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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

-vs-

CASE NO. 92,605

BONITA H. RUDNICK,

Respondent.

______________________________/

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

Petitioner was the Defendant and Appellant in the trial and appellate courts; Respondent was the Plaintiff and the Appellee in those courts. Petitioner will be referred to as "Allstate," and Respondent will be referred to as such. All emphasis in this brief is supplied by Respondent, unless otherwise indicated. The symbol "R" will denote the Record-on-Appeal; the symbol "T" will denote the transcript of the hearing which took place in the trial court on the issues raised in this proceeding on November 12, 1996; the symbol "MB" will denote Petitioner's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts, only to the extent that it is accurate and non-argumentative.

POINTS ON APPEAL

POINT I

THE TERM "PAID OR PAYABLE" IN SECTION 627.736(3), FLA. STAT. (SUPP. 1996), SHOULD BE DEFINED AS "THAT WHICH HAS BEEN PAID, OR PRESENTLY EARNED AND CURRENTLY OWING" AS HELD BY THE FOURTH DISTRICT

POINT II

THE TRIAL COURT DID NOT ERR REFUSING TO REDUCE THE AMOUNT OF THE JURY'S AWARD BY MEDPAY BENEFITS AVAILABLE TO THE PLAINTIFF

POINT III

THE TRIAL COURT DID NOT ERR IN FAILING TO REDUCE THE VERDICT BY THE $6,500 WHICH WAS PAID UNDER WORKERS' COMPENSATION

SUMMARY OF ARGUMENT

POINT I - The Fourth District correctly concluded that "available" and "paid or payable" refer to amounts which are presently owed and incurred under the plain meaning of the statutory language. Therefore, the Fourth District's opinion should be affirmed, and the Fifth District's opinion should be disapproved.

POINT II - Allstate attempts to raise an issue which it never raised in the trial court, that is, the application of the collateral source statute in the negligence chapter to the issues in this case. For that reason, the Fourth District did not entertain that issue, and this Court should not review it. Should the Court decide to do so, Respondent relies on decisions of other district courts of appeal to demonstrate that there was no error.

POINT III - The trial court properly denied a set-off for $6,500 in workers' compensation benefits because that claim had been settled for $3,000 which was deducted from Respondent's PIP coverage. Assuming that the Fourth District Court of Appeal was correct in the issue under Point I, and that there should be no set-off for future medicals, even if Allstate's arithmetic is correct, the judgment would be reduced by no more than $3,000.

ARGUMENT

POINT I

THE TERM "PAID OR PAYABLE" IN SECTION 627.736(3), FLA. STAT. (SUPP. 1996), SHOULD BE DEFINED AS "THAT WHICH HAS BEEN PAID, OR PRESENTLY EARNED AND CURRENTLY OWING" AS HELD BY THE FOURTH DISTRICT

Throughout its argument, Allstate essentially ignores an important factor in this case -- why it is in this Court. Allstate pays little attention to the basis of the Court's jurisdiction here, the question which was certified by the Fourth District in PIZZARELLI v. ROLLINS, 704 So.2d 630, 633 (Fla. 4th DCA 1997), and adopted as the certification in this case, as follows:

> WHETHER THE TERM "PAID OR PAYABLE" IN SECTION 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 SECTION 627.736 WILL NOT BE INTERPRETED TO PERMIT ANY REMAINING PERSONAL INJURY PROTECTION BENEFITS TO BE USED FOR SET-OFFS FOR FUTURE COLLATERAL SOURCES.

Throughout its brief, Allstate repeats the mantra that the recovery here must be set off by the PIP and medpay benefits paid and payable (MB9, 14, 16, 18, 24). Its disposition of the question certified by the Fourth District is that there "is no definition of 'payable' in the PIP statute, so the Fourth District adopted one to fit the conclusion it wanted to reach." (MB19). Not so. As the Fourth District stated, the "issue presented is whether, at the time of trial the $15,000 coverage for future PIP and medpay claims was 'available' or 'paid or payable' within the meaning of these statutes [§§627.727(1), Fla. Stat. (1993); 627.736(3), Fla. Stat. (1993); 768.76(1), Fla. Stat. (1993)]." ALLSTATE v. RUDNICK, 706

So.2d 389, 390 (Fla. 4th DCA 1998). The statutes listed by the Fourth District, which Allstate had argued in its appellate brief, were the uninsured motorist statute, the personal injury protection section of the no-fault law, and the collateral source statute.[1]

