THE SUPREME COURT OF FLORIDA

RUBEN FLORES

Appellant

Case No.: 00-2281
Appeal No: 98-04115

Vs.

ALLSTATE INSURANCE COMPANY

Appellee

_____/

INITIAL BRIEF ON THE MERITS

On Petition to invoke the discretionary jurisdiction of the Florida Supreme Court.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellant certifies that the type, size, and style utilized in this brief is 14 point Times New Roman, which is 10 characters per inch.

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STATEMENTS OF THE FACTS OF THE CASE

This petition requests review of an opinion herein of July 1, 2000 and order of September 21, 2000 denying rehearing (appendix Petitioner's jurisdiction brief)

In the jury trial of this cause for UM benefits, Allstate was allowed to raise the following defense in its Eighth Affirmative Defense:

Eighth Affirmative Defense

As to Count I, Defendant, ALLSTATE INSURANCE COMPANY, alleges fraud and misrepresentation by RUBEN FLORES in the presentation of his medical and prescription expenses to ALLSTATE INSURANCE COMPANY to the extent that Plaintiff, RUBEN FLORES, presented altered physician and prescription billing statements to ALLSTATE INSURANCE COMPANY for payment in violation of ALLSTATE INSURANCE COMPANY's policy and Florida Statues. (Appendix Jurisdiction Brief)

Flores moved for summary judgment on the grounds that said defense was legally insufficient and the trial court in the following order denied the motion:

ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Summary Judgment is denied. It is appropriate for Defendant to raise the issue of fraud as a defense to a claim under the policy.
2. Plaintiff's Motion to Sever is denied.

In making this ruling, the court has weighed the potential prejudicial effect of hearing the fraud issue in the same trial as Plaintiff's claim for damages, but has determined that the more appropriate procedure was to try all claims together. Plaintiff's position is that the court should have severed the fraud issue from the trial of the uninsured motorist claim. Another way of stating the Plaintiffs' position would be to contend that the Plaintiff

should not be harmed by a little bit of fraud. The difficulty of this position is apparent when one considers the contrary side of that issue which is that the Plaintiff should not be rewarded by committing a little bit of fraud, but not having t risk any consequences there from. All of the cases cited by Plaintiffs in support of their position that the fraud issue be treated as a coverage issue and tried separately were cases dealing with the statute concerning the non-joinder of insurance companies. The purpose of that statute is to keep the existence of insurance from the jury. That reasoning does not apply in this case which is an uninsured motorist claim in which the underlying policy of insurance will be in evidence.

The Plaintiff is also concerned that the alleged fraud of one insured might void the insurance coverage of other insureds. This Court further rules that only insureds who have committed or participated in the commission of fraud that materially violates the policy are subject to forfeiting their benefits under the policy.

DONE AND ORDERED in Chambers in Tampa, Hillsborough County, Florida, on this 15th day of September. (R 97-98)

This Order allowed Allstate to put on evidence of fraud; to wit, that Ruben Flores worked for a pharmacy and submitted bills of less than $200.00 for medicine which he had received gratis from his employer (T 206, 187-192). Ruben testified that he had prepared the bills and sent them to his former lawyer when requested to do so. (T142-173). The undersigned concedes that one of the bills was altered by someone to increase the amount and that the only person who could benefit from the alteration was Ruben. His denial of doing so made him look like a liar and a cheat. The jury believed that Ruben attempted to defraud Allstate (it never paid the PIP claim) and so found in its verdict (R 546). Allstate attempted to implicate Norma in this fraud and argued in closing argument that both spouses committed insurance

fraud against Allstate and were dishonest people (T112, 124-129, 380-385). The evidence that Norma committed fraud failed to convince the jury. So incensed was the jury by the evidence of fraud, that it found that Ruben's failure to wear a seatbelt was the sole cause of his injuries. He sustained severe injuries from a high-speed frontal collision. Allstate admitted that the tortfeasor's negligence was the sole cause of the accident. The jury awarded him $5,000.00 in past and $5,000.00 in future non-economic damages for losing five teeth, sustaining permanent disfiguring facial fractures, back and neck injuries and lacerations that resulted in permanent numbness of half of his upper lip. (R430-440, 284-301, T32-40).

