ORIGINAL

IN THE FLORIDA SUPREME COURT
CASE NO: SC01-464

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BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Defendant/Petitioner

District Court
Case No.: 2D00-932

v.

SC01-464

ANGELA STECK,

Plaintiff/Respondent
_____/

PETITIONER'S JURISDICTIONAL BRIEF

On Review From The Second District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

This case arises out of an automobile/pedestrian accident that occurred late one night in June, 1997. (A1 at D256). Ms. Steck walked in front of an automobile traveling with the right of way on a busy, multilane highway and was severely injured. Witnesses to the accident testified that the driver of the vehicle was not at fault and could not have avoided hitting her. At the time she was hospitalized, her blood alcohol level was more than three times the legal limit. Due to the fact that she received 4.7 liters of intravenous fluids in the half hour between the accident and the blood draw, her blood alcohol level was actually substantially higher than three times the legal limit when the accident occurred. Id.

As a result of the accident, Ms. Steck was hospitalized for 53 days, lost a leg, and incurred more than $350,000.00 of medical expenses. She was insured under a health insurance contract issued by Blue Cross and Blue Shield of Florida, Inc. ("Blue Cross"). Blue Cross refused to pay her hospital and medical expenses because the policy contained an exclusion which stated:

> This contract does not provide benefits for: . . . A condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician. (Emphasis added).

Ms. Steck sued for breach of contract and declaratory judgment. Blue Cross defended based upon the policy exclusion. The parties filed cross motions for summary judgment and stipulated that Ms. Steck's accident was caused by her drunken condition. The trial court granted Ms. Steck's motion and denied Blue Cross' motion, citing Mason v. Life & Casualty Ins., Co., of Tenn., 41 So. 2d 153 (Fla. 1949) ("Mason I") and Mason v. Life & Casualty Ins., Co., of Tenn., 41 So. 2d 155 (Fla. 1949) ("Mason II"). Blue Cross appealed and the Second District affirmed, holding that the policy's drunkenness exclusion only applied to exclude expenses related to a "direct" injury to biological systems of a person, such as acute alcohol poisoning or liver damage, not to "indirect" injuries, such as accidental injuries caused by the behavior of an insured while intoxicated. Id. Blue Cross timely filed a petition for review in this Court.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review the express and direct conflict created by the Steck decision below and the decision in Blue Cross and Blue Shield of Florida, Inc. v. Ming, 579 So. 2d 771 (Fla. 5th DCA 1991). The Ming decision, which involved the same health insurer and a policy exclusion for conditions resulting from an insured's drunkenness, reached the exact opposite conclusion from Steck. Ming held that the drunkenness exclusion "obviously applied" to injuries suffered by a driver in a drunk driving accident.

This Court should exercise its discretion to resolve this conflict because changes to the insurance code since 1949 and subsequent decisions by this Court and Florida's other district courts demonstrate that the drunkenness exclusion should be applied in those cases in which an insured's intoxication has a causal connection to the injuries suffered and the expenses incurred, not merely to those cases in which alcohol intake has a direct biological effect on a person's body, such as alcohol poisoning or liver damage.

ARGUMENT

THE COURT HAS JURISDICTION TO REVIEW THIS CASE

In its decision below, Blue Cross and Blue Shield of Florida, Inc., v. Steck, 26 Fla. L. Weekly D255 (Fla. 2d DCA Jan. 17, 2001), the district court created express and direct conflict with the decision of the Fifth District Court of Appeal in Blue Cross and Blue Shield of Florida, Inc. v. Ming, 579 So. 2d 771 (Fla. 5th DCA 1991). This Court has jurisdiction to review this case and resolve the conflict. Fla. R. App. P. 9.030(a)(2)(A)(iv).

In Steck, the applicable Blue Cross health insurance policy provision excluded health care benefits for: ". . . a condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician." Steck, 26 Fla. L. Weekly at D256. The Steck court concluded that this provision only operated to exclude the direct effects of drunkenness on the biological systems of an insured, such as acute alcohol poisoning or liver damage. Id. at D256. Steck held that the applicable policy's exclusionary language did not exclude coverage for the indirect effects of the insured's drunkenness, such as accidental injuries caused by the insured's behavior - in Ms. Steck's case, walking in front of and being struck by an automobile. Id. at D256.

In Ming, a Blue Cross policy exclusion based on drunkenness resulted in the opposite ruling by the Fifth District. The Ming court described the Blue Cross health insurance policy provision as follows: "Benefits are expressly excluded as to injury resulting from an insured's participation in a felony and from the insured's being drunk." Ming, 579 So. 2d at 771. Unlike the Court in Steck, however, the Ming court held that: "Without considering the insured's (sic) 'standing defense' the facts relating to the insured's injuries resulting from his drunk condition and felonious conduct are not in dispute and both exclusions obviously apply." Ming, 579 So. 2d at 772. In Ming, the insured was injured in an accident he caused while driving drunk and in which he caused a death-ultimately leading to a felony conviction. Unlike the Court in Steck, the Ming court was unconcerned with whether the drunken driver's injuries were direct effects of his drunkenness or an indirect effect caused by the insured's behavior while drunk. The Ming court plainly held that an exclusion for injuries resulting from the insured's being drunk obviously applied to injuries suffered in a drunk driving accident. In light of that holding, Ming reversed a summary judgment entered in favor of the insured's assignee, and remanded with directions to enter summary judgment for Blue Cross. The holding in Steck cannot be reconciled with the

holding in Ming and represents express and direct conflict justifying the exercise of this court's discretionary jurisdiction.

