SUPREME COURT OF THE STATE OF FLORIDA

DAN RAY WARREN, ET AL.,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE,

Respondent.
_____/

CASE NO.: SC 02-285

L.T. CASE NO.: 5D00-3064

PETITIONER'S INITIAL BRIEF

Larry Mark Polsky, Esq.
Attorney for Petitioners
619 North Grandview Avenue
Daytona Beach, FL 32118
(386) 257-1529
FL Bar No.: 159328

TABLE OF CONTENTS

CITATION OF AUTHORITIES

INTRODUCTION

The following reference words and symbols will be used throughout this brief:

"Petitioners" will designate Dan Ray Warren and Dr. Jack Rotstein.

"Petitioner Warren" will designate Dan Ray Warren.

"Petitioner Rotsein" will designate Dr. Jack Rotstein.

"Respondent" will designate State Farm Mutual Automobile Insurance.

"5th DCA" will designate the Fifth District Court of Appeals.

"Florida Statutes" unless otherwise indicated will designate Florida Statues (1999)

STATEMENT OF THE CASE AND FACTS

The Petitioner, Dan Ray Warren, was injured in a motor vehicle accident on March 22, 1999. He received treatment from the Petitioner, Jack Rotstein, M.D., on May 27, 1999 June 16, 1999 and July 6, 1999. Dr. Rotstein failed to submit statements for his medical services to State Farm Mutual Automobile Insurance until August 9, 1999, more than thirty (30) days after service was rendered. Because the statements were statutorily delinquent, State Farm Mutual Automobile Insurance denied payment to Dr. Rotstein, even though the treatment which had been rendered by the Plaintiff were reasonable charges for necessary medical treatment of injuries related to the subject accident of March 22, 1999.

The County Court ruled that the thirty (30) day billing requirement of Section 627.736(5)(B) was unconstitutional. The Court found that the Statute denied equal protection under the Florida Constitution to health care providers such as Dr. Rotstein, because the statute does not require any reasonable proof that the charges are not reasonable, necessary or related. The Statute also by differentiating health care provider bills from hospital and ambulance bills the Statute was not reasonably related to a legitimate legislative object. Therefore, violating due process provisions of the Florida Constitution in that it denied medical providers who are not hospitals or

ambulance companies access to the Court.

The question was then certified as a matter of great public importance by the County Court wherein upon appeal the 5th DCA reversed the County Court's decision and held Section 627.736(5)(b) to be constitutional.

SUMMARY OF THE ARGUMENT

The opinion of the 5th DCA was incorrect in that Florida Statute 627,736(5)(b) violates the constitutional right for equal protection, due process and access to the courts of appellees Rotstein and Warren. (See Appendix A)

The proper standard of review of the constitutionality of Florida Statute §627.736(5)(B), is the rational basis test, Florida Statute §627.736(5)(B), does violate the equal protection clause of the Florida Constitution because the distinction in the Statute between doctors and hospital emergency departments and ambulances "does not bear some relationship to a legitimate state purpose." The Florida High School Activities Association, Inc., et al v. George Thomas, by and through his mother, 434 So. 2d 306 (Fla. 1983) at 308. Using this case as an example for determination, the Florida Legislature had no legitimate State purpose for distinguishing between private medical providers and hospital emergency departments and ambulance providers.

There is no rational legislative purpose for imposing the thirty (30) day billing requirement upon doctors but not hospital emergency departments and ambulance services.

As written the statute discriminates between one type of health care provider and another, and therefore takes away the fundamental right of the private health care provider from seeking proper relief from the courts. Article 1, Section 21 of the Florida Constitution provides as follows:

> "The courts shall be open to every person for redress of any injury, and shall be administered without sale, denial or delay."

The other illegal discrepancy is that services provided by a hospital emergency room department or ambulance service are not inherently different from treatment provided by a doctor. Therefore, the statute is discriminating between one type of health care provider and another.