Flores asked for a new trial on the grounds that the Court erred in allowing the fraud defense and that evidence of fraud inflamed the jury, causing it to render a verdict that was against the manifest weight of the evidence. The trial court denied the motion for new trial. (R72-73) The Second District Court of Appeal affirmed. (Appendix, Jurisdiction Brief.) This is a petition for review of that decision.

SUMMARY OF ARGUMENT

The Second District Court of Appeal has certified the following question "Does an insured lose all benefits under a divisible insurance policy where the insured's fraud is committed with respect to one part of the policy but the applicable general fraud provision of the policy provides that fraud in any portion of the policy voids the entire policy?"

Petitioner submits that the question is of sweeping importance. All Florida policies of auto insurance must include P.I.P. coverage pursuant to the Florida No-Fault Statute, 627.736. Most UM claims involve a P.I.P. claim, as here. The opinion allows a carrier to deny UM coverage on the grounds of a fraudulent P.I.P. claim for less than $200. This would encourage UM carriers to look for "material misrepresentations" in P.I.P. claims in order to deny payment on UM claims on the same policy. It would also make it possible for carriers to deny liability coverage.

The opinion in question conflicts with this Court's decision in *Allstate v Boynton*, 486 So. 2nd 552 (Fla. 1986) that a UM defense may not conflict with Florida Statutes. It conflicts with two Florida Statutes. The opinion conflicts with decisions of other District Courts to the effect that a carrier may not raise defenses that cannot be raised by a tortfeasor and may not limit UM coverage.

Introduction of the evidence of fraud inflamed the jury, resulting in its finding that Flores' failure to wear a seatbelt was the sole cause of his flying into his windshield and sustaining severe injuries. It also resulted in a reward of damages that was shocking and unconscionable.

ARGUMENT I

The Trial Court erred in permitting Allstate to raise a PIP fraud defense in an Uninsured Motorist claim.

The Court's Order of September 17, 1997, presented in it's entirety, above, is premised on the belief that a PIP carrier can void an entire policy of automobile insurance if it receives one fraudulent PIP claim. This would allow it to deny UM coverage on the grounds that the policy is void. This defense of fraud would conflict with a Florida statute; to wit, 627.736. This court in *Allstate v. Boyton* 486 So 2d 522 (Fla 1986) held that a UM defense may not conflict with a Florida Statute. Florida Statutes 627.736 (1) (a) mandates that an auto insurer pay "80% of all reasonable expenses for necessary medical services." This means that it may only deny payment for expenses that are unreasonable or unnecessary, for example, for fraudulent claims. If it cannot deny additional PIP claims, it follows that it cannot deny uninsured motorist coverage by voiding the policy.

Florida Statute 627.728 provides a motor vehicle insurance carrier with its only remedy for fraud, i.e., "cancellation after written notice." Florida Statute 627.728(3) (a) states: "This statute provides the exclusive method of cancellation." Allstate's position is that it may ask a jury to cancel UM coverage by finding that an insured

engaged in material fraud or misrepresentation in making a PIP claim. This would be incompatible with Florida Statute 627.728.

Uninsured motorist coverage is a creature of statute and not subject to modification by the contracting parties. The purpose of the statute is to allow an injured person to recover from his own insurer the amount he would have been able to recover from a tortfeasor if the tortfeasor had a policy of liability insurance. *David v. U.S. Fidelity & Guaranty Insurance Company,* 172 So. 2d 45 (Fla.1st DCA 1965). *Salas v. Liberty Mutual Fire Insurance Company*, 272 So. 2d 1 (Fla. 1972) puts it this way: "The intention of the Legislature…is plain, to provide for the broad protection of the citizens of this State against uninsured motorists. As a creature of statute rather than a matter of contemplation of the parties in creating insurance policies, the uninsured motorist protection is not susceptible to the attempts of the insurer to limit or negate that protection."

