IN THE SUPREME COURT OF FLORIDA

HELEN M. CARUSO,individually and on behalf of CRYSTAL GRBBS, a minor,

Petitioners,

vs.

Case No. SC03-127
Lower Tribunal No.
5D01-2114

EARL BAUMLE,

Respondent,
_____/

BRIEF OF AMICUS CURIAE,
FLORIDA DEFENSE LAWYERS ASSOCIATION

ON PETITION FOR DISCRETIONARY REVIEW FROM DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

As evidenced from the record on appeal, the trial court ordered all objections to exhibits to be listed in the Pre-Trial Order, stating "objections not reserved or grounds not noted on such separate schedule will be deemed waived at trial." (R1.56) The Respondent served his witness and exhibit list, including the Petitioner's PIP file and PIP log on the exhibit schedule. The Petitioners indicated on the Pre-Trial Order objections to the PIP exhibits only on grounds of over breadth and relevance (R.8). There was no objection on authenticity grounds (R.8).

At the trial, Respondent's counsel informed the Court that she would be submitting evidence the PIP payout sheets, however the Court told her to submit them later in a post-trial proceeding (S.794-7). Petitioner's counsel agreed that the payout sheet should absolutely not be submitted by the jury (R.796).

At that point, the Petitioner argued that the Respondent was required to introduce authenticated payout sheets at trial but they should not be a part of the evidence presented to the jury (R.796-7).

On the following day of trial, Respondent's counsel further attempted to introduce PIP benefit logs however Petitioners again objected to the introduction of same on the grounds of authenticity. The Court then indicated that the Respondent could file documents as the documents as

exhibits for identification (R.227-9). The application of the set off was accomplished at a post trial proceeding.

SUMMARY OF ARGUMENT

This Court should dismiss the Petition and affirm the decision of the Fifth District Court of Appeal by recognizing that the Petitioners waived their objection to a post-trial determination of set off by their improper objection at trial. The Petitioners counsel's basis for objecting was that the evidence of No Fault benefits needed to be placed into evidence during the trial but that the jury should not make the set off determination. Instead he explicitly desired for the Court to make that determination post-trial. There is no basis for this procedure under Florida law and such would create needless juror confusion. This improper objection should waive the Petitioners' arguments before this Court.

ARGUMENT

REGARDLESS OF THE APPLICATION OF EITHER SECTIONS 627.736 (3) OR 768.76 (1) FLORIDA STATUTES (1998), THIS COURT SHOULD DISMISS THIS APPEAL AND AFFIRM THE HOLDING OF THE FIFTH DISTRICT COURT OF APPEAL AS THE PETITIONERS HAVE WAIVED THEIR OBJECTIONS BY BRINGING SAME ON IMPROPER GROUNDS.

All parties in automobile accident cases, whether Plaintiff or Defendant, should encourage uniformity in the application of the collateral source law throughout the State of Florida. As evidenced by the briefing and the record of this case, there exist conflicts in the District Courts of Appeal and even within the Judicial Circuits of this state concerning the application of the collateral source statutes [sections 768.76 (1) and 627.736(3) Florida Statutes (1998)][1] in trials involving No Fault benefits. Some courts, as here, order the parties to submit evidence of No-Fault Personal Injury Protection benefits post-trial for judicial set off. Other courts have determined such evidence to be the province of the jury and allow the jury to apply the set-off. The Petitioner in this appeal objected at trial on the basis of a third alternative, requiring submission of this evidence in the trial, but not applying same until after the jury has reached a verdict

The Petitioners argue to this Court that the lower courts' rulings should be reversed because evidence of these collateral sources must be admitted at trial and applied post trial by the judge. The Petitioner's position

at trial, and as stated in the briefs, is an incorrect argument of the law in that it seeks approval of a procedure deviant from the requirements of either sections 768.76(1) (1998) or 627.736(3) Florida Statutes (1998).