If this act is declared constitutional, it would make these private medical providers, whom insured people see inside a hospital after they have been admitted for an automobile accident injury and these private physicians who give life-saving service to critically/seriously injured people in emergency rooms and/or operating rooms in hospitals "insurers" for medical bills incurred by the critically/seriously injured party,

thereby shifting the burden of loss from the PIP insurance carrier to the private physicians which should be a compelling argument to declare this portion of the statute unconstitutional.

Not only is there no rational legislative reason for imposing the thirty (30) day billing requirement, there is no rational purpose for excluding hospital emergency room departments and ambulance services from this requirement. Since the Statute does not provide this provision, it is making an illegal/unconstitutional classification between one type of health care provider and another.

ARGUMENT

Section 627.736(5)(b) WHICH EXEMPTS MEDICAL CHARGES FOR TREATMENT MAILED TO AN INSURER MORE THAN THIRTY (30) DAYS AFTER THE DATE OF TREATMENT SHOULD BE DECLARED UNCONSTITUTIONAL.

In Nationwide Mutual Fire Insurance Company v. M&M Diagnostics, Inc. 753 So. 2d 55 (5th DCA 1998) the Fifth District Court of Appeal held the "substantive" section of Florida Statute 627.736 unconstitutional based on the following rationale::

> "The legislature has broad power to regulate business, especially the insurance business. See Hughes vs. Professional Ins. Corp., 14 So. 2nd 34 (Fla. 1st DCA 1962) [sic]. Such legislation, however must be reasonable related to a legitimate legislative objective, Lasky v. State Farm Ins. Co., 296 So. 2d9 (Fla. 1974)."
>
> "Under Lasky the Court must determine whether this act reasonably related to a legitimate legislative objective. The act requires

> a contest between a medical provider-assignee and an insurer to be resolved by arbitration while those between an insured and insurer may be resolved in court. In other words, the act allows access to the court for claims for or against the insured, but denies it for claims for or against the medical provider. It is readily apparent that the objective of the act is to deny the right to litigate certain legitimate claims in court based on who owns the claim. Given the people's right to redress wrongs in court provided by Article I, Section 21, Florida Constitution, such an objective cannot be considered a legitimate one. Therefore the act violates the parties' substantive due process rights under Article I, Section 9, of the Florida Constitution."
>
> "For the forgoing reasons, Chapter 90-119, Section 42, Laws of Florida codified in section 627.736 (5), Florida Statutes, is hereby declared unconstitutional and unenforceable as being in violation of the due process provision of the Florida Constitution. Accordingly, Delta's request to order Pinnacle's claim to binding arbitration is denied."

In Kluger v. White, 281 So. 2nd 1 (Fla. 1973) the Florida Supreme Court held the legislature is without power to abolish common law or statutory right of access to courts without providing a reasonable alternative to protect peoples' rights unless it can show an overpowering public necessity for doing so and no alternative method of meeting such public necessity can be shown." (emphasis added)

Petitioner Warren contends that Florida Statute §627.736(5)(b) is unconstitutional because it improperly discriminates between two classes of similarly situated litigants - doctors and ambulances and hospitals. Specifically, it requires doctors to forfeit those safeguards traditionally afforded to those who litigate their disputes in court. See A.G. Edwards & Sons, Inc. v. Petrucci, 525 So.2d 918 (Fla.

2d DCA 1988); Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So 2d 1240 (Fla. 2d DCA 1976), cert. Den., 353 So. 2d 675 (Fla. 1977).

Florida Statute §627.736(5)(b) is unconstitutional because it arbitrarily discriminates against medical providers by subjecting them to a prevailing party test of attorney's fee recovery when insureds enjoy the benefits of section 627.428(1)." See Nationwide Mutual Fire Insurance Company v. M&M Diagnostics, Inc. 753 So. 2d 55 5th DCA (1998).