The insurer in an action brought by its insured under his uninsured motorist coverage may raise any defense, which would be available to the uninsured tortfeasor. *Mobley v. Allstate Insurance Company,* 276 So. 2d 495 (Fla. 2d DCA 1973). *Kentucky Farm Bureau Mutual Insurance Company v. Mills*, 367 So. 2d 673, 675 (Fla. 2d DCA 1979). For example, an insurer is not obligated to pay uninsured motorist benefits where its insured fails to satisfy the tort threshold. *Castillo v. State Farm Mutual Auto Insurance Company*, 328 So. 2d 567 (Fla. 3d DCA 1976).

All of the cases relied upon by the Second District Court of Appeals involve first party claims on commercial property and homeowners policies. With regard to them the law is well-established, that fraud and misrepresentation void a policy in its entirely. 5A John Allan Appleman and Jean Appleman; Insurance Law and Practice 3595 (1970) also see 12A id. 7297-98 (1981). If the court below is correct and PIP fraud voids the entire policy including its UM coverage it follows necessarily that liability coverage would be voided also. This would deprive persons injured by the insured tortfeasor of the right to recover under his liability coverage. The difficulty with the decision below becomes clear when we consider the fact that a fraudulent PIP claim may be made by a resident relative of the tortfeasor.

Argument II

Evidence of fraud inflamed the jury, causing it to make findings and awards that were shocking, unconscionable and against the manifest weight of the evidence.

Evidence that Ruben's fraud inflamed the jury. Even the trial court agreed that the jury award of past non-economic damages for the child, Bobby Flores, was shocking and unconscionable. The court granted an additure of $10,000.00 (Order denying new trial October 12, 1998, R 595-596). Only a very angry jury could have found that Ruben's failure to wear a seatbelt was the sole cause of his severe injuries. Allstate admitted that the uninsured tortfeasor's negligence was the sole cause of the accident. The jury found that the tortfeasor's contribution to Ruben's injuries was 0% (R 546-548). The jury's finding that the admitted negligence of the tortfeasor was not a legal cause of the Plaintiff's injuries is against the manifest weight of the evidence. The tortfeasor's negligence was clearly a sine qua non and a "cause in fact" of the Plaintiff's injuries (*RTC v. Strook* 853 Fla. Supp 1422 CSD Fla. 1944); *Pope v. Pinkerton* 120 So. 2d 227 (1st DCA 1960). Clearly the high-speed impact was a "cause in fact" of Rubin's being thrown into his windshield. It could not be said that his failure to wear a seatbelt alone caused him to be thrown into his windshield. His vehicle was totaled and his head broke the windshield, causing him to sustain

permanent facial fractures, permanent numbness in half of his upper lip, back and neck injuries and the loss of five teeth, (R 430-440, 284-301, T 32-40). The jury's award of $5,000.00 in past and $5,000.00 in future non-economic damages is shocking and unconscionable in view of the extent of his injuries. *Pymrs v. Meranda* 98 So. 2d 341 (Fla 1957); *Daniels v. Weiss* 385 So. 2d 661 (3d DCA 1980).

CONCLUSION

Allstate put on no evidence on the issue of the Flores' injuries. Its case consisted primarily of its "fraud" defense. This proved highly effective but was the result of an erroneous ruling permitting the defense. This ruling allowed Allstate to introduce evidence and argue that the plaintiffs had attempted to defraud Allstate before suing it. The verdict awards and findings complained of should be set aside and a new trial ordered on all issues in the jury trial relating to Ruben Flores. The defense of fraud should be stricken. The order taxing costs against Ruben Flores should be set aside.

Respectfully submitted,

D. Russell Stahl, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail on this____day of December, 2000 to: CHRISTOPHER J. NICHOLAS BUTLER, BURNETTE & PAPPAS, Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-5946 (Attorney for Defendant).

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