IN THE SUPREME COURT OF FLORIDA

CASE NO.
DCA Case No.: 1D01-4606

Florida Bar No. 184170

CYNTHIA CLEFF NORMAN, as Personal Representative of the Estate of WILLIAM CLEFF, deceased,

Petitioner,

v.

TERRI LAMARRIA FARROW,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION
CYNTHIA CLEFF NORMAN,
as Personal Representative of the Estate of
WILLIAM CLEFF,

(With Appendix)

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STATEMENT OF THE FACTS AND CASE

The essence of this case is that the First District in the present decision decided to apply the concept of fault to the "no-fault" statute. The facts in the present case revolve around a PIP payment, and the amount of set-off for the PIP payment. This was an automobile accident case, and after verdict the trial judge did not allow a set-off for the full amount of PIP payments. The jury had found the plaintiff 10% comparatively negligent, and the trial judge, rather than giving a set-off for the full amount of the PIP payments, decreased the PIP set-off by 10% for the plaintiff's comparative negligence. This holding is in express and direct conflict with Assi, infra; and Pizzarelli, infra.

SUMMARY OF ARGUMENT

The decision in the present case expressly and directly conflicts with the Fifth District's decision in Assi v. Florida Auto Auction of Orlando, Inc., 717 So. 2d 588 (Fla. 5th DCA 1998); and with Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000). Although, the First District did not state it was certifying conflict, the First District discussed Assi in the opinion, and acknowledged that this decision reached the exact opposite interpretation of the statute than Assi.

The way the no-fault law is written, and has always been interpreted, is that a motorist has his medical bills and lost wages paid by PIP coverage without regard to fault, and if the motorist files suit against a tortfeasor and recovers a judgment, the amount of PIP payments are subtracted from the recovery as a collateral

source set-off.

This has been the procedure for twenty years, and is done routinely thousands of cases throughout the State yearly, and the appellate decisions have acknowledged this PIP set-off on a routine basis, that it is so firmly established in Florida law that it should not need discussion. As this Honorable Court knows, trial courts routinely deduct the full amount of the PIP benefits from the jury verdict as a collateral source set-off.

In the present case, the Court of Appeal decided that it thought it would be more fair if, instead of a deduction for the full value of the PIP benefits, that there was only a deduction for the percentage of fault of the tortfeasor.

For instance, if $10,000 in PIP benefits had been paid, under the common procedure, there is a collateral source set-off from the verdict for the $10,000, regardless of the fault of either party.

However, under this decision of the First District, if there were $10,000 of PIP payments, and the plaintiff and defendant were each 50% at fault, there would only be a collateral source set-off for $5,000. Similarly, if the plaintiff were 20% at fault, there would only be a set-off for $8,000 of PIP benefits.

In effect, it appears the First District decided to apply the concept of "fault" to the no-fault law. The whole theory behind no-fault is that small claims would be paid quickly and without resort to litigation, since the PIP would be automatically paid without fault; and if the plaintiff recovered a tort verdict, the PIP would be automatically subtracted from the verdict to prevent a double recovery.

It is respectfully submitted this Honorable Court should take jurisdiction and clarify the law, since there will be thousands of verdicts handed down in automobile accidents throughout the State each year until this is clarified, and the trial judges will be uncertain how to apply the PIP set-off. There will be vast confusion in the law in thousands of cases per year unless the Supreme Court accepts jurisdiction and resolves the conflict caused by this opinion.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT IN ASSI v. FLORIDA AUTO AUCTION, SUPRA, AND WITH THE DECISION OF THE SUPREME COURT IN ROLLINS v. PIZZARELLI, SUPRA; THE DECISION WILL CREATE WIDESPREAD CONFUSION IN THE TRIAL COURTS IN THOUSANDS OF CASES PER YEAR UNTIL THIS LAW IS CLARIFIED BY THE SUPREME COURT.

It should be noted that although the First District did not expressly state that it was "certifying conflict" with Assi, the decision discusses Assi, and acknowledges that Assi interpreted the PIP statute the exact opposite way from the way the Fifth District was interpreting it in the present case. Therefore, the face of the opinion clearly shows express and direct conflict, since the First District stated there was express and direct conflict between the two opinions.

Moreover, the decision is in direct conflict with the Supreme Court's decision in Pizzarelli, as well as other cases, in which the Supreme Court and other appellate courts have held there is a set-off

for PIP benefits paid or payable; and not for the plaintiff's percentage of fault of the PIP benefits paid or payable. See also, McKenna v. Carlson, 771 So. 2d 555 (Fla. 5th DCA 2000).