The thirty (30) day billing requirement should be considered a restriction upon Petitioner Rotstein's access to the courts and, as such, is an unreasonable restriction rendering the statute unconstitutional. Florida Statutes 627.736(5)(b) denies and abolishes PETITIONER ROTSTEIN'S right of access to the courts and also abolishes PETITIONER WARREN'S right to seek redress in the courts to recover PETITIONER WARREN'S insurance benefits for the insured's reasonable, necessary, and related medical charges to the subject automobile accident. There is no valid reason to single out private medical providers and to deny them court access in this manner, i.e. the thirty (30) day submission requirement applying to them but not to emergency rooms and ambulances.

In the instant case, there is no compelling reason not to declare the thirty (30) day "submission" requirement of Florida Statute §627.736(5)(b), unconstitutional when applied to the injured party and to the private health care providers who are treating the injured party. The injured automobile accident victim should have the right to seek out a private doctor to treat or see him and the doctor selected by the injured person should be able to have his bills paid within five (5) years after the initial submission. If the PIP carrier felt that the treatment of the patient was unreasonable, unnecessary, and/or not related to the subject automobile accident they could have then refused to pay, at which time the issue could have been addressed in court.

However, the thirty (30) day submission requirement shifts the burden of loss to the doctor from the PIP carrier of the

party seeking treatment and literally makes the doctor the "insurer" for all medical treatment for auto accident victims not submitted within thirty (30) days. This should be declared void as against public policy and unconscionable.

The repercussions of making the medical provider the "insurer" of an accident victim under these conditions could force medical providers to insist on payment from the insured's at the time of services or an approval from the insurance company prior to any treatment of the victim rather then risk not being able to collect payment. Such a delay would cause great harm to the victim and possibly even cause the ability of full recovery of the victim impossible. This is against the public's interests and should not be allowed.

The Florida Constitution provides that persons must be afforded due process which encompasses substantive and procedural due process. Article 1, section 9 states, in relevant part, as follows" "No person shall be deprived of life, liberty or property without due process of law."

The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974). To evaluate the constitutionality of the Statute, a court must "examine the objectives of the Legislature...in order to determine whether the provisions of the act bear a reasonable relation to them." Id. The Court should not concern itself with "the wisdom of the Legislature in choosing the means to be used or even with whether the means chosen will in fact accomplish the intended goals." Id. At 15-16. The court should only consider "the constitutionality of the means chosen." Id. At 16.

Section 627.736(5)(b) , does violate the due process clause of the Florida Constitution because the thirty (30) day billing requirement, does not comport with any rational legislative objectives. It should have specified it applied to "bulk billing" but did

not. As such, it must fail and be declared invalid.

Interestingly enough Florida Statute §627.736(5)(b), and Florida Statute 95.11(2)(b) (5 year statute of limitations for a contract action) allow for submission of a lost wage claim of an insured party for up to five years from the date the lost wage claim accrues so that PIP carrier can pay same. There is absolutely no rational basis for allowing the lost wages claim to be submitted within five years from the date of an accident, but requiring a private physician to submit bills within thirty (30) days.

Services provided by a hospital emergency room department or ambulance service are not inherently different from treatment provided by a doctor. A neurosurgeon or orthopaedic surgeon can visit a patient who is in a hospital emergency room or in a hospital room a day or two after a motor vehicle accident and not be fully apprised of the insurance company which the patient may have. A neurosurgeon may visit patient who is in a hospital who may be in a coma and may not be able to ascertain insurance coverage for this individual for many months after his services. An orthopaedic surgeon or a neurosurgeon may operate on a seriously injured patient in an emergency room and/or in an operating room on the date of the motor vehicle accident and not be apprised of the insurance information for the patient for many months after the date of service. These private medical providers all would be unable to have their bills paid which would seem to be quite unfair and would not seem to have any rational basis either in law or fact.

If this act is declared constitutional, it would make these private medical providers, these private physicians who give life-saving service to critically injured people in emergency rooms and/or operating rooms in hospitals "insurers" for medical bills incurred by the critically injured party, thereby shifting the burden of loss from the PIP insurance carrier to the private physicians which should be a compelling argument to declare this portion of the statute unconstitutional.