Steck holds that the Blue Cross health insurance policy exclusion for injuries "resulting from" drunkenness only applies to the direct effects of drunkenness, alcohol poisoning or liver damage. Ming held that the Blue Cross policy exclusion for injuries "resulting from" the insured's drunkenness applied to the indirect effects of that drunkenness, such as the auto accident related injuries suffered by the insured in Ming or the pedestrian/auto accident related injuries suffered by Ms. Steck in this case. Steck and Ming involve the same insurer, a drunkenness exclusion, and the same type of injuries, yet the cases reach different results. There is express and direct conflict.

THE COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THIS CASE

Mason I construed a policy exclusion for deaths "resulting directly from the use of intoxicating liquors." Mason I, 41 So. 2d at 154. This Court correctly held that the use of the adverb "directly" in the policy exclusion limited the reach of the exclusion to those cases in which the use of intoxicating liquor had a direct biological effect on the insured. Id. at 155. The Steck decision is, however, based on Mason II, which construed a life insurance policy that excluded benefits "resulting from the

use of intoxicating liquors." Mason II , 41 So. 2d at 155 (emphasis added). With little explanation (as noted in Steck below), Mason II held that the policy exclusion for benefits "resulting from" the use of intoxicating liquors was to be applied the same as the policy exclusion in Mason I, which involved a policy exclusion for benefits "resulting directly from the use of intoxicating liquor." Mason I, 41 So.2d at 154.

Subsequent to the decisions in Mason I and Mason II, in 1953, the Florida legislature expressly authorized health insurers to exclude coverage for "any loss sustained or contracted in consequence of the insured's being intoxicated. . ." Ch. 28027, Laws of Florida (1953). In 1982, the statute was amended to its present language permitting an exclusion "for any loss resulting from the insured being drunk. . ." §627.629, Fla Stat. (1982). Since the enactment of these statutes, but for Steck, every Florida court construing drunkenness exclusions in life or health insurance policies, including this Court in Harris v. Carolina Life Ins., Co., 233 So. 2d 833 (Fla. 1970), has ceased to rely on Mason II and has held that the statutory exclusion applies if an insurer proves a causal connection between the insured's drunkenness and the loss claimed. In other words, drunkenness exclusions have been given effect if an indirect causal relationship is proven. For example, in Rivers v. Conger Life Ins., Co., 229 So. 2d 625 (Fla. 4th DCA

1969), then Associate Judge Tjoflat, in construing the 1953 version of the statute, concluded that: "The words 'in consequence of being intoxicated' mean that a causative connection between intoxication and death must be shown if coverage is to be denied." Id. at 628. In addition, Judge Tjoflat quoted with approval from 10 Couch on Insurance, 2d. ed. §41:457, which equated the phrase "in consequence" with the word "result" in concluding that the 1953 statute only required a casual connection between intoxication and death before an insurer would be permitted to rely upon a drunkenness exclusion.

If this court allows Steck to limit the statutorily permitted drunkenness exclusion to cases in which the insured is treated solely for the effects of alcohol toxicity or drug overdose, the decision will give rise to absurd results. For instance, in that event, an insured, who drinks himself into an alcoholic coma, passes out and strikes his head on the ground, would be prevented from recovering benefits for the cost of pumping his stomach of alcohol (a direct effect of drunkenness that presumably would be excluded from coverage), but would remain entitled to recover for treatment of head or other injuries suffered in the resulting fall (an indirect effect of the drunkenness). Such a result would follow because the "direct cause" of the head or other injury would be a person's impact with the ground, not the direct effect of

alcohol on the body itself. No logic is apparent from such a result.

Florida's legislature has determined that health insurers may exclude from coverage injuries "resulting from" drunkenness or the use of narcotics. Presumably, in doing so, the legislature was not only concerned with excluding direct costs of treating alcohol toxicity or drug overdose (which would be relatively insignificant), but was also interested in imposing on individuals who became drunk or who overdosed on drugs the cost of paying for their injuries or treatment necessitated by their drunkenness or drug use. As can be seen from the instant case, the so-called indirect results of such drunkenness can be severe, costly injuries. Nevertheless, the legislature has determined that the cost burden of such destructive (and possibly illegal) behavior should be borne by the individual who engages in the behavior, and not by health insurers or the public that purchases such health insurance. This Court should accept jurisdiction to prevent Steck from emasculating the legislature's policy decision in that regard.

CONCLUSION

This Court has jurisdiction to resolve the express and direct conflict between the Second District's decision below and the Fifth District's decision in Ming. It should exercise that jurisdiction to quash the decision in Steck and confirm the decision in Ming so as to conform to the policy determination made by the legislature in §627.629, Florida Statutes.

Respectfully submitted,

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APPENDIX

Blue Cross and Blue Shield of Florida, Inc. v. Steck,
26 Fla. L. Weekly D255 (Fla 2d DCA Jan. 17, 2001) A1

Blue Cross and Blue Shield of Florida, Inc. v. Ming,
579 So.2d 771 (Fla 5th DCA 1991) A2

Appendix Part 1

CF96-04989. She further alleged that she is, in actuality, serving the sentences in the two cases consecutively to each other. The trial court's order stated that the written sentences in CF96-06254 do not reflect that they are to be served concurrently with the sentences imposed in any other case and that "the presumption is that [appellant's] sentences are consecutive."