The facts in the present case were that after an automobile accident the defendant was found 90% at fault, the plaintiff was found 10% at fault, and the defendant moved to set-off the PIP payments of $4,989.17. However, the trial judge held that there should only be a set-off for the percentage of the PIP payments attributed to the defendant's negligence, and therefore only allowed a set-off for $4,498.35, and not for the $499.82, which comprised the plaintiff's 10% of fault for the accident.

The First District discussed the fact that there was conflict between the districts, in that the Fifth District in Assi had held there was a set-off for all of the PIP payments, but that the Fourth District ruled the opposite in Aetna Casualty & Surety Co. v. Langel, 587 So. 2d 1370 (Fla. 4th DCA 1991).

Despite the express wording of the statute which states that there will be a set-off for PIP benefits which have been paid, the court held that the procedure followed by the Fourth District in Langel satisfied the purpose of the PIP statute, which was to avoid duplication of benefits, and therefore only allowed a set-off for 90% of the PIP benefits. (As will be later discussed, this procedure results in a "windfall" for the plaintiff, since the plaintiff does not have to repay his percentage of the PIP benefits to the PIP carrier, which had been paid to him without regard to fault.)

It would also seem that the fact that there is a full set-off for PIP benefits is so firmly established in Florida law, that it is

surprising that there is any controversy on this. Thousands of automobile cases every year routinely reduce verdicts by the full amount of the PIP payments, and the appellate courts have decided numerous cases involving PIP set-offs, and have referred in the opinions to the fact that there is a set-off for all PIP paid or payable.

The facts in Assi, supra, were that suit was filed as a result of an automobile accident, and the jury awarded the plaintiff $21,019.23 in damages, all of which were for past economic losses, consisting of past medical expenses and past loss earnings. The jury also found the plaintiff was 45% at fault.

The trial judge calculated the judgment the routine way, by taking the plaintiff's economic damages of $21,019.23, then subtracting Assi's 45% comparative negligence amount of $9,458.65, to yield $11,560.58. The court then subtracted the $10,000 of PIP benefits to yield a judgment to the plaintiff of $1,560.58.

Assi appealed, arguing that the PIP benefits should be deducted from the total damage award to yield $11,019.23; minus Assi's 45% comparative negligence, to yield a judgment of $6,060.58. The Fifth District affirmed the trial court, and pointed out that the no-fault statute specifically states that there is no right of a plaintiff to recover any damages for which PIP benefits are paid or payable, and that under the statute a party is entitled to the full PIP exemption:

> Pursuant to Florida's no-fault statutory scheme, an injured party has "no right to recover any damages for which personal injury protection benefits are paid or payable." Every owner [of a motor vehicle with respect to which security has been provided pursuant to the statute] is "exempted from tort liability

> for damages because of bodily injury, sickness,...to the extent that the benefits described in § 627.736(1) are payable for such injury." Since Assi had such insurance in this case and since the defendants also had the required statutory insurance coverage, the full amount of the defendants' tort liability found by the jury was entitled to the full amount of the statutory exemption. If Assi's method of calculations were utilized, a portion of the full PIP exemption is lost to the defendant because, in effect, it is reduced by 55% (the amount of the defendant's comparative negligence.
>
> Under Florida's no-fault statute, if an insured complies with the no-fault law, *i.e.*, obtains PIP benefits, in exchange he receives up to $10,000 for his economic injuries, without regard to the fault on his part, and he is shielded from suit for non-economic damages should be injure another, absent certain limited exceptions, as well as the $10,000 PIP coverage. The insurer has no right of subrogation with regard to these amounts. PIP benefits due from an insurer under § 627.730-627.7405, are deemed to be primary.
>
> The purpose of the no-fault statutes was to reduce litigation for "small" claims brought by parties and their insurers, and to provide an injured party with quick and certain payment for PIP coverage. The calculation used by the trial court properly encompassed these objectives.
>
> Assi, 589-590.

The Florida No-Fault Statute, § 627.736(3), specifically provides that the plaintiff can not recover damages for which PIP benefits are paid or payable. It does not state that this is only for the defendant's percentage of the PIP benefits, but it is clear it can not recover for any damages paid by PIP benefits; and, in fact, it says this three times in the statute:

> (3)Insured's right to recovery of special damages in tort claims.--No insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for personal injury

> protection benefits, whether suit has been filed or settlement has been reached without suit. An injured party who is entitled to bring suit under the pro- visions of §§ 627.730-627.405, or his or her legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable. The plaintiff may prove all of his or her special damages notwithstanding this limitation, but if special damages are introduced in evidence, the trier of facts, whether judge or jury, shall not award damages for personal injury protection benefits paid or payable. In all cases in which a jury is required to fix damages, the court shall instruct the jury that the plaintiff shall not recover such special damages for personal injury protection benefits paid or payable.
>
> Fla. Stat. §627.736.

