IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2659

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

AMENDED
REPLY BRIEF OF PETITIONER ON THE MERITS

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

(With Appendix)

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REPLY ARGUMENT

It is difficult to respond to the Briefs filed by the Respondent and by the Amicus Curiae, because they do not use concrete examples which would clearly reveal which procedure produces a double recovery.

The Briefs simply state over-and-over that the purpose of the set-off rule is to prevent duplication of benefits, and to prevent a double recovery, with which we fully agree. However, if the Respondent and Amicus Curiae would provide mathematical examples, it would be clear that the procedure they are proposing is the one which creates a duplication of benefits, and a double recovery.

However, the Brief of Amicus Curiae does not give any mathematical examples, and the Brief of Respondent only gives one mathematical example. We will later discuss this one mathematical example, and show how, in fact, their procedure does yield a double recovery and duplication of benefits.

The bottom line is that the reason the procedure proposed by the Respondent and Amicus Curiae, produces a double recovery and duplication of benefits, is that the plaintiff has already recovered the PIP benefits without regard to fault, and therefore when there is only a set-off for the defendant's percentage of fault as applied to the PIP payments, the plaintiff then recovers twice for his own percentage of fault as applied to the PIP benefits. Therefore, he has received a double recovery and duplication of benefits for his percentage of fault as applied to PIP benefits received.

In other words, for instance, if the plaintiff is 40% at fault

and has $10,000 of PIP coverage, he receives PIP benefits of $10,000. If he recovers a verdict against a tortfeasor, if there were only a set-off for $6,000 (the Defendant's percentage of fault as applied to the PIP benefits), the plaintiff would receive a double recovery of $4,000.

Therefore, under the procedure proposed by the plaintiff and Amicus Curiae, there is an incentive for the plaintiff to file suit, which is the exact opposite of the purpose of the no-fault law, which is to prevent litigation.

Contrary to the argument of plaintiff and Amicus Curiae in their Briefs, their procedure creates a double recovery.

In short, it appears the reason the Amicus Curiae and Respondent did not give mathematical examples, is that when a mathematical example is given, it is easy to show that there is a double recovery under that procedure.

Similarly, the Amicus Curiae and Respondent do not discredit the several examples we gave in our Brief, which examples clearly show the plaintiff's proposed procedure creates a double recovery.

On page 9 of the Brief of Respondent, the Respondent does give the following mathematical example:

> **Common Facts:** Fault is apportioned at Plaintiff-20%/Defendant-80%, Plaintiff has $15,000.00 in medical specials, and has received $10,000.00 in PIP benefits.
>
> **Ex. 1 (what the trial court did in the instant case)** - The jury makes no reduction in its verdict for PIP benefits received by Plaintiff, but the trial court reduces Defendant's PIP set-off by the amount of Plaintiff's comparative negligence:

$15,000.00 (total damages)
-$ 3,000.00 (Plaintiff's 20% comparative fault)
-$ 8,000.00 ($10,000 PIP - 20% comparative fault)
=$ 4,000.00 (Judgment for Plaintiff)
(Brief of Respondent, p. 9).

Under the plaintiff's own example, there is a double recovery of $2,000 for the plaintiff. Since the total damages are $15,000, and the plaintiff has 20% comparative fault, under the doctrine of comparative fault the plaintiff should recover $12,000 ($15,000 x 80% = $12,000).

However, under the plaintiff's example the plaintiff recovers $4,000 from the defendant, in addition to the $10,000 recovered from the PIP carrier, for a total of $14,000. Therefore, the plaintiff has recovered $2,000 more than he should have, since he received a double recovery for the $2,000.

The following is the correct way of calculating this, which creates no double recovery, and which meshes perfectly with comparative fault:

$15,000 (Total damages)
x .80% (Defendant's fault)
$12,000
-$10,000 (PIP set-off)
$ 2,000

Therefore, the plaintiff has recovered $2,000 from the tortfeasor, plus $10,000 from his PIP carrier, for a total of $12,000, which is the correct amount under comparative fault.

Once again, under the plaintiff's example, because the plaintiff recovered 100% of her PIP benefits without regard to fault,

and then the set-off is reduced by 20% or $2,000, the plaintiff receives a double recovery of this $2,000.

Therefore, although the Amicus Curiae and the Respondent repeat over-and-over that the purpose of the set-off rule is to prevent a double recovery and duplication of benefits, in fact, concrete mathematical examples indicate clearly that it is the procedure proposed by the Respondent and Amicus Curiae which creates a double recovery and duplication of benefits.