The Fourth District decided the issue as follows:

> In White v. Westlund, 624 So.2d 1148 (Fla. 4th DCA 1993), this court concluded that benefits "otherwise available" under section 768.76(1), did not include benefits potentially payable in the future. Rather, we ruled that
>
> > in order to have collateral source benefits set off against an award, those benefits must either be already paid ("amounts which have been paid") or presently earned and currently due and owing ("otherwise available to him").
>
> Id. at 1153. Recently, in Pizzarelli v. Rollins, 22 Fla. L. Weekly D2632 (Fla. 4th DCA Nov. 19, 1997), this court held that a benefit was "payable" under section 627.736(3), if related to a medical bill which the plaintiff incurred before trial but which had not been processed by the PIP carrier at the time the offset was sought. We concluded in Pizzarelli that this interpretation of "payable"
>
> > would be in keeping with our interpretation of "available" in White. It would also be in keeping with the definition of "payable" as "capable of being paid; suitable to be paid . . . justly due." Black's Law Dictionary, 1128 (6th ed. 1990). Indeed, there is nothing in the everyday usage of "payable" that would require its application to future expenses and benefits rather than accrued benefits not yet paid.

---

[1]/As will be explained under Point II, Allstate presented no argument under §768.76 in the trial court.

> Id. Nothing in the language of section 627.727(1), requires that the term "available" be accorded any different meaning than we gave to the same word in White, even though that case involved a different statute.

706 So.2d 391.

The Fourth District's determination of the meaning of the words "available" or "paid or payable" in those statutes comports with elementary principles of statutory construction. The plain meaning of statutory language is the first consideration of statutory construction. SHELBY MUTUAL INS. CO. OF SHELBY, OHIO v. SMITH, 556 So.2d 393, 395 (Fla. 1990); ST. PETERSBURG BANK & TRUST CO. v. HAMM, 414 So.2d 1071 (Fla. 1982). Where the legislature has not defined the words used in a phrase, the language should be given its plain and ordinary meaning. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASS'N v. FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS, 686 So.2d 1349, 1354 (Fla. 1997); SOUTHEASTERN FISHERIES ASS'N, INC. v. DEPARTMENT OF NATURAL RESOURCES, 453 So.2d 1351 (Fla. 1984). The "plain and ordinary meaning" of the word payable was established by this Court long ago in IN RE ADVISORY OPINION TO THE GOVERNOR, 74 Fla. 250, 77 So. 102, 103 (1917), and enshrined for the legal community in *Black's Law Dictionary* (4th ed. 1968), as follows:

> Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable."

Id. at 1285 (citations omitted). *Black's* explains further:

> A sum of money is said to be payable when a person is under an obligation to pay it. "Payable" may therefore signify an obligation to pay at a future time, but, when used

> without qualification, "payable" means that the debt is payable at once, as opposed to "owing." Sweet. And see First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 19 S.W. 334; Easton v. Hyde, 13 Minn. 91, Gil. 83.

Id.

The logic of this definition of the word payable applies as well to the use of the word "available" in the following passage from the uninsured motor vehicle statute, §627.727(1):

> The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under any automobile medical expense coverage; under any motor vehicle liability insurance coverage....

The Fourth District explained this in the context of §768.76(1), the general collateral source statute, when it stated the following in WHITE v. WESTLUND, 624 So.2d 1148, 1153 (Fla. 4th DCA 1993), rev. dismissed, 640 So.2d 1109 (Fla. 1994):

> In fact, the term "available" means "Accessible for use: at hand," connoting a present, rather than a future, application. And, furthermore, the term "collateral source" is defined in subsection (2) as those payments "made" to the claimant; nowhere does that definition include payments that may be made in the future. Hence, it follows that appellant's interpretation of this section as applying to both past and future benefits is strained.

Id. at 1153 (emphasis in original) (footnote omitted).

Thus, Respondent submits that it is the Fifth District in KOKOTIS v. DeMARCO, 679 So.2d 296 (Fla. 5th DCA 1996), rev. denied, 689 So.2d 1086 (Fla. 1997), not the Fourth District in this case as

Allstate charges (MB19), that adopted a definition to fit the conclusion it wanted to reach. In fact, in KOKOTIS, the Fifth District offered no source whatsoever for its interpretation of the phrase "paid or payable." Id. at 297.