Appellant's motion was inartfully drafted but is akin to a claim that the written sentence does not comport with the oral pronouncement. Such a claim is cognizable in a motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). *See Dawson/Knapp v. State*, 698 So. 2d 266 (Fla. 2d DCA 1997). If there is a discrepancy between the oral pronouncement and the written sentences, "the written sentencing documents shall be corrected to conform to the oral pronouncement." *Williams v. State*, 744 So. 2d 1156, 1156 (Fla. 2d DCA 1999). The trial court did not address appellant's claim that the written sentence does not comport with the oral pronouncement but merely reviewed the written sentence. On remand, the trial court shall consider this claim. The trial court shall also consider appellant's claim that she did not receive the proper credit in this case for the time she spent incarcerated prior to her sentencing.

Reversed and remanded with instructions. (NORTHCUTT, A.C.J., and SALCINES and STRINGER, JJ., Concur.)

* * *

Criminal law—Sentencing—Correction—Probation revocation—Error to summarily deny motion alleging entitlement to relief under *Heggs v. State* because sentence imposed upon violation of probation was a departure sentence under 1995 guidelines where basis for denial was a finding that defendant was sentenced as prison releasee reoffender—Prison releasee reoffender sentence would not be legal because original offense of attempted felon in possession of firearm was committed prior to effective date of Act and also was not one of the enumerated offenses which would qualify defendant for treatment as prison releasee reoffender—Remand for determination whether offense was committed within *Heggs* window and, if so, whether sentence could not have been imposed under 1994 guidelines without a departure

JEFF L. JEFFERSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D00-3852. Opinion filed January 17, 2001. Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Polk County; Dennis P. Maloney, Judge.

(PER CURIAM.) Jeff L. Jefferson appeals the summary denial of his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). We reverse.

Jefferson states in his motion that the trial court sentenced him to five years' incarceration after he violated his probation in trial court case number 97-4125 on an attempted felon in possession of a firearm offense committed on May 20, 1997. Jefferson states he is also serving a concurrent fifteen-year sentence as a prison releasee reoffender on a different case, which has a trial court case number of 98-3522.

Jefferson claims he is entitled to be resentenced under the 1994 guidelines on case number 97-4125 pursuant to the supreme court's decision in *Heggs v. State*, 759 So. 2d 620 (Fla. 2000), because his current five-year sentence is a departure sentence under the 1994 guidelines. Jefferson has stated a facially sufficient claim for relief. *See Heggs*, 759 So. 2d at 623, 627-28. The trial court summarily denied Jefferson's motion, finding that he was not entitled to relief because he was sentenced as a prison releasee reoffender. In support of its finding, the court attached a scoresheet for case number 98-3522. No other documentation was attached to the trial court's order.

If Jefferson was sentenced as a prison releasee reoffender in case number 97-4125, this would be an illegal sentence. According to Jefferson, the offense in 97-4125 was committed on May 20, 1997, which was ten days before the Prison Releasee Reoffender Punishment Act became effective. *See Williams v. State*, 743 So. 2d 1154 (Fla. 2d DCA 1999) (holding that it was an ex post facto violation to impose a prison releasee reoffender sentence on offenses committed prior to the effective date of the act, which was May 30, 1997). Furthermore, the offense of attempted felon in possession of a firearm is not one of the enumerated offenses which qualifies a defendant for treatment as a prison releasee reoffender. *See* § 775.082(8)(a), Fla. Stat. (1997).

Accordingly, the trial court's order is reversed and remanded with instructions to determine whether Jefferson in fact committed the offense in trial court case number 97-4125 within the Heggs window and, if so, whether his sentence could not have been imposed under the 1994 guidelines without a departure. If the answers to both of these questions are affirmative, then Jefferson must be resentenced in accordance with the valid guidelines in existence at the time he committed his offense in case number 97-4125. If the court again enters an order declaring resentencing unnecessary, it should attach all documents necessary to reach that conclusion. *See Smith v. State*, 761 So. 2d 419 (Fla. 2d DCA 2000).

Reversed and remanded. (FULMER, A.C.J., and WHATLEY and STRINGER, JJ., Concur.)

* * *

Criminal law—Post conviction relief—Ineffectiveness of counsel—Motion, which was filed by counsel, was facially insufficient where no factual basis was provided for any of the claims—Summary denial affirmed—In view of fact that two-year limit for motion expired while facially insufficient motion filed by attorney was pending, defendant to be permitted thirty days within which to file another 3.850 claim, which shall not be deemed successive or untimely

ROBERT ANDRE LEWIS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D00-4060. Opinion filed January 17, 2001. Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Hillsborough County; Jack Espinosa, Jr., Judge. Counsel: Daniel L. Castillo, Tampa, for Appellant.

(PER CURIAM.) Robert Andre Lewis appeals the summary denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied the motion because it found that the motion was facially insufficient. We affirm.