On page 11 of the Brief of Respondent, the Respondent argues that there is a windfall to the defendant under the traditional procedure as stated above, giving the following example:

> **Ex. 3 (demonstrates windfall to Defendant if the trial court does not reduce the PIP setoff by Plaintiff's comparative fault)** - the jury makes no reduction for PIP, and the trial court does not reduce the PIP setoff by Plaintiffs comparative fault:
>
> $15,000.00 (total damages
> -$ 3,000.00 (Plaintiff's 20% comparative fault)
> -$10,000.00 ($10,000 PIP, not reduced by comparative fault)
> =$ 2,000.00 (Judgment for Plaintiff)
>
> Instead of Plaintiff being awarded $4,000.00, as the legislature intended, Plaintiff is only awarded $2,000.00, giving Defendant a $2,000.00 windfall.
>
> (Brief of Respondent, p. 11).

However, to the contrary, the plaintiff recovers the amount envisioned by the procedure of comparative fault because the plaintiff has recovered under this example 80% of the total damages of $15,000, which is $12,000. (The plaintiff recovered $2,000 from the tortfeasor and $10,000 from the PIP carrier.)

The plaintiff argues in Example 3 above that this is a windfall to the defendant because he only has to pay $2,000, instead of $4,000, which the plaintiff contends he should pay. One could argue the tortfeasor has recovered a windfall of $10,000 because he receives a set-off for the $10,000 paid by the plaintiff's own PIP insurer. However, this is the exact legislative concept, that PIP benefits be paid by the plaintiff's insurance carrier without regard to fault, but that the plaintiff not recover from the tortfeasor these amounts. The purpose of the PIP set-off statute is that PIP benefits be paid automatically, but then set-off from the tort recovery, in order to avoid double recovery by the plaintiff and a duplication of benefits by the plaintiff. The purpose of the PIP statute is not to avoid a "windfall to the defendant," as the plaintiff terms it. The legislature thought that society is better served by having medical bills paid quickly and automatically by the insurance carrier, but that these not be recovered from the tortfeasor. Once again, the traditional procedure, and that proposed by the Petitioner, follows the exact legislature purpose and intent.

The example on page 16 and 17, namely Example 4, is not a valid argument. In that example, the plaintiff complains that PIP only pays 80% of benefits and therefore the plaintiff has 20% of medical expenses paid out-of-pocket, and therefore, the plaintiff must pay 20% of her own medical bills. The problem with this argument is that this is the exact way the PIP statute was intentionally written, and not a product of any court's interpretation of the set-off. In other words, if there is <u>no lawsuit filed</u>, PIP only pays 80% of the medical

bills and lost wages, and the plaintiff must pay 20% out-of-pocket. Therefore, this result is not a result of the way a court interprets the set-off, but is the exact, intentional, legislative scheme. Apparently, the legislature wanted to create a disincentive for people to "run up" medical bills. Therefore, this is not a by-product of the interpretation of the statute, but the exact legislative scheme.

Without reiterating the examples we gave in our Brief, and especially on pages 13 and 14, we would simply like to draw this Honorable Court's attention to those examples, to show that the traditional procedure, namely providing a set-off for 100% of the PIP benefits received, meshes perfectly with comparative negligence, such that the plaintiff recovers the defendant's percentage of negligence through the tort recovery plus the PIP benefits received.

The plaintiff next argues that if set-offs are handled in the manner provided under Florida Statute § 627.736(3), the defendant in effect does receive a windfall for the plaintiff's own percentage of fault by the PIP benefits. There is a different procedure for handling PIP set-offs pursuant to Florida Statute § 627.736(3) which is the PIP collateral source statute, and Florida Statute § 768.76, which is the general collateral source statute.

However, first of all, it should be pointed out that the plaintiff stipulated that the set-offs would be determined post verdict, which is the procedure under § 768.76, and the plaintiff and Amicus Curiae both admit this happens with most cases that go to trial.

Therefore, having stipulated to this procedure, the plaintiff can not complain on appeal about having the set-offs determined under the post verdict procedure, since that is the statute and procedure he has stipulated to.

One of the fundamental rules of litigation, is that a party can not complain of a procedure he stipulated to or acquiesced in. It is well established in Florida law that a party cannot successfully complain of error for which she herself is respon- sible for or the ruling that she has invited the trial court to make. Arsenault v. Thomas, 104 So. 2d 120 (Fla. 3d DCA 1958).