Florida Statute §627.736(5)(b) unfairly favors the Insurance company and Hospital Emergency Rooms and ambulances

and is placing an undue burden upon the private medical provider. It discriminates against the private medical provider and gives unfair favor to emergency rooms and ambulances. Since this Florida Statute discriminates against one party over another and makes a distinction, favoring one party over the other, violating one parties rights of due process, access to the courts and equal protection, this Statute must be declared unconstitutional.

Florida Statute §627.736(5)(b), does violate PETITIONER ROTSTEIN's right of access to the courts. The Florida Constitution provides that persons must be afforded the right of access to the courts. Article 1, Section 21 of the Florida Constitution provides as follows: "The courts shall be open to every person for redress of any injury, and shall be administered without sale, denial or delay." However, the thirty (30) day restriction denies Petitioner Rotstein's the ability to access the court to obtain recover for his services that where reasonable, necessary and related to the subject automobile accident.

In Kluger v. White 281 So. 2d 1 (Fla. 1973), the Supreme Court of Florida addressed the conditions under which a statute would violate Article 1, Section 21. The court stated as follows:

[W}here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of such Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. S 2.01 F.A.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. At 4. See Nationwide Mutual Fire Insurance Company v. Pinnacle Medical, Inc., 753 So. 2d 55, 57 (Fla. 1999).

No public necessity can be shown, and no alternative method is given to the medical provider to protect their rights or redress for injuries in this statute. Florida Statute §627.736(5)(b), violates not only the Petitioner's but all private medical providers the ability to protect their rights and access to the courts to seek redress for their unpaid bills.

The court in Pinnacle Medical, Inc. considered whether Florida Statute §627.736(5)(b), which required medical

providers who have assignments from their patients/insurance claimants, violated Article 1, Section 21 of the Florida Constitution because it required medical providers to attend binding arbitration. Applying the conditions set forth in Kluger, the court first considered whether medical providers with assignments had a preexisting right to recover directly from insurers. The court answered this question in the affirmative, finding "[t]he right of an assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution." Id. at 57. As to the second part of the Kluger v. White analysis, the court considered whether Florida Statute §627.736(5)(b), provided a reasonable alternative to protect the rights of medical providers with assignments to seek redress for their injuries. The court held the statute did not provide a reasonable alternative because "[t]he limited review and the conclusiveness attached to the arbitration award without the right to a trial de novo diminishes the right to have the ultimate decision in a case made by a court." Id. At 58. This, the court held, violates the medical providers' access to courts.

Pursuant to Florida Statute 95.11(2)(b) as a third party beneficiary, i.e. PETITIONER ROTSTEIN, on this PIP contract should have five(5) years, not thirty (30) days, in which to bring legal action. Therefore, the thirty (30) day submission request for PETITIONER ROTSTEIN contradicts F.S. 95.11(2)(b) and must be declared invalid.

CONCLUSION

Discrimination against any person (private medical providers) from access to the courts to seek redress for an injury of non-payment of reasonable, necessary and related medical bills to the subject automobile accident, as well as not giving, said person their rights of due process and equal protection, are the reasons why Florida Statute §627.736(5)(b), should be declared unconstitutional and the Fifth District Court of Appeal's decision should be quashed and the Final Judgment of Judge McDermott of September 18, 2000 should be reinstated. Counsel for Petitioners should be awarded appellate attorney fees and costs as well, including attorney fees and costs incurred in front of the 5th District Court of Appeal..

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of September, 2002 to: Karen A. Barnett, Esq., 201 E. Kennedy Boulevard, Suite 1518, Tampa, FL 33602 and the original and seven (7) copies to the Clerk of the Court, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927.

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the size and style of this brief is Times New Roman, 14 point, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

LARRY MARK POLSKY, ESQ.
619 N. Grandview Avenue
Daytona Beach, FL 32118

(386) 257-1529 (cn)
Fla. Bar No. 159328
Attorney for Petitioners

APPENDIX