Lewis, through counsel, listed five actions by trial counsel that he characterized as ineffective assistance of counsel. Each claim is merely one sentence. A cursory review of case law would have revealed to counsel for Lewis the information that he should have included in the motion to state a facially sufficient claim. However, no factual basis is provided for any of the claims, thereby making a substantive evaluation of the allegations impossible for both this court and for the trial court.

Lewis' motion was timely filed, but the two-year limit for filing rule 3.850 motions expired while the facially insufficient motion, filed by his attorney, was pending. Accordingly, we direct that Lewis may file another rule 3.850 claim within thirty days of the date of this opinion, and it shall not be deemed successive or untimely by the trial court.

Affirmed. (BLUE, A.C.J., and GREEN and STRINGER, JJ., Concur.)

* * *

Insurance—Health—Exclusions—Provision excluding benefits for, "a condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician," did not exclude coverage for medical expenses insured incurred after insured was hit by a vehicle at a time when she was inebriated—Provision did not exclude coverage for injuries indirectly caused by intoxication

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., Appellant, v. ANGELA STECK, Appellee. 2nd District. Case No. 2D00-932. Opinion filed January 17, 2001. Appeal from the Circuit Court for Hillsborough County; Sam D. Pendino, Judge. Counsel: Charles C. Lane of Lau, Lane, Pieper, Conley & McCreadie, P.A., Tampa, for Appellant. Charles P. Schropp of Schropp, Buell & Elligett, P.A., Tampa, for Appellee.

(PER CURIAM.) Blue Cross and Blue Shield of Florida, Inc. appeals the summary judgment in favor of Angela Steck, which found as a matter of law that Ms. Steck's health insurance policy with Blue Cross covered certain hospital and medical expenses she incurred when she was hit by a vehicle while attempting to cross a

busy street. We affirm.

For purposes of the summary judgment, the parties stipulated that the unfortunate accident in which Ms. Steck was involved was occasioned by her inebriated condition. At 11:00 P.M. one night in June 1997, she stepped off a curb to cross a busy multilane highway into the path of an oncoming vehicle that had the right of way. Witnesses to the accident testified by deposition that the driver of the vehicle was not at fault and could not have avoided hitting her. Ms. Steck was hospitalized for fifty-three days, ultimately lost a leg, and incurred hospital bills in excess of $350,000. Her blood alcohol level at the time she was admitted to the hospital was more than three times the legal limit.[1]

At the time of the accident, Ms. Steck was covered by a "Conversion Option III" health insurance contract issued by Blue Cross. The policy contained an exclusion couched in the following language:

> This contract does not provide benefits for: . . . a condition *resulting from* you being drunk or under the influence of any narcotic unless taken on the advice of a physician.

[Emphasis added.] When Blue Cross discovered that she was inebriated when she stepped in front of the oncoming car, it refused to pay her hospital and other health care expenses based on the quoted exclusion.

Ms. Steck then filed this breach of contract and declaratory action against Blue Cross seeking a determination that Blue Cross should pay her medical expenses under this policy. Blue Cross answered and denied any obligation to pay contract benefits based on the exclusionary language. After the issue was joined, cross-motions for summary judgment were filed. The trial court granted Ms. Steck's motion and denied Blue Cross's, citing *Mason v. Life & Casualty Insurance Co. of Tennessee*, 41 So. 2d 153 (Fla. 1949) (*Mason I*), and *Mason v. Life & Casualty Insurance Co. of Tennessee*, 41 So. 2d 155 (Fla. 1949) (*Mason II*). This appeal then ensued.

Mason I and *Mason II* were based on two different life insurance contracts but covered the same insured. Ms. Mason was intoxicated and riding in a taxicab outside of Pensacola, Florida, when she ordered the driver to stop and let her out on a dark, deserted stretch of road in the early morning hours. While walking along the paved portion of this road in her inebriated condition, she was hit by truck properly using the highway. She died as a result of her injuries. The two insurance policies paid double benefits if death resulted from accidental causes.

The policy in *Mason I* also stated that the accidental death benefit did not cover death "*resulting directly from* the use of intoxicating liquors or narcotics." *Mason I*, 41 So. 2d at 154 (emphasis added). The Florida Supreme Court held the exclusion inapplicable and the double benefits payable, reasoning:

> This provision of the policy is plain, simple and unambiguous and plainly refers to the effect of the use of intoxicating liquors upon the system of an assured as distinguished from acts committed by him by reason of his being under the influence of, or his mind being affected by, intoxicants. . . .
>
> To bring a cause of death within such an exception clause of a policy, the burden is on the insurer to show that the use of intoxicants by the assured was voluntary and that it was the direct cause of death.

Id. at 155 (citations omitted). Because the supreme court found that the direct cause of Ms. Mason's death was being struck by the truck, her inebriated condition was only a "remote cause." *Id.* at 155. Therefore, the exclusionary language of this first policy was inapplicable.

Similar, but not identical, exclusionary language in the policy in *Mason II* stated: "This policy does not cover . . . loss or injury *resulting from* the use of intoxicating liquors." *Mason II*, 41 So. 2d at 155 (emphasis added). The supreme court, without much explanation, held this exclusionary language also inapplicable, stating:

> We see no valid distinction between the facts of this case and the companion case referred to above [*Mason I*]. In our view, the judgment in this case, as was the judgment in the companion case, must be reversed because of the failure of the insurance company to show that the death of the insured was within the exception clause of the policy.