The Fourth District's decision that paid or payable means "benefits already paid or actually incurred and owed at the time of trial" is in keeping with the logic of the statute. Otherwise, a tortfeasor potentially receives a benefit that the victim has absolutely no guarantee of ever receiving. There is no mechanism for the victim to come back to court and seek further compensation from the tortfeasor should the PIP carrier, for whatever reason, not respond to the amount for which the tortfeasor was given credit. The Fourth District's opinion is also consistent with this Court's decision in MANSFIELD v. RIVERO, 627 So.2d 987 (Fla. 1993). In MANSFIELD, this Court held that where a victim had incurred medical bills, but had elected not to present them to the PIP carrier, the tortfeasor was nonetheless entitled to a set-off. Thus, the set-off was for bills which had been incurred, but which had not yet been paid by the PIP carrier.

The Fourth District's decision is also consistent with the many Florida opinions which have rejected set-offs for future collateral sources. See WHITE v. WESTLUND, supra; JEEP CORP. v. WALKER, 528 So.2d 1203, 1206 (Fla. 4th DCA 1988) (error to set off against the compensatory award any sum for future benefits); SWAMY v. HODGES, 583 So.2d 1095, 1096-97 (Fla. 1st DCA), rev. denied, 593 So.2d 1053 (Fla. 1991) (error to set off future social security

benefits); MEASOM v. RAINBOW CONNECTION PRESCHOOL, INC., 568 So.2d 123 (Fla. 5th DCA 1990) (unearned collateral source benefits not to be set off from future medical expenses); STANLEY v. UNITED STATES FIDELITY & GUARANTY CO., 425 So.2d 608, 612 (Fla. 1st DCA 1982), reversed on other grounds, 452 So.2d 514 (Fla. 1984) (future benefits to be excluded from collateral source set off).

Moreover, in the instances where the legislature has intended a reduction for future benefits, it has made that very clear in the statutory language, as the Fourth District pointed out in PIZZARELLI as follows:

> The law clearly holds that unambiguous statutory language must be accorded its plain meaning. *See Carson v. Miller*, 370 So.2d 10 (Fla. 1979). When the Florida Legislature wishes to provide for set-offs for future benefits it well knows how to express itself. For example, in worker's compensation claims subsection 440.39(3)(a), Florida Statutes (Supp. 1996), provides carriers with claims against the responsible third-party tortfeasor for "future benefits to be paid." Also, when providing for arbitration in medical malpractice cases in subsection 766.207(7)(c), Florida Statutes (1995), the legislature provides that "damages for future economic losses shall be awarded to be paid by periodic payments pursuant to section 766.202(8), and shall be offset by future collateral source payments." There is no doubt or ambiguity in the language chosen. In this case there is no reason to either make a decision contrary to the legislature's clear intent or to alter our prior well founded interpretation of the term "payable" in the statute.

704 So.2d at 633.

In sum, Respondent maintains that the certified question should be answered in the affirmative. Allstate is not entitled to

a set-of for future medicals, which totally changes Allstate's calculations in its brief (MB9-10).

POINT II

THE TRIAL COURT DID NOT ERR REFUSING TO REDUCE THE AMOUNT OF THE JURY'S AWARD BY MEDPAY BENEFITS AVAILABLE TO THE PLAINTIFF

In the first two paragraphs of its argument (MB26), Allstate appears to be raising essentially the same issues regarding PIP benefits as it discussed under Point I, and to which response has already been made under Point I of this brief. However, in the third paragraph on the same page, Allstate appears to be raising a somewhat different issue regarding medpay benefits as they relate to the collateral source statute, §768.76, Fla. Stat. (1993), in Chapter 768, the chapter on negligence in general.

Respondent respectfully maintains that this Court should decline to entertain the issues raised under this Point. While this Court has discretion to reach issues ancillary to those certified, ANGRAND v. KEY, 657 So.2d 1146, 1148 n. 3 (Fla. 1995), it should decline to do so here. First, the issue actually reached by the Fourth District in this case was the meaning of the term "available" under §627.727(1), as it related to the similar concept of "paid or payable" used in §627.736(3), as discussed in the PIZZARELLI case. The court did not reach any issue regarding the application of the collateral source statute, §768.76, which Allstate is raising under this Point, for the very good reason that, as Respondent pointed out in her brief in the Fourth District, the argument that a set off for PIP and medpay benefits was also mandated by §768.76 was never argued to the trial court by Allstate (T1-13), and therefore was not preserved for appeal. If

it was not preserved, and if the Fourth District did not reach it, and did not certify it, then this Court's discretion should not reach it either.