Under the doctrine of invited error, a party can not successfully complain of error for which he is himself respon- sible, or of ruling that he has invited the trial court to make. Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Keller Industries, Inc. v. Morgart, 412 So. 2d 950 (Fla. 5th DCA 1982). One who has contributed to an alleged error can not be heard to complain on appeal. Hawkins v. Perry, 146 Fla. 766, 1 So. 2d 620 (1941); Board of Public Instruction of Dade County v. Fred Howland, Inc., 243 So. 2d 221 (Fla. 3d DCA 1970); Behar v. Southeast Banks Trust Company, N.A., 374 So. 2d 572 (Fla. 3d DCA 1979). See also, Stanley v. State, 357 So. 2d 1031 (Fla. 3d DCA 1978)(under invited error rule, one may not take advantage on appeal, of alleged error which he himself introduced at trial); Carvajal v. Adams, 405 So. 2d 763 (Fla. 3d DCA 1981)(new trial not required where complaining party himself was responsible for adducing testimony raised as error); Poller v. First Virginia Mortgage and Real Estate Investment Trust, 471 So. 2d 104

(Fla. 3d DCA 1985)(party cannot successfully complain of error for which he himself is responsible); County of Volusia v. Niles, 445 So. 2d 1043 (Fla. 5th DCA 1984)(under doctrine of invited error, party cannot successfully complain of error for which he himself was responsible).

Since counsel for the plaintiff stipulated to handling set-offs post-verdict, which the plaintiff admitted is standard procedure in automobile accident cases in Florida, he can not complain that the set-off should be calculated in accord with this statute.

Moreover, the argument the plaintiff makes, that the legislature "intended" this procedure which creates a double recovery to the plaintiff, is not accurate. The plaintiff and Amicus Curiae over-and-over argue that the purpose of the PIP collateral source statute is to "prevent a double recovery," or a "duplication of benefits." This is another way of saying that the intent of the legislature was to prevent a double recovery, or a duplication of benefits. Therefore, the courts must interpret the statute in a manner which furthers the legislative intent, and avoids a double recovery or duplication of benefits, namely the court should allow a full set-off of 100% of PIP benefits paid or payable.

The Respondent also argues that the "exemption" from liability of the statute only applies in the absence of a permanent injury. However, the exemption from liability applies to medical bills and lost wages to the extent that they were paid by PIP insurance, without regard to whether or not there was a permanent injury. The exemption clearly does not apply to pain and suffering if there is a

permanent injury, but it still applies to payments received from PIP. In other words, it is clear that there is an exemption from liability for PIP benefits paid or payable, and the only issue is whether that exemption is for 100% of those PIP benefits, or is reduced by the plaintiff's comparative fault.

On page 10 of the Brief of Respondent, the Respondent argues that the standard jury instruction "erroneously" states that PIP set-offs are to be applied by the court, not the jury. However, once again, what the plaintiff omits is the fact that he stipulated to having the set-offs applied by the court, rather than jury. As both plaintiff and Amicus Curiae state, this stipulation to have set-offs applied by the judge is made in practically every case, and the Florida Standard Jury Instruction reflects this reality. Therefore, counsel can not complain that they were done by the judge pursuant to the general collateral source statute, since he stipulated to this procedure, which he admits is the standard procedure.

On pages 12 through 15 of the Respondent's Brief, the Respondent makes the gratuitous argument that when the legislature amended the statute in 1976 to eliminate equitable distribution of PIP benefits, that somehow this meant that equitable distribution should continue, through a reduction of PIP set-off by the percentage of the plaintiff's comparative negligence.

However, there is absolutely nothing in the PIP statute to indicate this. Equitable distribution did not involve reduction of PIP benefits by the plaintiff's percentage of comparative negligence, but rather involved taking into account many factors, mainly the

costs of litigation, attorney's fees, the result obtained, etc. Therefore, there is absolutely no basis for this gratuitous argument by the plaintiff.

To the contrary, the fact that the legislature in an earlier draft of the revision had a provision that all PIP benefits received be reimbursed to the PIP insurer, and later changed this to having a set-off for the PIP benefits, indicates an intent that there be a set-off for all PIP benefits.

The Amicus Curiae also relies on *dicta* in Centennial Insurance Company v. Fulton, 532 So. 2d 1329 (Fla. 3rd DCA 1988). However, the facts in Centennial Insurance were that the trial court did not award a set-off for workers' compensation benefits, and the Court of Appeal reversed, holding that the trial court should have granted a set-off. Moreover, the case involved anomalies of workers' compensation law, rather than the PIP statute which has an express provision that there should be a set-off for PIP payments received. The *dicta* relied on by the Amicus Curiae is simply not on point with the present situation.

Similarly, the reliance by the Amicus Curiae on Sutton v. Ashcraft, 671 So. 2d 301 (Fla. 5th DCA 1996) is misplaced. That case involves several technical questions concerning payments under "MED PAY" sections of the policy; a defendant paying the plaintiff's health insurer to relinquish their rights to reimbursement or subrogation of medical expenses incurred by the plaintiff and paid by the insurer; and whether the waiver or relinquishments of rights to subrogation or reimbursement destroyed the character of the medical

payments received. Therefore, this case is simply not on point with the present situation, which is a straightforward question which occurs every week in every automobile accident case, where the statute specifically states that PIP benefits are set-off.