Mason II, 41 So. 2d at 155-56.

Mason I and *Mason II* demonstrate that two types of injuries may result from one's intoxication: direct injury, i.e., injury to biological systems of a person, such as acute alcohol poisoning or liver damage; and indirect injuries, such as accidental injuries caused by the behavior of the person while intoxicated. Ms. Mason's and Ms. Steck's injuries were clearly the latter kind—indirect injuries. The trial court found, and we agree, that the language of Ms. Steck's policy was like the exclusionary language of *Mason II*. Blue Cross's exclusionary language in Ms. Steck's policy was not specific enough to exclude from coverage indirect injuries as well as direct injuries. Consequently, *Mason II* is controlling, as the trial court concluded.

The language of insurance policies must be construed liberally in favor of the insured and strictly against the insurer who prepared the policy, and exclusionary clauses must be construed more strictly than coverage clauses. *See Purrelli v. State Farm Fire & Cas. Co.*, 698 So. 2d 618 (Fla. 2d DCA 1997); *see also Prudential Property & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467 (Fla. 1993); *State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Florida, Inc.*, 678 So. 2d 397 (Fla. 4th DCA 1996), *affirmed*, 711 So. 2d 1135 (Fla. 1998); *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310 (Fla. 2d DCA 1994); *Triano v. State Farm Mut. Auto. Ins. Co.*, 565 So. 2d 748 (Fla. 3d DCA 1990). Like the supreme court did in construing the policy language in *Mason II*, we must construe Ms. Steck's policy narrowly against the insurer, i.e., only direct injuries will be excluded from coverage.

Blue Cross has valiantly argued that subsequent case law and changes in the insurance statutes have shown that *Mason I* and *Mason II* are aberrations now inconsistent with controlling authorities. We do not agree. The changes in the statute merely codified what insurance companies had previously excluded, as in the *Mason* cases. *See* ch. 28027, Laws of Fla. (1953).[2] The language of the various policies that subsequent case law has interpreted is different enough from the language in Ms. Steck's policy to explain the differing outcomes of those cases. For example, the exclusionary language of the policy examined in *Harris v. Carolina Life Insurance Co.*, 233 So. 2d 833, 833-34 (Fla. 1970),[3] is an excellent example of the type of exclusion Blue Cross clearly thought it had provided but did not: "EXCEPTIONS: Death . . . resulting directly or indirectly, wholly or partially from any of the following causes are risks not assumed under this policy: . . . c. Bodily injury while under the influence of alcohol or drug. . . ."

Because the trial court properly relied on the controlling authority of the *Mason* cases and correctly construed the exclusionary language of Ms. Steck's policy, we affirm. (NORTHCUTT and CASANUEVA, JJ., Concur. ALTENBERND, A.C.J., Concurs specially.)

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[1]It was probably higher at the time of the accident because she was given 4.7 liters of intravenous fluids in the half-hour period between the accident and the blood draw.

[2]Chapter 28027, Laws of Florida (1953), permitted health insurers to include the following exclusionary language:

> INTOXICANTS and NARCOTICS: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administrated on the advice of a physician.

[3]The supreme court in *Harris v. Carolina Life Insurance Co.*, 233 So. 2d 833 (Fla. 1970), did not construe any exclusionary language but instead was confronted with a petition for writ of certiorari wherein Ms. Harris claimed that the decision of the district court finding the exclusion denied coverage despite no fault on the part of the insured, *Harris v. Carolina Life Insurance Co.*, 226 So. 2d 710 (Fla. 4th DCA 1969), conflicted with *Mason v. Life & Casualty Insurance Co. of Tennessee*, 41 So. 2d 153 (Fla. 1949) (*Mason I*). The supreme court found the Fourth District's decision did conflict with *Mason I* and quashed *Harris*, holding instead that an insurer has the burden to show that there is some causal relationship between the injury or death and the intoxication before the exclusion is held to be effective. *See Harris*, 233 So. 2d at 834-35.

(ALTENBERND, Judge, Concurring.) I fully concur in this opinion, but do not wish to leave insurance companies with the

impression that a different outcome would be guaranteed if the exclusion contained the phrase "direct or indirect, wholly or partially." Section 627.629, Florida Statutes (2000), permits an insurance company to include the following exclusion in a health insurance contract:

> Intoxicants and Narcotics: The insurer will not be liable for any loss resulting from the insured being drunk or under the influence of any narcotic unless taken on the advice of a physician.

I am inclined to believe that *Mason I* and *Mason II* limit such an exclusion, as explained in the majority opinion, to direct injuries. Without clearer legislative intent, I question whether a health insurance or life insurance policy that is marketed to the general public should contain an exclusion for indirect injuries occurring when the insured is "drunk."

A person is "drunk" when operating a motor vehicle if he or she has a blood alcohol level of .08 gram per alcohol per 100 milliliters of blood. *See* § 316.193, Fla. Stat. (2000). Even though driving under the influence is a crime in Florida, there currently is no statutory authorization for an alcohol exclusion in a Florida No-fault Automobile Insurance PIP policy. *See* § 627.736(2), Fla. Stat. (2000). When the no-fault laws were first enacted, the legislature did permit an alcohol exclusion in a PIP policy if the circumstances involved a conviction for DUI. *See* ch. 71-252, § 7, Laws of Fla. *See also Travelers Indem. Co. of Am. v. McInroy*, 342 So. 2d 842 (Fla. 1st DCA 1977). Experience with that exclusion caused the legislature to withdraw its authorization in 1982. *See* ch. 82-243, § 554, Laws of Fla.