Petitioners' assertion constituted an improper objection and should be fatal to their request for this Court's of the lower court ruling. The fatal result of an improper objection at trial has been addressed by this Court previously because this Court must confine its review to the objections stated in the records. Harmon v. State, 527 So.2d 182, 185 (Fla. 1988). In Harmon, the Defendant appealed a conviction, objecting to allegedly improper evidence of collateral crimes or bad acts obtained in cross examination of a witness. However the Court noted the only objection made at trial was that the evidence was beyond the scope of the direct examination. Id. at 185. The court upheld the trial court's overruling of the objection on those grounds and refused to consider the argument regarding collateral crimes evidence, stating "(i)n order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection below…." Id.

The Petitioner did not claim at trial nor in the briefs served upon this Court that evidence of No Fault benefits should be placed into evidence during the trial and that the jury should apply any set-off. As stated above, they argue in favor of a mutated combination of both collateral source statutes that is not supported by statutory law, common law, or by case law. Because they have stated at trial an objection which was based upon

improper grounds, this Court cannot alter the record by presuming the correct objection was made and thereby render a decision. Instead the Court should dismiss the Petition and find a waiver of the argument regarding to the applicability of sections 768.76 (1) or 627.736(3) Florida Statutes (1998).

The majority opinion of the Fifth District Court of Appeal did not use this reasoning as its basis for affirming the trial court. It relied upon prior case law within that District, See Caruso v. Baumle, 835 So.2d 276, 279 (Fla. 5th DCA 2002). However the issue of waiver was addressed by the specially concurring judge, Judge Harris.

As stated in the concurring opinion of Judge Harris in the Third District Court of Appeals opinion, "(a)ppellant's counsel clearly waived the right to have the jury deduct the collateral source payments from its award. This, I believe is the important waiver. The only reason for putting the evidence in during trial is so that the jury will have such evidence for its determination. If the Court is to determine the appropriate set off, it should have the discretion to receive the proper evidence at the time it determines the issue." Id. at 280. Judge Harris further stated "(i)t is difficult to see how (Petitioner) was prejudiced by the court receiving the evidence of collateral source payments, the sufficiency of which is not challenged, post trial (instead of at trial) when it was determining the amount of set off." Id.

This Court should follow the reasoning of Judge Harris and determine a waiver of the objections before this Court.

This Court should also affirm the rulings of the lower Court based

upon the "tipsy coachman" rule as adopted by this Court in Dade County School Board v. Radio Station WQBA, 731 So.2d. 638 (Fla. 1999). This "rule" is a policy determination by this Court that a lower court's ruling will be affirmed even though the ruling may have been based upon improper reasoning, if there exist other grounds to do so. Id. at 645. If this Court determines the basis for the District Court of Appeal's majority opinion was erroneous, there still exists a basis for affirmation based upon the issue of waiver by improper objection discussed infra. Therefore, even if this Court determines that the District Court of Appeals' reliance upon Allstate Insurance Company v. Scott, 273 So.2d 1290 (Fla. 5th DCA 2001), was mistaken, its holding should be affirmed.

In this instance, regardless of this Court's ruling, if any, concerning the application of the collateral source laws, the record is clear that the Petitioner's objections stated in the trial Court were solely based upon their request for an improper procedural handling of the collateral source evidence. Nowhere in either of the collateral source statutes at issue, nor in any Court opinion, is there a basis for an argument that the evidence of collateral source benefits should be admitted in trial with the determination of the set off postponed until after trial. This improper objection should waive the Petitioners' request for review in this action.

CONCLUSION

For the reasons set forth above, the Petition should be dismissed and the Fifth District Court of Appeal's ruling affirmed.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been sent by U.S. Mail this ___ day of May, 2003 to Elizabeth Wheeler, Esq., Post Office Box 2266, Orlando, Florida 32802-2266, and to D. Paul McCaskill, Esq., Post Office Box 540024, Orlando, Florida, 32854-0024.

_____
Thomas R. Thompson, Esq.

CERTIFICATION OF COMPLIANCE

The undersigned certifies that the Florida Defense Lawyer's Association, Amicus Curiae Brief filed herein is written in 14 point Times New Roman typeface.

THOMPSON, CRAWFORD & SMILEY

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[1] The subject accident occurred February 4, 1998 (R. 1.)