The Clear Wording of the Florida Statute

The Respondent and Amicus Curiae avoid discussing the clear wording of the Florida statute, namely § 627.736(3), Fla. Stat. (1977), because it clearly states that the plaintiff is not entitled to recover "any damages" for which PIP benefits are paid or payable. The statute states this in three places:

> (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 entitled to recover PIP benefits, and the Respondent and Amicus Curiae simply ignore the statute because it is so clear. The

decision in this case need go no further than the exact language of the statute.

Similarly, Florida Statute § 627.737 also states that there is an exemption from tort liability to the extent that damages are payable by PIP:

> **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, Fla. Stat. (1999).

Since the statute clearly states that the exemption is to the extent of the benefits received pursuant to Fla. Stat. § 727.736(1), this makes clear that the trial court erred by not giving a full exemption for the amount of the PIP benefits received.

Pizzarelli

The Respondent and Amicus Curiae also avoid discussion of Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000). The apparent reason is that the Supreme Court in this decision, which was decided only three years ago, clearly states that it is all PIP benefits paid or payable which are set-off. It is clear that nowhere in the opinion does the Supreme Court state that there is a set-off of only the defendant's percentage of negligence as applied to the PIP benefits paid or payable, but states repeatedly that it is all PIP benefits paid or payable which are set-off:

> In summary, by examining the dictionary and case law definitions of the term "payable," applying well-recognized principles of statutory construction and examining legislative history, we conclude that the proper interpretation of the term "payable" is that only PIP benefits "currently payable" or owed by the PIP carrier as a result of expenses incurred by the plaintiff should be set off from a verdict that includes an award of future medical expenses. Accordingly, we answer the certified question in the affirmative, approve the decision of the Fourth District, and disapprove *Kokotis*. Rollins, 301.

Therefore, the Florida Supreme Court's opinion in Pizzarelli is crystal clear authority that the position of the Respondent is inaccurate.

Purdy v. Gulf Breeze Enterprises, Inc.

The Florida Supreme Court also discussed the history of the PIP statute in Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325 (Fla. 1981), and stated that there was a set-off for PIP benefits received. The Florida Supreme Court said:

> In 1976 the legislature revamped this subsection to take care of these problems by passing the current provision. Ch. 76-266, § 4, Law of Fla. Now insurers are no longer entitled to reimbursement of any personal injury payments made to injured persons. To prevent the injured persons from receiving double recovery, the legislature has provided that any PIP benefits they have received from their insurers will be set off from the amount they are entitled to recover from the tortfeasors. Although this provision primarily benefits the tortfeasor, it is in keeping with the "no-fault" concept of the Florida Automobile Reparations Reform Act. The benefits obtained by the tortfeasors will enure to their insurance carriers. Supposedly these benefits will eventually be shared by all

> carriers without the need of litigation. *Lee and Polk, Insurance*, 31 U.Miami L.Rev. 1061, 1071-73 (1977). This should result in lower premiums. (Emphasis added) Purdy, 1327-1329.

Therefore, the Florida Supreme Court specifically stated that any PIP benefits received are set-off. Once again, the Florida Supreme Court did not state that only the defendant's percentage of comparative fault as applied to PIP benefits are set-off, but instead said that "any PIP benefits" are set-off.

Once again, the Respondent and the Amicus Curiae ignore the clear wording of the Florida Supreme Court in Purdy, because it defeats their position.

In summary, it is clear from the wording of the PIP statute and the decisions of the Florida Supreme Court in Pizzarelli and in Purdy, that there is a set-off for all PIP benefits received or payable. Therefore, this case should be reversed with an opinion that there is a set-off for all PIP benefits which were received.

CONCLUSION

The decision of the First District in this case is in express and direct conflict with the decision of the Fifth District in Assi v. Florida Auto Auction of Orlando, Inc., 717 So. 2d 588 (Fla. 5th DCA 1998) and the decision of the Florida Supreme Court in Rollins v. Pizzarelli, supra.

The law should be clarified that there is a set-off for all PIP benefits paid or payable, without any reduction for the comparative negligence of the plaintiff. This is in clear accord with the legislative intent of avoiding duplicate recovery, of avoiding

litigation in order to create a double recovery of PIP benefits or medical payments, and in accord with the legislative philosophy of avoiding inflation of medical bills in order to create a double recovery.

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CERTIFICATE OF SERVICE

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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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