If the legislature does not permit an indirect alcohol exclusion in a PIP policy, even though DUI is a crime, I question whether such an exclusion is or should be permissible in other types of health, life, and accident insurance. It is completely lawful for people to consume alcoholic beverages in the privacy of their home or at a social gathering. I am not convinced that the legislature intended section 627.629 to allow insurance companies to deny health insurance benefits to an insured merely because the insured had a blood alcohol level in excess of .08 at the time of an accident unrelated to an automobile. I am not convinced that parents should have no health coverage for a teenager who sustains bodily injuries while experimenting with alcohol.

It is possible that insurance companies should be allowed to market policies with an indirect alcohol exclusion—at a lower premium—to insureds who abstain from alcohol. However, to place this exclusion into a typical health insurance policy would create more problems than it would solve.

* * *

Dissolution of marriage—Equitable distribution—Child support—Although wife is entitled to one-half of mortgage reduction on husband's premarital residential property, trial court erred in failing to state basis for amount awarded for mortgage reduction—Error to fail to award child support retroactive to date of filing of petition of dissolution where there was no showing of inability to pay support at time of petition

DENISE KOWAL, Appellant, v. ALBERT TOMLINSON, Appellee. 2nd District. Case No. 2D98-1140. ALBERT TOMLINSON, Appellant, v. DENISE KOWAL, Appellee. Case No. 2D99-3140. Opinion filed January 17, 2001. Appeals from the Circuit Court for Sarasota County; Harry M. Kapkin, Judge. Counsel: Arnold D. Levine of Levine, Hirsch, Segall & Brennan, P.A., Tampa, for Denise Kowal. Daniel Joy of Law Office of Daniel Joy, and Susan J. Silverman, Sarasota, for Albert Tomlinson.

(GREEN, Acting Chief Judge.) The wife, Denise Kowal, and the husband, Albert Tomlinson, each present multiple points in these consolidated appeals from three judgments of marital dissolution entered after the principal trial.

We affirm the final judgment and amended final judgments of dissolution of marriage on all points except for an assessed mortgage credit award to the wife and retroactive child support paid to her. On these two points we reverse and remand for further proceedings.

The husband does not dispute that the wife is entitled to one-half of the mortgage reduction on the husband's premarital Shell Road residential property. *See Adkins v. Adkins*, 650 So. 2d 61 (Fla. 3d DCA 1994) (holding that increase in equity in marital home due to mortgage payments from marital account was a marital asset subject to distribution); *Cole v. Roberts*, 661 So. 2d 370 (Fla. 4th DCA 1995) (holding wife was entitled to one-half of amount of marital funds used to reduce mortgage on condominium that was husband's nonmarital asset absent evidence contradicting wife's testimony that mortgage payments were made with marital funds). However, the trial judge's order does not recite the basis for the award to the wife of $68,832, representing the wife's reduction payment. The husband complains that the wife has not presented evidence with respect to the amount of her entitlement and, therefore, the husband has been foreclosed from asserting his contentions.

The trial judge simply observed that there was a principal debt reduction of $137,666 during the forty-four months of marriage, one-half of which the wife was entitled to receive. He did not provide a record reference for his conclusion, and therefore, the matter must be revisited. The parties are entitled to know how this computation was made and to present evidence which they believe may bear upon the result. Whatever award is concluded will not affect the remaining property distribution in this case.

Additionally, the trial judge awarded retroactive child support from December 1, 1996, a date on which the court determined the husband began receiving ascertainable income. There is no evidence in the record that the husband was not earning an income for the time period between the filing of the dissolution of marriage petition on March 3, 1994, and the December 1, 1996, date chosen by the trial court. It was error for the trial judge not to award support retroactive to the filing date of wife's petition. *See Bardin v. Dept. of Revenue*, 720 So. 2d 609 (Fla. 1st DCA 1998) (holding trial court abuses discretion with respect to petition for child support by failing to award support from date of petition, where need for support and ability of the father to pay existed at time petition was filed); *Beal v. Beal*, 666 So. 2d 1054 (Fla. 1st DCA 1996) (holding where record showed child's need and husband's ability to pay existed at time of filing of petition for dissolution, trial court should not have denied retroactive child support on ground that wife waived claim to such support); *Anderson v. Anderson*, 609 So. 2d 87 (Fla. 1st DCA 1992) (holding it is abuse of discretion to fail to award support from date of petition for modification, where need for support and ability of former spouse to pay existed at time modification petition was filed). We note the wife concedes that the husband is entitled to some credit for contributions during the uncovered period.

We therefore direct that an additional hearing be held so that these two deficiencies can be resolved.

Affirmed in part; reversed and remanded for further proceedings in part. (DAVIS, J., and CAMPBELL, MONTEREY (SENIOR) JUDGE, Concur.)

