

IN THE SUPREME COURT OF FLORIDA

CASE NO.: Sc02-2659  
DCA Case No.: 1D01-4606  
Florida Bar No.: 508942

CYNTHIA CLEFF NORMAN, as )  
Personal Representative )  
of the Estate of WILLIAM )  
CLEFF, deceased, )  
 )  
Petitioner, )  
v. )  
 )  
TERRI LAMARRIA FARROW, )  
 )  
Respondent. )  
\_\_\_\_\_)

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

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**BRIEF OF RESPONDENT ON JURISDICTION**  
TERRI LAMARRIA FARROW

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**POINT ON APPEAL**

THE DECISION OF THE FIRST DISTRICT IN THE PRESENT CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT IN ASSI V. FLORIDA AUTO AUCTION, INFRA, OR WITH THE DECISION OF THE SUPREME COURT IN ROLLINS V. PIZZARELLI, INFRA.

### STATEMENT OF THE FACTS AND CASE

Contrary to Petitioner's assertion that the First District applied the concept of fault to the "no-fault" statute, the First District's ruling in the instant case recognized that "no-fault" insurance pays not only for medical and wage loss damages caused by Defendant's negligence, but also for those damages caused by Plaintiff's own negligence. As stated by Petitioner, the Plaintiff in the trial court below was assigned 10% comparative negligence by the jury. Plaintiff had accumulated a total of \$4,989.17 in PIP benefits which were paid or payable. The Plaintiff prevailed at trial, and a verdict for Plaintiff was entered. After the trial court reduced the verdict by Plaintiff's 10% comparative negligence, it applied a PIP setoff. The court calculated the PIP setoff by reducing the total PIP benefits which were paid or payable by 10%, to account for the PIP benefits paid to Plaintiff due to her own negligence. This holding is not in express and direct conflict with Assi, infra, and Rollins, infra.

### SUMMARY OF ARGUMENT

There is no express and direct conflict between Norman ex rel. Cleff v. Farrow, 832 So.2d 158, 160 (Fla. 1st DCA 2002) and Assi v. Florida Auto Auction of Orlando, 717 So.2d 588 (Fla. 5th

DCA 1998). The only issue addressed in Assi was the order of calculations for reducing a plaintiff's damages award by the amount of the plaintiff's comparative negligence and the appropriate PIP setoff. The Assi court held that the plaintiff's damages should be reduced by his comparative negligence before the PIP setoff is applied. The ruling in Farrow is not contrary to Assi's holding because it is based on an argument that was never raised or addressed in Assi. The Farrow court used the exact same order of calculations as Assi, but added another calculation to reduce the amount of the PIP setoff by the percentage of the plaintiff's comparative negligence. There is no express and direct conflict between these two cases, as the Assi court never addressed whether this additional calculation would be permitted. Therefore, this Court lacks jurisdiction to hear this appeal under Art. V, § 3(b)(3), Fla. Const.

Additionally, Petitioner's argument that Farrow expressly and directly conflicts with this Court's ruling in Rollins v. Pizzarelli, 761 So.2d 294 (Fla. 2000) is specious, at best. Although the Rollins opinion addresses a PIP setoff issue, it makes no mention of comparative negligence, which is at the very heart of the issue presented in Farrow. Therefore, it is impossible for there to be an express and conflict between Rollins and Farrow. Accordingly, this court lacks jurisdiction

to hear this appeal under Art. V, § 3(b)(3), Fla. Const.

## ARGUMENT

THE DECISION OF THE FIRST DISTRICT IN THE PRESENT CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT IN ASSI V. FLORIDA AUTO AUCTION, SUPRA, OR WITH THE DECISION OF THE SUPREME COURT IN ROLLINS V. PIZZARELLI, SUPRA.

As Petitioner notes, the First District did not certify conflict between its opinion in the instant case and Assi v. Florida Auto Auction of Orlando, 717 So.2d 588 (Fla. 5th DCA 1998). The First District was correct not to certify conflict, because there is no express and direct conflict between its opinion and Assi. As Judge Kahn noted, "[i]n Assi, the court applied the same PIP set-off statute we apply today, although in that case *the argument was structured somewhat differently.*" Norman ex rel. Cleff v. Farrow, 832 So.2d 158, 160 (Fla. 1st DCA 2002) (emphasis added).

In Assi, the only issue before the court was whether the \$10,000.00 set off for plaintiff's PIP benefits should be applied before or after the plaintiff's damages were reduced by his comparative negligence. See Assi, 717 So.2d at 589. The Fifth District's entire opinion relates to this one issue regarding the order of calculations.

Unlike the plaintiff in Assi, the Plaintiff in Farrow did not argue that her PIP benefits should be deducted from her



damages award before the award was reduced by her comparative negligence. Rather, Plaintiff agreed that her damages award should be reduced by her comparative negligence before the PIP setoff was applied, but argued that an *additional* calculation should be performed to reduce the PIP setoff by the percentage of Plaintiff's comparative negligence. Therefore, the question of law presented in Farrow was different from that presented in Assi.

The Assi court solely addressed the "order of calculations" issue. Its opinion simply stated that the Plaintiff's damages award should be reduced for comparative negligence before a PIP setoff is applied. The Farrow court applied the same order of calculations as the Assi court, but merely added a calculation to reduce the amount of the PIP setoff. Therefore, there is no direct conflict between these two opinions, because the Farrow court's ruling was based on an issue never presented in Assi.

While the Farrow and Assi opinions produce two very different results as to how a plaintiff's PIP setoff should be calculated, this is not due to an express and direct conflict in their rulings on the same question of law. It is due to an argument being raised in Farrow that was never raised in Assi. Therefore, there is no express and direct conflict between the Farrow and Assi rulings on the same question of law, and this

Court does not have jurisdiction to hear this appeal under Art. V, § 3(b)(3), Fla. Const.

Petitioner's argument that the Farrow opinion expressly and directly conflicts with this Court's opinion in Rollins v. Pizzarelli, 761 So.2d 294 (Fla. 2000) is entirely without merit. In Rollins, the Court was never presented with the issue of whether the setoff for plaintiff's PIP benefits should be reduced by the plaintiff's comparative negligence. In fact, there was no mention at all of comparative negligence in Rollins. Petitioner fails to make a single good faith argument in his jurisdictional brief as to how Rollins expressly and directly conflicts with Farrow. Accordingly, this court does not have jurisdiction to hear this appeal under Art. V, § 3(b)(3), Fla. Const.

#### **CONCLUSION**

Because there is no express and direct conflict between Farrow and Assi, or between Farrow and Rollins, this court does not have jurisdiction to hear this appeal under Art. V, § 3(b)(3), Fla. Const. Accordingly, Petitioner's request for discretionary review by this Court should be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished to Gregory Shoemaker, Esq., Schofield and Wade, P.A., 25 West Cedar Street, Suite 450, Pensacola, Florida 32501 via HAND DELIVERY and Richard A. Sherman, Suite 302, 1777 South Andrews Avenue, Ft. Lauderdale, Florida 33316 via U.S. Mail, postage pre-paid, this \_\_\_\_ day of February, 2003.

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**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS**

I HEREBY CERTIFY that the font used throughout this brief is Courier New 12-point Font.

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Daniel M. Soloway, Esq.