Therefore, the statute is clear, that the plaintiff is not to recover any damages paid by PIP benefits, and there is not any wording which could be construed to mean that the percentage of liability should be applied to decease the defendant's set-off for PIP benefits paid or payable.

Furthermore, Florida Statute § 627.737 specifically states that a party is "exempted from tort liability" to the extent of any damages which are payable by PIP benefits:

> **627.737. Tort exemption; limitation on right to damages; punitive damages**
>
> (1) Every owner, registrant, operator, or occupant of a motor vehicle...and every person or organization legally responsible for her or his acts or omissions, is hereby exempted from tort liability for damages because of bodily injury...to the extent that the benefits described in § 627.736(1) are payable for such injury...
>
> Fla. Stat. § 627.737.

It should be noted that the statute states the exemption is to the extent of benefits described in Fla. Stat. § 727.736(1), and that provision specifically applies to PIP benefits:

> **627.736. Required personal injury protection benefits; exclusions; priority; claims**
>
> (1) Required benefits.--Every insurance policy complying with the security requirements of § 627.733 shall provide personal injury protection...to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows.
>
> Fla. Stat § 627.736.

Therefore, it is clear that the way the Florida No-Fault Statute is written, is that a party recovers PIP benefits without regard to fault, but then can not recover from the tortfeasor any amount that was paid by PIP benefits.

In other words, the whole point of the "no-fault law" was to take the determination of fault out of automobile accidents, to the extent of the first $10,000 of recovery. A party automatically recovers PIP benefits of up to $10,000 without regard to fault, but then can not recover this amount from the tortfeasor. The purpose is to encourage settlement of small cases without resorting to litigation.

However, the effect of the decision of the First District in the present case, is that a party will be encouraged to file suit, by being able to recoup some of his PIP benefits. There will only be a set-off for the defendant's percentage of fault, and therefore the plaintiff will be able to recover his own percentage of fault of the PIP benefits which had been paid, but will not have to refund these

to the PIP carrier. Therefore, there is a duplicate recovery of these PIP benefits.

For an example of how this would operate, assume a party has been paid $10,000 by PIP, and obtains a verdict of $25,000, and the jury also finds him 50% negligent. Under the procedure for computing verdicts which is used thousands of times a year across the State, the 50% comparative negligence is applied to the $25,000 verdict to yield $12,500. The $10,000 PIP set-off is then subtracted from this to yield a net verdict of $2,500. The plaintiff has recovered a total of 50% of his damages ($2,500 from the tortfeasor, plus $10,000 from the PIP carrier, equals $12,500).

However, under the decision of the First District in the present case, after the 50% is applied to the $25,000 to yield $12,500, the collateral source set-off would only be $5,000 (50% of $10,000), to yield a judgment of $7,500. Therefore, instead of 50%, the plaintiff has recovered 70% of his damages ($7,500 from the tortfeasor, plus $10,000 from the PIP carrier, equals $17,500).

It is clear that there is nothing in the No-Fault Statute which evidences an intent to apply a concept of fault or comparative fault whatsoever into PIP benefits, nor an intent to reward a party who files suit to recover PIP benefits. The clear purpose of no-fault is to avoid any discussion of fault, and to avoid litigation, such that a party automatically receives $10,000 of economic damages, and if he files suit he can not recover any of the PIP payments he received.

Since the plaintiff does not have to repay the amount of PIP benefits which were deducted from the set-off, the plaintiff is being rewarded by filing suit, and receiving a windfall for the PIP

benefits which were paid to him without regard to fault.

Therefore, there is clearly express and direct conflict between the cases, and also this decision is very important since thousands of automobile cases go to the trial and verdict each year, and this decision which is contrary to how a PIP set-off has always been applied, will created confusion and uncertainty in the law. Therefore, this Court should accept jurisdiction and clarify the law.

CONCLUSION

There is express and direct conflict between the decision in the present case and the case of Assi v. Florida Auto, supra; and with Rollins v. Pizzarelli, supra. Accordingly, this Honorable Court should accept jurisdiction and clarify the law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of December, 2002 to:

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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