the Plaintiffs and their *amicus* spent a great deal of time, in their briefs, attempting to interpret the word *payable* as it is used in the no-fault statute. This Court,

however, has already interpreted the words *paid* or *payable* as they were used in that statute. In *Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325, 1329 (Fla. 1981), this Court stated that benefits which are *paid* or *payable* are "those benefits a person is entitled to under his or her contract after he or she files a claim."

The *Purdy* court's interpretation of the words *paid* or *payable* tracks the reasoning of the Fifth District Court of Appeals in its decision in *Kokotis v. DeMarco*, 679 So. 2d 296 (Fla. 5th DCA 1996), *rev. denied*, 689 So. 2d 1068 (Fla. 1997). The court in *Kokotis* found that the word *payable*, as used in the statute, includes "expenses which have not yet accrued but which will result from the covered injury."

There is no necessity, then, for a tortured interpretation of the words *paid* or *payable*. This Court has already given them straightforward application.

Accordingly, since no time limitation is allowable for the presentation of PIP claims, and because the word *payable* is plain and clearly expressed to mean benefits that one is entitled to after a claim has been made, the trial court in this case was correct in reducing the jury's future medical expense award by the amount of PIP available to pay benefits in the future.

ARGUMENT

The Plaintiffs and the their *amicus* emphasize, in their respective briefs, two arguments which, they say, militate for this Court's adoption of the reasoning of the Fourth District in the action *sub judice*. Their first argument is that somehow a claim for personal injury protection (PIP) benefits grows stale over time and will not be honored if presented at some point in the future. The second argument centers around the interpretation of the word *payable* as used in the PIP statute.

As we shall see, however, this Court has addressed the issues raised by both arguments and has decided these questions contrary to the positions taken by the Plaintiffs and their *amicus* here.

First, the Plaintiffs raise the question of whether a claim for PIP benefits made in the future grows stale over time. Without any citation to authority, the argument is set forth that PIP benefits will not be payable from a no-fault insurance carrier after the time of a jury trial on damages against a tortfeasor has occurred.

However, there is no time limitation contained in the no-fault statute for bringing a claim for PIP benefits. Indeed, it has been determined that the public policy of this state would invalidate restrictions on the time within which claims for PIP benefits could be made. In *State Farm Mutual Automobile Insurance Company v. Swearingen*, 590 So. 2d 506 (Fla. 4th DCA 1991), *rev. denied*, 599 So. 2d 1280 (Fla. 1992), an insurance policy limited presentation of claims for medical payments (med pay) benefits to those medical bills which were incurred within three years of the date of an accident. When, after three years, the carrier refused to make med pay coverage available as an adjunct to PIP benefits, the insured sued. The Fourth District Court stated:

> Appellant argues that the language of the med pay statute itself allows for a time limitation because it states "if available", and thus, Appellant argues in this case med pay coverage was no longer "available" because it expired after three years. *See*, §627.736(4)(f), Fla. Stat. (1989). ("medical payments insurance, if available in a policy of motor vehicle insurance, shall pay the portion of any claim for personal injury protection…"). This argument is totally without merit. In our view, the "if available" language simply indicates the optional nature of med pay coverage. PIP insurance is mandatory; med pay insurance is optional. The "if available" language means only that "if the insured person has purchased the med pay in his/her insurance policy", this is what it accomplishes.
>
> 590 So. 2d at 507-508.

Because a claim for PIP benefits can be made, without time limitation, at any point in the future, as long as the claim meets the qualifications of §627.736, Fla. Stat. (1995), the concomitant med pay co-payment must also be available without time limitation.

Additionally, this Court noted, in *State Farm Mutual Automobile Insurance Company v. Lee*, 678 So.2d 818 (Fla. 1996), that an insured is entitled to PIP benefits, whenever submitted, as long as the claim is a covered claim under the no-fault statute. Under the *Lee* decision, an insured does not lose his or her claim for PIP benefits merely through the passage of time. Indeed, in *Lee* it was decided that the statute of limitations for PIP benefits runs from the date that benefits are denied (and *not* from the date that an accident occurs).

The Plaintiffs and their *amicus* also spend a great deal of time attempting to interpret the word *payable* as it is used in the no-fault statute. This Court, however, has already interpreted the words *paid or payable* as they are used in the statute. In *Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So. 2d 1325, 1329 (Fla. 1981), this Court stated that benefits which are "paid or payable" are "*those benefits a person is entitled to under his or her contract after he or she files a claim.*"

This is a straightforward interpretation of the words "paid or payable". Benefits which are "paid or payable" are those benefits that a person is entitled to receive after a claim is presented. It is those benefits that the statute requires and the insurance policy provides. That is, *e.g.,* those benefits which represent "eighty percent of all reasonable expenses for necessary medical, surgical, x-ray, dental and rehabilitative services…" or those benefits which are "sixty percent of any loss of gross income and loss of earning capacity per individual from inability to work caused by the injuries sustained by the injured person…" §627.736(1), Fla. Stat. (1995).

In other words, benefits which are "paid or payable" are: (1) *paid*, that is, those benefits that have already been established and recovered; or, (2) *payable*, those benefits which *will be* recovered under an insurance policy by an insured "after he or she files a claim."

This Court's interpretation of the words "paid or payable" in the *Purdy* decision track the reasoning of the Fifth District Court of Appeals in its decision in *Kokotis v. DeMarco*, 679 So. 2d 296 (Fla. 5th DCA 1996), *rev. denied*, 689 So. 2d 1068 (Fla. 1997). The Court there found that the word "payable", as used in the statute, includes "expenses which have not yet accrued but which *will result* from the covered injury."

There is no necessity, then, for the tortured interpretation of what the words "paid or payable" might mean. This court has already given them straightforward application. It is well established: that construction and interpretation of a statute are unnecessary when it is unambiguous, *State v. Egan*, 287 So. 2d 1 (Fla. 1973); that the Courts are obliged to give effect to the language of a statute that the legislature has used, *Cobb v. Maldonado*, 451 So. 2d 482 (Fla. 4th DCA 1984): and, that the legislature should be held to mean what it has plainly expressed, *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918).

Accordingly, since there is no time limitation for the presentation of PIP claims, and because the word *payable* is plain and clearly expressed to mean benefits that one is entitled to under the PIP statute after a claim has been made, the trial court in this case was correct in reducing a jury's future medical expense award by the amount of PIP available to pay benefits in the future. The Fourth District was wrong to reverse it.

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 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.

JAMES K. CLARK & ASSOCIATES
SunTrust International Center, Suite 1800
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 416-2200
Florida Bar No.: 161123

By:_____
JAMES K. CLARK
Co-Counsel for Petitioners