* * *

Dissolution of marriage—Alimony—Error to provide for termination of permanent alimony when wife becomes 62 years of age in absence of evidence that wife's ability to support herself would change at that time—Error to award rehabilitative alimony in absence of evidence of a rehabilitation plan—No record support for contention that rehabilitative alimony was intended as bridge-the-gap alimony

SUZANNE A. WESTBERRY, Appellant, v. LAWSON L. WESTBERRY, II, Appellee. 2nd District. Case No. 2D99-2363. Opinion filed January 17, 2001. Appeal from the Circuit Court for Hillsborough County; Bob Anderson Mitcham, Judge. Counsel: Elizabeth S. Wheeler of Beer & Wheeler, P.A., Brandon, for Appellant. Dario D. Diaz of Fernandez & Diaz, P.A., Tampa, for Appellee.

(BLUE, Judge.) Suzanne A. Westberry appeals the final judgment dissolving her long-term marriage to Lawson L. Westberry, II. She presents several issues related to the alimony award and the denial of her motion for attorney's fees. She contends that the trial court erroneously imposed rehabilitative alimony, thus resulting in an inadequate permanent alimony award; erroneously ordered an automatic termination of the permanent alimony award; and improperly denied her motion for attorney's fees. We agree with Mrs. Westberry's arguments and, accordingly, reverse and remand

Appendix Part 2

judgment, this tax burden should be shared by the parties. The final judgment should, accordingly, be amended to provide that if the condominium is sold within five years of the date of the amended final judgment, the appellee will be responsible for one-half of any taxes imposed upon the sale as a result of the depreciation taken by the parties between 1981 and 1988.

We, accordingly, reverse and remand with instructions to enter an amended final judgment in accordance with this opinion. We affirm in all other respects.

Reversed and remanded with instructions.

RYDER and HALL, JJ., concur.

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., Appellant,

v.

Norbert L. MING, Appellee.

No. 90-1140.

District Court of Appeal of Florida, Fifth District.

May 2, 1991.

Rehearing Denied June 4, 1991.

Physician who had been assigned insured's rights to benefits under health and accident policy brought action against the insurer. The Circuit Court, Orange County, B.C. Muszynski, J., entered judgment in favor of physician, and insurer appealed. The District Court of Appeal held that provision of the policy giving insurer 60 days to make a decision on the claim did not preclude it from thereafter denying the claim on the basis of the exclusions for injuries suffered while drunk or while engaged in a felony.

Reversed and remanded.

1. Insurance ⇐612(1), 615

"No action clause" giving insurer 60 days to make a decision on a claim prohibits suit against the insurer for policy benefits until after the expiration of that period of time, and the expiration of that period is a condition precedent to the filing of the action; provision does not mean that the insurer cannot assert a defense when an action is brought after that period of time.

2. Insurance ⇐372(2)

Doctrine of estoppel may be used to prevent forfeiture of insurance coverage, but doctrine cannot be used to create or extend coverage.

3. Insurance ⇐390

Where physician did not provide medical care to insured in reliance on any assurance from the insurer that exclusion from policy for injuries suffered while drunk or while engaged in a felony did not apply, and where physician did not delay in pursuit of payment from his patient, who had assigned his rights to receive benefits to the physician, insurer's failure to deny the claim on the basis of the exclusions within 60 days after receipt of the claim did not estop it from thereafter denying the claim on those grounds.

Angelina M. Robinson and Larry J. Townsend of Maguire, Voorhis & Wells, P.A., Orlando, for appellant.

Charles R. Steinberg of Charles Steinberg, P.A., Orlando, for appellee.

PER CURIAM.

Appellant, Blue Cross and Blue Shield of Florida, Inc., issued a health and accident policy to Terrance J. Lasek under which the insurer agreed to pay as benefits certain costs of medical care necessitated by the illness of, or injuries to, the insured. Benefits are expressly excluded as to injury resulting from an insured's participation in a felony and from the insured's being drunk. Under the claims processing provisions, the policy provides that the insurer:

> Has sixty (60) days to make a decision on your claim after we receive the claim....

The policy further provides that if the claim is not paid the insurer will give details in explanation.

The insured, Lasek, while drunk and driving, caused an accident in which he was injured and in which he caused a death for which he was ultimately convicted of a felony offense (manslaughter or vehicular homicide). For his injuries in the drunk driving accident, the insured Lasek received medical care from the appellee, Dr. Norbert L. Ming, to whom the insured assigned the insured's rights to receive benefits under his health and accident policy with the appellant insurer. The doctor presented a claim to the insurer.

The insurer did not pay the claim or provide the insured with the agreed explanation within the 60 day period and ultimately utterly denied the claim based on the applicability of both exclusions mentioned above. The doctor sued the insurer which challenged the doctor's standing to sue [1] and asserted the applicability of the exclusions. The trial court entered a summary judgment for the doctor and the insurer appeals.

This cause is reversed and remanded with directions to enter summary judgment for the insurer. Without considering the insured's "standing defense" the facts relating to the insured's injuries resulting from his drunk condition and felonious conduct are not in dispute and both exclusions obviously apply.

Apparently the decision below results from the failure of the insurer to make an explained denial during the 60 day period. This appears to mean that the policy has been interpreted as denying the insurer the right to defend a claim based on a coverage exclusion if the insurer fails to make an explained denial within the 60 day period and this interpretation is simply in error.