Moreover, to the extent that arguments by analogy via §768.76 and WHITE v. WESTLUND have been presented by Respondent under Point I, those arguments apply here as well, and Respondent will rely on them should this Court decide to consider the issues raised under this Point. Finally, on the merits of the medpay issue raised here, Respondent will rely on the holdings in SUTTON v. ASCHCRAFT, 671 So.2d 301, 304 (Fla. 5th DCA 1996), and PENSACOLA JUNIOR COLLEGE v. MONTGOMERY, 539 So.2d 1153, 1156 n. 3 (Fla. 1st DCA 1989), that under the collateral source statute, there should be no collateral source reductions for medpay, because it is not within the definition of a collateral source as defined in §768.76(2)(a), Fla. Stat. (1993).

POINT III

THE TRIAL COURT DID NOT ERR IN FAILING TO REDUCE THE VERDICT BY THE $6,500 WHICH WAS PAID UNDER WORKERS' COMPENSATION

Allstate raises here the same issue which it raised under Point III in its appeal before the Fourth District. That argument was rejected by the Fourth District at the conclusion of its opinion where it stated that "[r]egarding the remaining portion of Allstate's claimed set-off, we find that the record is insufficient to reverse the trial court's ruling." 706 So.2d at 391. For that reason, and because the issue raised here was not included in the question certified to this Court, Respondent maintains that it should not be reached by this Court. ANGRAND v. KEY, supra.

Even assuming that Allstate's version of the arithmetic involved in the case (which was the source of the record dispute below) is correct, Allstate is not entitled to the relief which it claims.

Allstate relies partially on FLORIDA FARM BUREAU CASUALTY CO. v. ANDREWS, 369 So.2d 346 (Fla. 4th DCA 1978). However, the Fifth District later questioned and certified conflict with ANDREWS in SMITH v. STATE FARM MUTUAL AUTOMOBILE INS. CO., 392 So.2d 267 (Fla. 5th DCA 1980), and WHITE v. STATE FARM MUTUAL AUTOMOBILE INS. CO., 392 So.2d 268 (Fla. 5th DCA 1980). The Fourth District itself later receded partially from ANDREWS in LACKORE v. HARTFORD ACCIDENT & INDEMNITY CO., 390 So.2d 486, 487 (Fla. 4th DCA 1980). This Court later affirmed SMITH and WHITE in STATE FARM MUTUAL AUTOMOBILE INS. CO. v. BERGMAN, 408 So.2d 1043 (Fla. 1982), based

on its decision in LACKORE, HARTFORD ACCIDENT & INDEMNITY CO. v. LACKORE, 408 So.2d 1040 (Fla. 1982). In that opinion, this Court held that set-offs from uninsured motorist coverage are not automatic, as the Court had apparently previously held in DEWBERRY v. AUTO-OWNERS INS. CO., 363 So.2d 1077 (Fla. 1978).

Here, Allstate argues that the $6,500 paid by the workers' compensation carrier must automatically be deducted from the amount of the jury's award. However, Allstate ignores the fact that the workers' compensation lien was settled for a payment of $3,000 from Respondent's PIP benefits. Thus, because the past medicals were covered by workers' compensation, and $3,000 of PIP went to settle the workers' compensation subrogation lien, even if Allstate is right there should be no further reduction than $3,000 from the judgment, because Allstate is dead wrong on its argument that the judgment should be reduced by PIP and medpay coverage for future medicals, as argued under Point I.[2]

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[2]/A review of Allstate's arguments in this case (T1-12) demonstrate that it has argued for set-offs of $6,500 in workers' compensation payments, $10,000 in the amount of the settlement with the tortfeasor, and $15,000 in PIP and medpay benefits, for a total of $31,500 of set-offs in a case where the verdict was $21,500 (R100a-100b). Under this Point, it essentially asks permission to pay $3,000 for a $6,500 set-off against Respondent.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that the decision of the Fourth District be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to RICHARD A. SHERMAN, ESQ., Ste. 302, 1777 South Andrews Ave., Ft. Lauderdale, FL 33316, and JOE HANKIN, ESQ., 515 N. Flagler Dr., Ste. 950, West Palm Beach, FL 33401, by mail, this 6th day of July, 1998.

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