[1] Insurance policies commonly provide that a claim is not payable for a stated period of time after a proper claim is made. The purpose of such a provision is to give the insurer an agreed period of time in which to investigate and determine the validity of the claim. The proper legal effect of such a "no action" clause is that the insurer cannot be sued for policy benefits until after the expiration of the "no-action" period of time. The expiration of this period of time is a condition precedent to the filing of an action on the policy. 18 *Couch on Insurance 2d* § 74:9 (Rev. ed.). The provision does not mean that the insurer cannot assert a defense when an action is brought after the "no-action" period.

[2, 3] No statute is asserted as affecting the result in this case.[2] However, it is interesting to note that section 627.426(2), Florida Statutes (1985) provides that a *liability* insurer shall not be permitted to deny coverage based on a particular coverage defense unless the insurer performs certain acts within certain specified periods of time and even that statute is not interpreted to prevent an insurer from asserting a defense after the allotted time has expired. *See United States Fidelity and Guaranty Company v. American Fire and Indemnity Company*, 511 So.2d 624 (Fla. 5th DCA 1987), *approved in A.I.U. Insurance Company v. Block Marina Investment, Inc.*, 544 So.2d 998 (Fla.1989) which also cites *Crown Life Insurance Company v. McBride*, 517 So.2d 660 (Fla. 1987) for the general rule that, while the doctrine of estoppel may be used to prevent a forfeiture of insurance coverage, the doctrine may not be used to create or extend coverage. The doctrine of estoppel does not apply because the doctor did not provide medical care to the insured relying on any assurance from the insurer that the drunk and felonious participation exclusion

1. Dr. Ming was a non-participating/non-contracting provider and the policy provided that if an insured received services from such a health care provider the insurer would pay benefits directly to the insured even if the insured assigned his benefits to such a non-participating/non-contracting health care provider.

2. Section 627.613, Florida Statutes, effective June 14, 1990, but not applicable to this case, appears to legislate a time for payment of claims by health insurers.

provisions in the policy did not apply to this claim. Neither did the doctor, to his detriment, delay pursuit of payment from his patient, the insured, in reliance on any such assurance from the insurer or because of the insurer's delay in asserting the policy exclusions. *See also Raymond v. Halifax Hospital Medical Center*, 466 So.2d 253 (Fla. 5th DCA 1985).

REVERSED AND REMANDED.

COWART, GRIFFIN and DIAMANTIS, JJ., concur.

James McCLOUD and Sharon McCloud, his wife, Appellants,

v.

SHERMAN MOBILE CONCRETE CO., INC., a corporation, Appellee.

No. 90-01196.

District Court of Appeal of Florida, Second District.

May 3, 1991.

Rehearing Denied May 30, 1991.

Plaintiff allegedly injured when sidewalk collapsed brought action to recover damages. The Circuit Court, Manatee County, James W. Whatley, J., entered judgment on jury verdict awarding zero damages, and plaintiff appealed denial of new trial motion. The District Court of Appeal, Schoonover, C.J., held that plaintiff was entitled to new trial on issue of damages where jury had found that defendant was 50% negligent and no credible evidence was submitted to contradict evidence that plaintiff had sustained injuries as result of accident.

Reversed and remanded.

1. Appeal and Error ⇐977(1)
New Trial ⇐6

Motion for new trial is directed to sound, broad discretion of trial judge, whose ruling should not be disturbed in absence of clear showing that such discretion has been abused.

2. New Trial ⇐72(5)

Trial judge has duty to grant new trial motion where jury has been influenced by extraordinary considerations, misled by force and credibility of evidence, or when verdict fails to comport with manifest weight of evidence.

3. New Trial ⇐75(4)

Negligence plaintiff was entitled to new trial on issue of damages where jury had found that defendant was 50% negligent but awarded no damages, even though no credible evidence was submitted to contradict evidence that plaintiff had sustained injuries as result of accident, that he had incurred reasonable and necessary medical bills, and that he had lost wages and suffered pain.

Joel S. Perwin of Wagner, Cunningham, Vaughan & McLaughlin, P.A., Tampa, and Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, for appellants.

Carl B. Lyle, II and Chester L. Skipper of Lyle & Skipper, P.A., St. Petersburg, for appellee.

SCHOONOVER, Chief Judge.

The appellants, James McCloud and Sharon McCloud, challenge the denial of their motion for a new trial on damages filed after a jury returned a verdict of zero damages in their personal injury action against the appellee, Sherman Mobile Concrete Company, Inc. We reverse.

The appellants filed a negligence action against the appellee for injuries Mr. McCloud sustained when a walkway he was using collapsed and caused him to fall five feet into the water. In addition to Mr. McCloud's claim for medical expenses, disability, past and future wages, and pain and suffering, Mrs. McCloud sought damages for loss of her husband's services, society, and consortium. At the conclusion of a jury trial, the jury returned a special verdict finding negligence on the part of the appellee which was the legal cause of the accident. The jury also found negli-

CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Timothy F. Prugh, Esquire, Prugh and Associates, P.A., 1009 West Platt Street, Tampa, Florida 33606, and Charles P. Schropp, Esquire, Schropp, Buell & Elligett, P. A., 401 East Jackson Street, Suite 2600, Tampa, Florida, 33602, by United States Mail this 23rd day of February, 2001.

I also certify that the jurisdictional brief has been prepared using Courier New 12-point type, non proportionally spaced.

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